**TEAM 608R**

**Price Media Law Moot Court Competition Case**

**IN THE MATTER BETWEEN**

**Sang & Centiplex (Applicants)**

**AND**

**The State of Mhugan**

# MEMORIAL FOR THE RESPONDENT

**3, 942**

## Table of Contents

**List of Abbreviations**

| | |
|---|---|
| **ACtHPR** | African Court on Human and Peoples' Rights |
| **art** | Article |
| **Cir** | Circuit |
| **Ct** | Court |
| **ECFP** | European Charter on Freedom of Press |
| **ECHR** | European Convention of Human Rights |
| **ECPA** | Electronic Communications Privacy Act |
| **ECtHR** | European Court of Human Rights |
| **EHRR** | European Human Rights Reports |
| **EU** | European Union |
| **EWCA** | England and Wales Court of Appeal |
| **GA** | General Assembly |
| **HRC** | United Nations Human Rights Committee |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **Ltd** | Limited |
| **MHD** | Mhuganian Dollars |

| | |
|---|---|
| **NPI** | Non-Public Persona Information |
| **OECD** | Organization of Economic Cooperation and Development |
| **Para/ ¶** | Paragraph |
| **PPI** | Public Personal Information |
| **prin** | Principle |
| **QB** | Queen's Bench |
| **s** | Section |
| **SDNY** | South District of New York |
| **SPA** | Search Privacy Act |
| **UHRC** | Universal Human Rights Court |
| **UDHR** | Universal Declaration of Human Rights |
| **UK** | United Kingdom |
| **UKHL** | United Kingdom House of Lords |
| **UN** | United Nations |
| **UNCHR** | United Nations High Commissioner for Refugees |
| **USA** | United States of America |
| **Vol** | Volume |

**Index of Authorities**

## A. Treaties and Conventions



## B. Cases

### i. European Court of Human Rights

**ii. United Kingdom**

**iii. United States Cases**

on Human Rights' Vol. 25, No. 4 Netherlands Quarterly of Human Rights, pp. 661 12

Lidsky L.B, 'Silencing John Doe: Defamation & discourse in cyberspace' (2000) 49 Duke L.J. 855 at 863

Makali D, (ed) *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers Ltd Nairobi 2003) 7

13

McLoughlin D, 'In Re January 11, 2013, Subpoena by the Grand Jury of Union County' (2013) New Jersey Law Journal Online, September 5, 2013, at http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202618205026&In_re_January_11_2013_Subpoena_by_the_Grand_Jury_of_Union_County#ixzz2pK2KpJxS (accessed 27/12/2013) 10

Nied M, 'Damage awards in internet defamation cases: Reassessing assumptions about the credibility of online speech' (2010) Alberta Law Quarterly Online, at http://www.albertalawreview.com/index.php/alr/supplement/view/Damage%20Awards%20in%20Internet%20Defamation%20Cases#_ftn1 (accessed 28/12/13) 7

Pizzimenti L, 'The lawyers duty to warn clients about limits on confidentiality' (1990) 39 Catholic University Law Review, 441 to 490

19

Pozen J, (2006) 'Justice Obscured: The non-disclosure of witnesses' identities in ICTR trials' Vol. 38:281 International Law and Politics 281-283

11

Samuelson P, Phil Hill, & Tara Wheatland 'Statutory Damages: A rarity in copyright laws internationally, but for how long?' (2013) 60 J. Copyright Soc'y U.S.A. 1. At http://cyber.law.harvard.edu/people/tfisher/IP/Samuelson_SDs_2013.pdf (accessed 30/12/2013) 7

Smet S, 'Freedom of expression and the right to reputation: Human rights in conflict' (2010) 26 (1) American University International Law Review 183-236

Solove D, 'A Taxonomy of Privacy' (2006) 154 University of Pennsylvania Law Review 479 to 558 2, 5, 11, 12

Tene O, 'What Google knows: Privacy and Interest Search Engines' (2007) 4 Utah Law Review 1434 to 1490 16, 18

Warren S & Brandeis D, 'The Right to Privacy' (1890) 4 Harvard Law Review, 193 to 220 17

Yeo S, 'Causation, fault and the concurrence principle' (2002) Vol 10 No 2 Otago Law Review 213-237, 214 18

**D. EU Directives** 6, 8, 10

Council Directive, 95/46, art. 6(1)(b), 1995 O.J. (L. 281) 40 (E.C.)(providing that personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes")

**E. OECD Guidelines** 16

OECD Guidelines On The Protection Of Privacy and Transborder Flows of Personal Data (Sept. 23, 1980), <http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html> (accessed 27/12/2013)

**F. International Principles** 16

Article 19, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1 October 1995

Siracusa Principles on the Limitation and Derogation of Provisions in the International

Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984)

### G. Conference Papers

Kathurima M'Inoti, 'Freedom Of Expression And The Law Of Sedition In Post Independent Kenya' (ICJ Kenya Section Seminar, Naivasha, Sept 1991) 2

### H. Online sources

Google Privacy Policy (December 20, 2013) available at <https://www.google.com/intl/en/policies/privacy/> (accessed 27/12/2013) 14

Lord Neuberger, D, 'Privacy & Freedom of Expression: A delicate balance,' in a speech on April 28, 2010, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-privacy-freedom-expression-28042010.pdf> (accessed 25/10/2013) 17

Donnelly L, 'Media Law: Protection of journalistic sources in the UK,' POJS report, <https://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CEsQFjAB&url=http%3A%2F%2Fwww.psw.ugent.be%2FCms_global%2Fuploads%2Fpublicaties%2Fdv%2Fmedia_law_llm%2FPOJSUK.II.doc&ei=usirUpDJLNST0AWGpIDwCA&usg=AFQjCNFtG5BEuOwZGojz_4HU73ob0IdZuA&sig2=TVpglIUbtbU-tTwwsgmnhQ&bvm=bv.57967247,d.d2k> (accessed 11/12/2013) 2, 3, 11, 12

**Statement of Relevant Facts**

The Republic of Mhugan is a country whose economy has grown rapidly fueled by a combination of information technology industries, manufacturing, and financial services. Centiplex Corporation is the leading Internet services company in Mhugan. Its main search website contains a link to Terms of Service which are silent with respect to Centiplex's disclosure of any data that it collects from its search engine. Centiplex is a client of Dexian Corporation, an information services company whose core business is disseminating information relating to individuals which vary widely in their scope, completeness, and correctness.

Thon Sang, who maintains an active blog on the Centiplex platform in which he describes himself as "celebrity-obsessed" posted on May 1, 2013 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 needs to "give his wife 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 his, but denied allegations of spousal abuse.

The next day, Sang posted Rho's web searches, which included 'how to control your wife' that he had acquired by "buying Rho's profile from Dexian." He also 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 disseminate the contents of a telephone or electronic communications that the person knows to have been unlawfully intercepted or obtained." The Act also contains a section that provides for a special provisional search engine order. On May 8, 2013, Rho sued Sang under the Wiretap Act and immediately applied for a search engine order under the Act against Centiplex, which the court granted. The court ultimately ruled that Sang had violated the Wiretap Act and awarded statutory damages to Rho of 400,000 MHD. 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 which the court denied, finding that a qualified privilege not to reveal sources applies only to "professional journalists".

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. Centiplex's motion against enactment of the Act was dismissed. All of the rulings described above were appealed to the Mhugan Supreme Court, the highest appellate court in Mhugan, which dismissed them. Sang and Centiplex have then sought to challenge all of the following rulings in the Universal Court of Human Rights.

**Statement of jurisdiction**

The UHRC has jurisdiction to deal with this matter because it involves the interpretation of the UDHR. The Universal Freedom of Expression Court has specific jurisdiction to address violations of Article 19 of the UDHR raised in this case.

**Questions presented**

(a) Whether the damages imposed on Sang for disseminating the recorded voicemail are an unlawful limitation of Sang's freedom of expression;

(b) Whether the subpoena to Sang to disclose the source of the recorded voicemail is lawful under the UDHR;

(c) 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 a violation of the UDHR;

(d) Whether the 2013 Search Privacy Act is a permissible limitation to the freedom of expression.

## Summary of Arguments

### The damages imposed on Sang for disseminating the recorded voicemail are an unlawful limitation of Sang's freedom of expression

The damages awarded to Bansit were a proper limitation of Sang's freedom of expression under Article 19 of the UDHR. First, the limitation was done pursuant to written law in the form of the Wiretap Act and was driven towards ensuring a democratic society. The actions of the source and Sang violated Bansit's right to privacy. The acts of the source were unlawful when viewed as one act; and given Sang had knowledge of the unlawful acquisition, his subsequent dissemination is a violation of the Wiretap Act. As such, the award of damages was well founded in the law.

### The subpoena to Sang to disclose the source of the recorded voicemail is lawful under the UDHR

Sang is not a journalist and as such cannot plead qualified privilege from disclosing his source under Mhuganian law. Sang is a trained programmer and lacks proper journalistic training. However, even if the court was to hold that indeed Sang is a journalist he would not merit privilege because his acts were not done in good faith. Therefore, given that the subsequent dissemination by Sang was not in good faith, then he can still be compelled to reveal his source.

**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 a violation of the UDHR**

The order is proper as it is pursuant to Respondent's obligation to ensure right to privacy of its citizens is respected. The European Commission of Human Rights in *X v Iceland* found that states have a corresponding obligation to ensure protection of this right. This right to privacy extends to famous people who are entitled to private and personal lives as everyone else and must be free to enjoy personal relationships without interference or notoriety. Further, the order adheres to the permissible limitations of the freedom of expression and right to internet access as it was given pursuant to the Wiretap Act.

**The 2013 Search Privacy Act is a permissible limitation to the freedom of expression**

The Search Privacy Act is a permissible limitation on Centiplex's right to freedom of expression. The Act is established by the Mhuganian parliament, it pursues a legitimate aim in that it seeks to ensure user privacy is upheld and it is necessary and proportional in that it only deals with sell of the first instant search queries. The SPA fulfills the principle of data specification. The Act also seeks to promote the Mhuganian user's right to privacy and confidentiality. The overriding aim of the Act is to ensure the privacy of individuals especially on information provided on search queries. The SPA seeks to protect such information. On confidentiality once a user has a 'reasonable expectation of privacy' when they enter a search query, any subsequent use of the same data breaches this confidentiality whether a relationship of trust exists or not.

**Arguments Advanced**

## I. Damages imposed on Sang for disseminating the recorded voicemail

1. The disputed damages were imposed on the first Applicant for violations under the Wiretap Act. It is the Respondents case that the imposition of the damages was proper under Mhuganian law. Sang was able to clearly recount all that happened to lead him to acquire the contested voicemail.[1] That the information was gotten through means that violated Rho's right to privacy is indicative of violation of the law. The consequent dissemination of this information by Sang despite having knowledge of how this violation makes him liable under the Wiretap Act. The positive and 'continuous' act of disseminating the information is primarily the source of Sang's culpability.

### 1. Sang's act's cannot be justified under Article 19 of the UDHR

2. The Applicant may attempt to justify his actions as justified by the guaranteed freedom of expression under Article 19 of the ICCPR.[2] The Respondents however underline the fact that the said freedom is not absolute and paragraph (ii) of Article 19 provides an important caveat:

> "[The freedom of expression] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others…"

[1] Facts¶9.

[2] Cf. Article 19 of the UDHR.

3. Further, Article 29(2) of the UDHR provides that enjoyments of rights under the declaration shall:

> "…be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[3]

4. The freedom of expression is not a right to be enjoyed in isolation.[4] The freedom of expression impliedly carries the rights of the individual to express self as against the right of the public and others.[5] It is the Respondent's submission that these rights should be weighed against the other and if the right of the individual greatly prejudices the right of others; then it should be limited.[6]

**1.1 The limitations on Sang's freedom of expression are justifiable under the UDHR**

5. The UDHR establishes[7] the three-fold test for the validity of restrictions on freedom of expression which includes legality,[8] legitimacy[9] and necessity.[10] The UDHR further provides

---

[3] See also Principle 1.3 of Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

[4] Stijn Smet 'Freedom of expression and the right to reputation: Human rights in conflict,' (2010) 26 (1) American University International Law Review 183-236, 192.

[5] *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996), para 7.9.

[6] Lord Neuberger of Abbotsbury, Master of the Rolls (2010) 'Privacy & Freedom of Expression: A delicate balance,' in a speech on April 28, 2010, at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-privacy-freedom-expression-28042010.pdf (accessed 25/10/2013).

[7] Article 29(2) of UDHR.

[8] *Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 229; *Marques de Morais v Angola* 2005 AHRLR 3 (HRC).

that the restriction on the freedom of expression must be prescribed by law, must further a legitimate aim, and should be necessary in a democratic society.[11]

6. It is the Respondents case that the limitation on this freedom in Mhugan was properly prescribed under the Wiretap Act.[12] The Wiretap Act qualifies for the legal framework requirement envisioned in Article 29(2) of the UDHR which provides that the rights shall be subject only to such limitations as are determined by law. That the damages were issued pursuant to legislation in-line with Article 29 of the UDHR means that they qualify as a legitimate limit on the freedom of expression.[13]
7. Secondly, the limitation under the Wiretap Act properly fall within the accepted purview under international human rights law which provides that the restriction on the freedom must be for purposes of national security and as is necessary to maintain public order. The respondents submit that these are the aims of the Wiretap Act.
8. Finally, the Respondents concur with the statement of Lord Neuberger of Abbotsbury, Master of the Rolls when he observed that though the freedom of expression be the '*primary right*' and the '*life blood of democracy'*; the freedom should be restricted under certain circumstances for democracy to thrive.[14] As such, the limitation under the Wiretap Act was properly driven towards maintaining a democratic society.

---

[9] Clause 6 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACtHPR).

[10] *Velichkin v Belarus* Communication no 1022/2001 UN Doc CCPR/C/85/D/1022/2001 (2005) (HRC).

[11] Article 19 of UDHR.

[12] Facts¶14.

[13] Cf. Article 19(2) of the ICCPR.

[14] See n5.

9. The Respondent therefore argue that international human rights law is agreeable to limits of the Applicant's freedom of expression; the violation of which is sufficient basis for imposition of the disputed damages.

### 1.1.1 Sang's actions violated Bansit's right to privacy

10. In *Hartford Casualty Ins. Co.* and the *Acara* case, the courts have applied and held that violation of one's right to privacy is sufficient ground for the award of damages to the victim.[15] The Applicant has consented to receiving the wrongfully attained second recording in the violation of the respondent's right to privacy.[16] The Applicant in further violation of this right disseminated the material in further violation of the respondent's right to privacy. These acts in violation warrant the award of statutory damages as provided for under the Wiretap Act.

### 1.1.2 Sang's actions violated Bansit's right to reputation

11. Article 12 UDHR recognizes the right to honour and reputation.[17] Protection of this right constitutes a valid and reasonable restraint on the freedom of expression.[18] In this case, the information that was maliciously released by Sang was aimed at lowering the estimation of

[15] *Hartford Casualty Ins. Co. v. Corcino & Assocs.*, No. 2:13-cv-03728-GAF-JC (C.D. Cal. Oct. 7, 2013); *Acara v. Banks*, 2006 U.S. App. LEXIS 28120.

[16] Facts¶13.

[17] Art 12 of the UDHR 1948; Art 17 ICCPR.

[18] Art 10(2) of ECHR. See *Pedersen v. Denmark*, App. No. 49017/99 at ¶78. Smet n4.

Rho in the eyes of reasonable men of the society.[19] The updates by Sang were intended to paint Rho as a 'wife-batterer' and even went further to beseech the public to boycott Rho's music in protest.[20] Smet argues that the complete absence of proof for a statement of fact or of any factual basis for a value judgment lead the ECtHR to find in favor of the right to reputation of the plaintiff as against the freedom of expression of the defendant.[21]

12. The freedom of expression of individuals has been read to compete with the right to reputation of the subjects of the said information. The court has to choose one between two Convention rights with *a priori* equal value and as such applies the proportionality test considering whether the interference with the freedom justifies the legitimate interest sought. First, an application of this test requires that the interest sought be legitimate.[22] Such exercise of the freedom can only be considered legitimate if it upholds respect for right to reputation and if the information is driven by general interest rather than personal interest to harm.[23] In this case, Sang's freedom of expression is not driven by a general interest but rather by interest to harm Rho.[24] Sang's exercise of his freedom of expression does not uphold Rho's right to reputation and as such is unlawful.

[19] Facts¶9. See also *Youssoupoff* v *MGM Pictures Ltd* (1934) 50 TLR 581.

[20] Facts¶9.

[21] Smet n4 at 215.

[22] ibid; Hannes Cannie & Dirk Voorhoof (2011) 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An added value for democracy and human rights protection?" Vol. 29/1 *Netherlands Quarterly of Human Rights*, 54–83, 64.

[23] ibid.

[24] Facts¶9..

**1.2 Sang is culpable for the violation of the Wiretap Act**

13. The Act makes it unlawful for one to 'intentionally intercept or obtain unauthorized access to any telephone or electronic communications, whether in transit or in storage."[25] Further, the Act has also declared unlawful the act of 'dissemination with knowledge' that the information was acquired unlawfully.[26] Although the Applicants may argue that the original act of obtaining access to the voicemail was accidental, this does not automatically mean that the source's other actions were lawful. The Applicants imply a requirement of concurrence between the intention and the wrong act.

14. The Respondents however, seek to rely on the fault based approach in analyzing the culpability of both the source and consequently, Sang's. The fault-based approach focuses on the final act and fault of the accused.[27] Professor Stanley Yeo argues that under this approach the fault element brings the initial act and subsequent acts together as "one transaction."[28] Therefore, the Respondents contend that although the initial act by the source was accidental, the subsequent downloading and sharing the voicemail with Sang were laced with the wrongful intention envisioned under the Wiretap Act.[29] As such, the actions of the source were unlawful and given that Sang had this knowledge, then he was liable for the consequent dissemination with knowledge of the unlawful acquisition.

---

[25] Facts¶14.

[26] ibid.

[27] Stanley Yeo "Causation, fault and the concurrence principle," (2002) Vol 10 No 2 *Otago Law Review* 213-237, 214.

[28] ibid at 216.

[29] Facts¶13& 16. Cf. *Thabo Meli v. The Queen* [1954] 1All ER 373.

**1.3 The damages of MHD 400, 000 awarded to Bansit are justifiable**

15. The violations under the Wiretap Act are punishable in the form of statutory damages to a maximum of MHD 1, 000, 000. The Applicants were awarded a sum of MHD 400, 000 which well within the continuum allowed by the Act.[30] On this ground, the Respondents state that the challenge against the statutory damages awarded lacks merit. Statutory damages are extraordinary mainly because they allow successful plaintiffs to recover substantial monetary damages without any proof that the plaintiff suffered any actual harm from the infringement or the defendant profited from the infringement.[31]

16. The use of online platforms has been used to justify awarding of higher damages on the recognition that the internet's "instantaneous," "borderless," and "far-reaching" mode and extent of publication has "tremendous power to harm."[32] That the Mhuganian Courts only granted less than half of the maximum statutory damages is indicative of fairness and consideration in the court's judgement.[33]

17. The Respondents argue that the act of accidentally getting access to Bansit's account, the unauthorised copying thereafter and sharing for dissemination with Sang should be

---

[30] Facts¶14.

[31] Pamela Samuelson, Phil Hill, & Tara Wheatland "Statutory Damages: A rarity in copyright laws internationally, but for how long?" (2013) 60 *J. Copyright Soc'y U.S.A.* 1. <http://cyber.law.harvard.edu/people/tfisher/IP/Samuelson_SDs_2013.pdf> (accessed 30/12/2013).

[32] *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 at paras. 31, 32, 33 (C.A.) [*Barrick* (C.A.)]. Cf. Lyrissa Barnett Lidsky, 'Silencing John Doe: Defamation & discourse in cyberspace,' (2000) 49 Duke L.J. 855 at 863. See also Matthew Nied 'Damage awards in internet defamation cases: Reassessing assumptions about the credibility of online speech,' (2010) *Alberta Law Quarterly Online*, <http://www.albertalawreview.com/index.php/alr/supplement/view/Damage%20Awards%20in%20Internet%20Defamation%20Cases#_ftn>1 (accessed 28/12/13).

[33] Courts have issued maximum statutory damages. For instance in, *Adobe Systems Inc. v. Thompson (c.o.b. Appletree Solutions)*, 2012 FC 1219 (Campbell, J.). *Agence France Presse v. Morel*, 2011 WL 147718 (S.D.N.Y. Jan. 14, 2011). *Curet-Velazquez v. ACEMLA de Puerto Rico, Inc*., No. 10-CV-01587, 2011 BL 222108 (1st Cir. Aug. 29, 2011).

considered a single compound act. Consequently, the Respondents invite the court to find that Sang had knowledge of the unlawful acquisition of the information as is required under the Wiretap Act.[34] As such, the Court should find that Sang disseminated the information that with the knowledge that it was wrongfully acquired.[35]

## II. Subpoena to Sang to disclose the source of the recorded voicemail

18. The Respondents submit that bloggers are not properly within the purview of 'journalists'.[36] Sang is a programmer.[37] As such, Sang cannot plead qualified privilege under Mhuganian law. Therefore, the subpoena for disclosure can and should be effected to allow Rho his right to confront his 'accuser' under the principle of confrontation.[38] Due to the gravity of the allegations leveled against the complainant; it is pertinent that the complainant is allowed the chance to confront and cross examine him.
19. The Applicants have sought to rely on the blanket argument that the first appellant is a journalist. This argument is predicated on the reasoning that bloggers are journalists and as such are covered by the same protections extended to journalists on non-disclosure of sources. The Respondents argue that the bloggers are not entitled to journalistic protection.

[34] Facts¶16. See Stanley Yeo 'Causation, fault and the concurrence principle,' (2002) Vol 10 No 2 Otago Law Review 213-237, 214.

[35] ibid.

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

[37] Facts ¶7 & 8.

[38] Joanna Pozen 'Justice Obscured: The non-disclosure of witnesses' identities in ICTR trials,' (2006) Vol. 38:281 International Law and Politics 281-322; 281-283.

**2.1 Sang is not a journalist**

20. The USA arguably has the most advanced media law while the EU has the most progressive human rights regime. As such, absent a specialised international Convention on journalism and media law, the Respondents shall be guided by authorities from these jurisdictions when necessary.[39]

21. In the Crystal Cox Opinion, Judge Marco Hernandez, enunciated the criteria for determining who is a journalist. He listed these as education in journalism; credentials or proof of affiliation with a recognized news entity; proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; creation of an independent product rather than assembling writings and postings of others; keeping notes of conversations and interviews conducted, mutual understanding or agreement of confidentiality between the defendant and his/her sources; and contacting "the other side" to get both sides of a story.[40]

22. Sang does not qualify to be a journalist according to this criteria. First, he has only undergone training as programmer but lacks education and training in journalism.[41] Secondly, Sang posts his work on his blog and is not affiliated to any recognised news entity in Mhugan.[42] Further, most of Sang's updates are not original content and are based on information he finds elsewhere on the internet.[43] That Sang fails on these fundamental respects of journalism

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

[40] *Crystal Cox Opinion* page 9. Cf. *Too Much Media, LLC* v. *Hale*, 413 N.J. Super. 135, 142 (App. Div. 2010).

[41] Facts¶ 9.

[42] ibid.

[43] Facts¶ 8.

is proof that he is not journalist and as such does not stand to benefit non-disclosure of sources.

23. The Applicants however may seek to rely on the seminal decision in the *Re January* case in the USA, New Jersey as ground for granting of journalistic privilege to 'bloggers' like Sang.[44] However, the Respondent underline that this may not be well founded given that the respondent therein, though describing herself as a blogger was found to have met the criterion in the *Crystal Cox* Case [hereinabove listed] and in *Too Much Media* decision.[45] The respondent in *Re January* (Ms Renna) was employed by a recognized media entity and also used to generate original content; unlike Sang.[46]

24. Even with the submissions just made, was the court to find that Sang is a journalist, the Respondents in the alternative argue that his acts fall outside the protections of the freedom of expression.

**2.2 Sang's acts were not in good faith**

25. 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.[47] The fact that there is no proof that Sang made any attempt to prove the validity of the source's information is

[44] *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).

[45] Yeo n26.

[46] Debra McLoughlin 'In Re January 11, 2013, Subpoena by the Grand Jury of Union County,' (2013) *New Jersey Law Journal Online*, September 5, 2013, <http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202618205026&In_re_January_11_2013_Subpoena_by_the_Grand_Jury_of_Union_County#ixzz2pK2KpJxS> (accessed 27/12/2013).

[47] Article 10 of the ECHR.

sufficient proof of lack of good faith.[48] Further, Sang was not able to substantiate the defamatory statements by providing proof or at least a sufficient factual basis.[49] Therefore, the Respondents submit that the Applicant could be denied the right of non-disclosure.

26. The Courts in the UK adopt a more restrictive stance on journalistic disclosure of sources. It is held that the public interest in protecting the source of the leak is not sufficient to outweigh the public interest in seeking justice.[50] In cases of disclosure, the first test is that of whether there has been wrongdoing by the subject journalist.[51] In the face of a wrongful act, then disclosure is allowable. It is the Respondent's case that the wrongful acquisition of the tape and inciteful acts by Sang against the livelihood of Rho constitutes a wrongful act which exempt Sang from journalistic protection against source disclosure.[52]

27. Finally, the Court should consider whether the interference with the freedom of expression is necessary and proportionate to that aim.[53] It has been that this should be undertaken as a balance between the speech interest against the harm caused.[54] The practice is that the

---

[48] See *Chauvy v. France* 2004-II Eur. Ct. H.R. 125, 148. *Europapress Holding D.O.O. v. Croatia*, App. No. 25333/06, ¶¶ 66-68 (Eur. Ct. H.R. Oct. 22, 2009).

[49] Stijn Smet 'Freedom of expression and the right to reputation: Human rights in conflict,' (2010) 26 (1) *American University International Law Review* 183-236, 220. See *Alithia Publ'g Co*. v. *Cyprus*, App. No. 17550/03, ¶ 67 (Eur. Ct. H.R. May 22, 2008).

[50] *Interbrew v. Financial Times and Others [*2002] EMLR 24. Louisa Donnelly, 'Media Law: Protection of journalistic sources in the UK,' POJS report, <https://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CEsQFjAB&url=http%3A%2F%2Fwww.psw.ugent.be%2FCms_global%2Fuploads%2Fpublicaties%2Fdv%2Fmedia_law_llm%2FPOJSUK.II.doc&ei=usirUpDJLNST0AWGpIDwCA&usg=AFQjCNFtG5BEuOwZGojz_4HU73ob0IdZuA&sig2=TVpglIUbtbU-tTwwsgmnhQ&bvm=bv.57967247,d.d2k> (accessed 11/12/2013).

[51] ibid. See *Interbrew v. Financial Times and Others* [2002] EMCR 24.

[52] See *Jersild v. Denmark*, 23 September 1994, Application No. 15890/89, para. 35. Dissenting opinions of Judges Ryssdal, Bernhardt, Spielmann and Loizou.

[53] see n33.

[54] *Goodwin v. UK* 1996) 22 EHRR, 123.

freedom of disclosure is also lifted to allow for disclosure when it is necessary in the *interests of justice, national security* or for the *prevention of crime or disorder*.[55] The Respondents submit that it is in the interest of justice for Sang to disclose his source to allow the Respondent a specific action for violation of his right to privacy.[56]

## 3. The order against Centiplex requiring that web pages that link to the recorded voicemail never appear on the first page of search results

28. The order is proper as it is pursuant to Respondent's obligation to ensure right to privacy of its citizens is respected. Further, the order adheres to the permissible limitations of the freedom of expression and right to internet access.

### 3.1. Respondent has an obligation to protect its citizens' Right to Privacy

29. In the modern age of technology, invasion of people's privacy has reached monumental proportions.[57] Thus, social changes have made it imperative for legal protection to be afforded to potential victims of the outrageous practices of invasion of privacy.[58]The modern privacy benchmark at an international level can be found in Article 12 of the Universal Declaration of Human Rights, which also obligates states to ensure that right is protected for each of its citizens. Numerous international human rights covenants give specific reference to

[55] See discussions on section 10 of the UK Contempt of Court Act in Louisa Donnelly, 'Media Law: Protection of journalistic sources in the UK,' *op. cit.* Smet n4 at 194. *Chauvy* v. *France* 2004-II Eur. Ct. H.R. 229. David Keane 'Attacking hate speech under Article 17 of the European Convention on Human Rights,' (2007) Vol. 25, No. 4 Netherlands Quarterly of Human Rights, pp. 661.

[56] ibid.

[57] A. Awya & C. Mulei, *An Outline of Media Legal Education Program-Sheria* (University of Nairobi Press 1998) 16

[58] ibid

privacy as a right. They include the ICCPR, the ECHR and the UNCRC[59] which contains corresponding obligations on states to protect, fulfil and promote this right.

30. The European Commission of Human Rights found in its first decision on privacy that states have a corresponding obligation to ensure protection of this right.[60] This governmental protection(censorship) is mandated by the fact that sometimes the influence of mass media can applaud a set of stereotyped opinions and prejudices that hinder or promote the process of opinion-shaping.[61] In this instance, it can be seen that Sang's prejudices have been perpetrated through the Centiplex infrastructure to the detriment of Rho's reputation.[62] Thus, Respondent contends that the order issued to Centiplex was pursuant to fulfilment of the State of Mhuganian's obligations under international human rights law to protect, promote and fulfil the right to privacy for every of its citizens.

**3.2. Bansit Sangnot is entitled to the right to privacy irrespective of being famous**

31. Public figures are entitled to private and personal lives as everyone else and must be free to enjoy personal relationships without interference or notoriety. This position has been supported in several case-law.

32. In *Tammer v Estonia,*[63] the court held that criminal penalties ought to be imposed when a sexual relationship was reported between the Prime Minister and a political aide could not be said to have violated the freedom of the media to publish information about famous people.

[59] UNGA Doc A/RES/44/25 (12 December 1989) with Annex, Article 16.

[60] *X v Iceland* ECHR 18-May-1976.

[61] David Makali, (ed)*Media Law And Practice: The Kenyan Jurisprudence* (Phoenix Publishers Ltd Nairobi 2003) 30

[62] Facts ¶

[63] (2001) 37 EHRR 857.

Similarly, in *Re Jacqueline Kennedy Onassis,*[64] the court recognized the right to privacy to extend to celebrities by providing that this right includes a general right to be left alone, and to define one's circle of intimacy, to shield personal and intimate characteristics from public gaze.

33. Thus, Respondent contends that irrespective of his fame, Bansit alias Rho is still entitled to right to privacy.

### 3.3. Further, the order is not within the permissible limitations of the freedom of expression

34. Freedom of expression is not absolute. Article 10 (2) of ECHR has admitted some exceptions meant to ensure that exercise of freedom of expression does not compromise three categories of interest namely public safety, the rights and reputations of others and peculiar demands of certain offices.[65]Thus, limitations of this freedom can be understood in two-fold: The limitation must be prescribed by law and it must be necessary in a democratic society.

35. In the present context, this order was given pursuant to the Wiretap Act, hence it was prescribed by law. To be necessary in a democratic society, there should be a pressing need and limitation must be relevant and sufficient.[66] There must be a legitimate aim such as Protection of rights and reputations of others[67] The ruling given by the Mhugan Court was to protect Rho's reputation, hence making it necessary in a democratic society.

---

[64] 533 F. Supp at 1105

[65] Kathurima M'Inoti, 'Freedom of Expression and The Law Of Sedition In Post Independent Kenya' (ICJ Kenya Section Seminar, Naivasha, Sept 1991)

[66] *Handyside v United Kingdom* (1976) 1 EHRR 737

[67] *Tolstoy Miloslavsky v U.K.* (A1323) (1995) 20 EHRR 442

### 4. **The Search Privacy Act is a permissible limitation on Centiplex's right to freedom of expression**

36. While the right to freedom of expression is a fundamental right, it is not guaranteed in absolute terms. Article 19 (3) of the ICCPR permits the right to be restricted in the following respects:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special Duties and responsibilities. It may therefore be subject to certain restrictions, but shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others
>
> (b) For the protection of national security or of public order, or of public health or morals

37. Restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put the right itself in jeopardy.[68] The method of determining whether a restriction is narrowly tailored is often articulated by a three pronged test. Restrictions must: (i) be provided by law, (ii) pursue a legitimate aim, (iii) conform to the strict tests of necessity and proportionality.

38. The Search Privacy Act fulfills these criteria, the act is established by the Mhuganian parliament,[69] it pursues a legitimate aim in that it seeks to ensure user privacy is upheld and it is necessary and proportional in that it only deals with sell of the first instant search queries.

[68] *Lingens v. Austria* (Application 9815/82) ECHR 8 July 1986.

[69] Facts ¶ 19.

### 3.4. The Search Privacy Act fulfills the Principle of purpose specification

39. One of the fundamental principles of data protection law in OECD and EU instruments[70] is the principle of purpose specification. Under this principle, personal data obtained for one purpose must not be used or made available for another purpose without the data subject consent. In the EU, the purpose specification principle is based on the underlying belief that personal data "belongs" to the data subject and may be collected, used and transferred (collectively, "processed") by the user of the data (in the EU, "data controller"), strictly for the purpose consented to by the data subject or prescribed by law.

40. Prof Solove explains that secondary use of data queries for instance the sale of search queries "creates a dignitary harm…..emerging from denying people control over the future use of their data, which can be used in ways that have significant effects on their lives".[71] He points out that "secondary use resembles breach of confidentiality, in that there is betrayal of the person's expectations when giving out information.[72]

41. When a user enters a search log on Centiplex's search engine they consent to that information being used to respond to their query and no more. The individual does not knowingly consent that Centiplex will aggregate the queries with others in order to improve its service. Nor does the individual expect that the query will be sold to other internet

[70] OECD Guidelines On The Protection Of Privacy and Transborder Flows of Personal Data (Sept. 23, 1980), <available at http://www.oecd.org/document/18/0,3343,en_2649_34255 _1815186_1_1_1_1,00.html> (accessed 27/12/2013); Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, art. (5)(b), Jan. 28, 1981, Europ. T.S. No. 108, available at <http://conventions.coe.int/Treaty/en /Treaties/html/108.htm> (accessed 27/12/2013); Council Directive, 95/46, art. 6(1)(b), 1995 O.J. (L. 281) 40 (E.C.)(providing that personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes").

[71] Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 University of Pennsylvania Law Review 477 at 521-22.

[72] ibid at 522.

companies or data service providers.[73] When Centiplex uses the information in a user's search-query log for purposes diverging from those you reasonably envisaged, it breaches the trust placed upon it "reasonable expectation of privacy."[74] Centiplex's link on Terms of Service is silent on the disclosure of any data that it collects from its search engine.[75] This is unlike Google which states on its privacy terms that the search query may be used in future.[76]

### 3.5. Centiplex's use of search queries violates Mhuganian user's right to Privacy

42. The Search Privacy Act aims at making it unlawful for a search engine to sell information about a person's search queries without that persons consent.[77] The overriding aim of the Act is to ensure the privacy of individuals especially on information provided on search queries.

43. A user's search history contains highly revealing and sensitive personal data. Individuals use search engines to explore financial investments, sexual interests, friends and acquaintances, matchmaking services, political issues, religious beliefs, medical conditions and more.[78] Search-query logs may be far more embarrassing and privacy intrusive than that of the contents of e-mails correspondences or telephone calls. Consider the scrutiny one gives to an

[73] Facts ¶ 6.

[74] In the U.S the predominat test for a legally protected right to privacy is the "reasonable expectation of privacy"test established in *Katz v. United States*, 389 U.S 347, 360-61 (1967) (Harlan J, concurring).

[75] ibid.

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

[77] ibid.

[78] Omer Tene, 'What Google knows: Privacy and Interest Search Engines' (2007) 4 Utah Law Review 1434 to 1490 at 1442.

email message prior to clicking "send" compared to the utter carelessness before entering a search query. One can imagine an online dossier laden with terms. such as "Britney nude," "growing marijuana," "impotence pills," "job search," "genital warts," "married gay men" etc.[79]

44. The Search Privacy Act seeks to curtail personally identifiable information. This information that is associated with any identifier, including, without any limitation, a name, address, phone number, email address, government identification number, date of birth, or IP address.[80] The act is specifically concerned with information that can be linked to an individual person.

### 3.6. The Search Privacy Act shields user's from breach of confidentiality

45. 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.[81] Daniel 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.[82] Hence the harm in the breach

[79] ibid at 1443.

[80] Facts ¶ 19.

[81] 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.

[82] Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 University of Pennsylvania Law Review 477 at 526-27.

of confidentiality is not simply that information has been disclosed, but that the victim has been betrayed.[83]

46. Traditionally the confidentiality paradigm has been applied to professionals in fiduciary roles such as lawyers, doctors, therapists and banks.[84] English law has gradually expanded the confidentiality doctrine to protect data subjects against disclosure of personal data by non-fiduciaries including the press.[85]

47. Lord Nicholls observes in the Naomi Campbell case, "this case has now firmly shaken off the limiting constraint of the need for an initial confidential relationship…."[86] Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.[87] Increasingly the focus has been placed more on the nature of the information than on the fiduciary relationship. The Search Privacy Act focuses on ensuring that this confidential information given on search query is protected.

[83] ibid.

[84] Susan Gilles. 'Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy' (1995) 43 Buffalo Law Review, 1; Michael Harvey, 'Comment, Confidentiality: A Note, Breach of Confidence: An Emerging Tort (1982) 82 Columbia Law Review, 1426; Lee Pizzimenti, 'The Lawyers Duty to Warn Clents About Limits on Confidentiality (1990) 39 Catholic University Law Review 441, 463-71.

[85] *Attorney General* v. Guardian Newspaper Ltd (No 2) [1990]1 AC 109.

[86] *Campbell* v. *MGN Ltd* [2004] 2 A.C 457.

[87] ibid at 464-65.

**Relief Sought**

The Respondents prays that this honourable finds and declares that:

1. The damages imposed on Sang for disseminating the recorded voicemail are a lawful limitation of Sang's freedom of expression.
2. The subpoena to Sang to disclose the source of the recorded voicemail is lawful under the provisions of the UDHR.
3. 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 line with provisions of the UDHR.
4. The 2013 Search Privacy Act is a permissible limitation to the freedom of expression.

**TEAM 608R**