

THE 2017–2018 PRICE MEDIA LAW  
MOOT COURT COMPETITION

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PEAPS & SCOOPS  
(APPLICANTS)

v

THE FEDERAL REPUBLIC OF TURTONIA  
(RESPONDENT)

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MEMORIAL FOR RESPONDENT

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ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IA	Information Act of 2006
ODPA	Online Dignity Protection Act of 2015
OECD	Organisation for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
SCOTUS	Supreme Court of the United States

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## STATEMENT OF RELEVANT FACTS

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### **Background of Turtonia**

- A. Turtonia is a democratic country with a population of 17 million. In the past three years, it has seen a significant influx of immigrants from its neighbouring country, Aquaria. The Turtonian Minister of Immigration, Kola, believes that Aquarian immigrants can meaningfully contribute to Turtonia. However, some Turtonians are upset with the influx of immigrants, claiming that the immigrants have disrupted Turtonia's economy and diluted its culture. In particular, Turton Power, a vocal group of nationalist Turtonians, has been protesting outside Kola's office and calling for her resignation, and even attempted to assault her. Kola has also been subjected to harassments online.
- B. Turtonia is also threatened by a religious extremist terror group called True Religion, which has attacked mainstream religious institutions and schools and has been gaining popularity amongst Aquarian youths. True Religion's leader, an Aquarian named Parkta, has been in hiding.

### **Turtonia's efforts to curb fake news**

- C. The IA was enacted in 2006 in response to the distribution of fake documents before the 2005 General Elections, which purported to show a favoured political candidate involved in corruption and bribery. The favoured candidate lost the election, and civil unrest followed, along with a decrease in public faith in the democratic process.

- D. The IA criminalises the communication of false information with the intent to damage the reputation of another or incite civil unrest.

### **Turtonia’s efforts to curb the dissemination of intimate images**

- E. The ODPa was enacted in 2015 in response to the problem of intimate images being distributed without consent. The problem reached its peak because easy access to smart devices meant that intimate images could be easily shared through social media. A majority of Turtonians also believes that sharing intimate images without consent should be made illegal. In 2013 and 2014, two Turtonian girls committed suicide after their intimate images were circulated.
- F. The ODPa criminalises the distribution of intimate images where the publisher disregards a substantial and unjustified risk that the person depicted has not consented to such disclosure.

### **The publication of Peaps’ post on Scoops**

- G. Scoops is the most popular social media platform in Turtonia. It hosts a variety of content from its users, ranging from news, opinions, to even the latest gossip. Its users are incentivized to create compelling content to improve their “influencer score”, which is a measure of the user’s popularity. Scoops also uses algorithm in conjunction with human review to ensure that the posts reach users who may be interested in the content.
- H. Peaps, a Turton Power member, created a Scoops account on May 1 under the name of “XYZ News12” despite having no affiliation to XYZ News, a reputable news network in Turtonia. At noon on May 2, he published a post on his Scoops account alleging that

Kola had approved visas for at least 23 True Religion members at the behest of her secret lover, Parkta. Accompanying the post was an image depicting Kola naked with Parkta. Within the first hour of appearing on Scoops, Peaps' post reached more than 10,000 views and spread to other websites and social media.

- I. At 5:00pm of the same day the post was released, XYZ News released a statement denying any affiliation or involvement with Peaps and his post. Kola's office also released a statement claiming that Peaps' post was false and that the image was photoshopped. Two hours later, Kola's staff sent an online report to Scoops claiming that Peaps' post contained a "nude image of [her] shared without [her] consent". Scoops' employee manually sent a reply requesting for Kola's staff to verify that Kola was the individual depicted in Peaps' post, though Kola's staff did not do so. At 11:00am on May 3, Kola's legal counsel sent a letter to Scoops threatening a civil action for defamation and violation of privacy against Scoops. Scoops managed to remove Peaps' post and all the shares of the post at 1:00pm on May 5. By that point, Peaps' post had 21,000 shares and 145,000 views.
  
- J. In the wake of Peaps' post, Kola received death threats online and offline, including threatening phone calls at her office. On May 4 and 5, protesters gathered outside Kola's office to criticise Kola and her immigration policies. With the turnout rate at more than 100 people, the protest was by far the largest one. On the evening of May 5, two Aquarian immigrants were beaten to death by an angry mob who was yelling anti-Aquarian epithets.

### **Turtonia's prosecution of Peaps and Scoops**

- K. Peaps was prosecuted and convicted under the ODPa and the IA. He was sentenced to two years' imprisonment for the former offence, and a US\$100,000 fine for the latter.
  
- L. Scoops was also prosecuted and convicted under the ODPa and IA. It was sentenced to a US\$200,000 fine for the former offence, and a US\$100,000 fine for the latter.

## STATEMENT OF JURISDICTION

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Peaps, Scoops, and the Federal Republic of Turtonia, which is a member of the UN, have submitted their differences to the Universal Freedom of Expression Court ('this Court'), and hereby submit to this Court their dispute concerning Article 19 of the ICCPR.

On the basis of the foregoing, this Court is requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable declarations and treaties.

## QUESTIONS PRESENTED

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1. Whether Turtonia violated Peaps' right to freedom of expression by prosecuting him under the ODPa and sentencing him to two years' imprisonment.
2. Whether Turtonia violated Scoops' right to freedom of expression by prosecuting it under the ODPa and imposing a US\$200,000 fine.
3. Whether Turtonia violated Peaps' right to freedom of expression by prosecuting him under the IA and imposing a US\$100,000 fine.
4. Whether Turtonia violated Scoops' right to freedom of expression by prosecuting it under the IA and imposing a US\$100,000 fine.



## SUMMARY OF ARGUMENTS

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### **Turtonia's prosecution of Peaps under the ODPa was justified**

- A. The prosecution of Peaps under the ODPa was justified because it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.
  
- B. The prosecution was prescribed by law because Peaps could have foreseen liability under section 1 for publishing his post, which contained an image depicting a female's intimate parts and a caption that explicitly identified the depicted female as Kola. The application of the ODPa to a case of photoshopped intimate images is justifiable because it is consistent with the rationale of the statute. Further, Turtonia did not have unfettered discretion to restrict speech under the ODPa because it must satisfy the elements set out in the statute and disprove the exceptions, before liability is triggered. There were also adequate safeguards against the potential abuse of the ODPa because the right of appeal was available to Peaps.
  
- C. The prosecution pursued the legitimate aims of protecting Kola's rights to privacy and reputation. This is because it was in response to Peaps' post, which purported to display Kola's intimate parts and contained allegations that Kola was granting visas to True Religion terrorists at the behest of her secret lover, Parkta.
  
- D. There was a pressing social need to prosecute Peaps because his post was an unlawful interference with Kola's rights to privacy and reputation. First, Peaps' post infringed on Kola's privacy by purporting to depict details of her sexual life, even if the image was

fabricated. Further, Peaps' post also violated Kola's reputation by taking the form of a damaging factual allegation with no evidential basis. Secondly, Peaps failed to take reasonable steps to guarantee the accuracy of his post. Thirdly, the usage of the fabricated image in Peaps' post was merely to titillate the public. Finally, Peaps' post was published on Scoops, a social media platform with extensive reach.

- E. The two-year imprisonment term was proportionate. The sentence imposed by Turtonia was comparable to punishments in other democracies. Further, Turtonia should be accorded a wide margin of appreciation in determining the nature and the severity of Peaps' offences, given that domestic courts are better suited to assess the unique social context of each state.

#### **Turtonia's prosecution of Scoops under the ODPa was justified**

- F. The prosecution of Scoops was justified because it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.
- G. The prosecution was prescribed by law because Scoops could foresee liability under section 1 for facilitating the distribution of Peaps' post, which contained an image that depicted a female's intimate parts and a caption that explicitly identified the depicted female as Kola. Further, since Scoops was the most popular social media platform in Turtonia, it should have sought legal advice on the scope of the ODPa.
- H. The prosecution pursued the legitimate aim of protecting Kola's rights to privacy and reputation. This is because the distribution of intimate images on social media has

resulted in devastating reputational damage and privacy loss for the individuals depicted. The spread of Peaps' post on Scoops was followed by public vitriol against Kola, culminating in her resignation.

- I. There was a pressing social to prosecute Scoops for its failure to regulate Peaps' post. First, Scoops was an active intermediary which exercised substantial control over its user content, as it could selectively promote certain posts over others. Further, significance should be placed on Scoops' commercial interest in hosting user content. Secondly, internet-related misconduct is regulated most effectively through the imposition of responsibility on intermediaries because intermediaries have the technical means to detect intimate images and manage them quickly. Finally, Scoops should have proactively removed Peaps' post because the post ran a risk of being clearly unlawful and attracted a high volume of traffic.
  
- J. The US\$ 200,000 fine was proportionate. First, in contrast to states that have blocked intermediaries or imposed jail terms on their directors for failing to remove unlawful content, Scoops only received a monetary fine. Secondly, the quantum of US\$200,000 was justified to ensure its effectiveness since Scoops is the most popular social media platform in Turtonia. Further, the fine was also not excessive in comparison to that imposed on intermediaries in other states.

## **Turtonia's prosecution of Peaps under the IA was justified**

- K. States have a duty to combat hate speech. The prosecution of Peaps under the IA was justified because it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.
- L. The prosecution was prescribed by law because Peaps could have foreseen that his post would attract liability under section 1(b). Peaps' lack of effort in confirming the accuracy of his post demonstrated his recklessness as to its veracity. Further, Peaps' post was likely to spark unrest, given the sensitive social situation Turtonia was facing.
- M. The prosecution pursued the legitimate aim of protecting public order. It was in response to Peaps' post that had exacerbated existing tensions between Turtonians and Aquarian immigrants in Turtonia, led to large protests against Kola, and the eventual deaths of two Aquarian immigrants.
- N. There was a pressing social need to prosecute Peaps because his post amounted to an incitement of hostility. First, Peaps' post was made in the context of rising tensions between Aquarian immigrants and Turtonians. Secondly, Peaps intended to incite hostility, as he misled the public into believing that True Religion members were infiltrating Turtonia as immigrants by framing his post as an objective news report. Peaps' membership in Turton Power further strengthens the presence of an intention to incite hostility. Thirdly, such misinformation framed in the form of factual statements is more likely to fuel prejudice against the targeted group, in this case the Aquarian

immigrant community. Lastly, the likelihood of hostility arising from Peaps' post is exacerbated by the nature of social media.

- O. The US\$100,000 fine was proportionate. First, in contrast to states that have imprisoned individuals who disseminate hate speech, Peaps only received a monetary fine. Secondly, the quantum of the fine was appropriate because there is a need to deter individuals from abusing the far-reaching effects of social media.

**Turtonia's prosecution of Scoops under the IA was justified**

- P. The prosecution of Scoops under the IA was justified because it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.
- Q. The prosecution was prescribed by law because Scoops could have foreseen that its receipt of the letter from Kola's legal counsel satisfied the element of knowledge under section 1(a). Further, as the IA explicitly referred to "Online Service Providers", Scoops should have sought legal advice on the scope of the IA.
- R. The prosecution pursued the legitimate aim of protecting Kola's reputation since Peaps' post, which alleged that Kola was granting visas to True Religion terrorists at the behest of Parkta, was widely disseminated on Scoops.
- S. There was also a pressing social need to prosecute Scoops. In addition to having control over its user content and generating profits from its user content, Scoops also only took

down Peaps' post after much of the post's damage had materialised. Further, significance must be placed on the nature of social media as an "echo-chamber".

- T. The US\$100,000 fine was proportionate. Turtonia's sentence was comparable to punishments in other democracies. Further, the quantum of the fine was not excessive in comparison with Scoops' annual revenue.

## ARGUMENTS

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### I. TURTONIA DID NOT VIOLATE PEAPS' FREEDOM OF EXPRESSION BY PROSECUTING PEAPS UNDER THE ODP

1. The freedom of expression<sup>1</sup> is not absolute,<sup>2</sup> as it may yield to a state's duty to protect the rights to privacy and reputation.<sup>3</sup> The effective discharge of this duty is made more challenging with the prevalent use of social media. This is because injurious content posted on social media can be disseminated instantaneously to a sizable audience,<sup>4</sup> thus posing a heightened risk of harm to the enjoyment of these rights.<sup>5</sup>

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<sup>1</sup> UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19; ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 132 art 10; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13; ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9.

<sup>2</sup> ICCPR art 19(3); ECHR art 10(2); ACHR art 13(2); ACHPR art 10(2); *Shchetko v Belarus* UN Doc CCPR/C/87/D/1009/2001 (HRC, 8 August 2006) para 7.3; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 ('UNHRC August 2011 Report') para 15; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (11 May 2016) UN Doc A/HRC/32/38 ('UNHRC May 2016 Report') para 7.

<sup>3</sup> ICCPR art 17(2); ECHR art 8; ACHR art 11(3); *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) ('*Axel Springer*') paras 82–84; *Couderc and Hachette Filipachi Associes v France* App no 40454/47 (ECtHR, 10 November 2015) ('*Couderc*') paras 83–86, 88–90.

<sup>4</sup> Theresa Chmara, 'Balancing Privacy and First Amendment Rights in Social Media: The Example of Revenge Porn' (2016) 19 Copyright & New Media Law Newsletter 5, 5–6; Jeffery Rosen, 'The Web Means the End of Forgetting' *New York Times* (21 July 2010) <[http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0)> accessed 21 January, 2018; Edgar Alvarez, 'Rob Kardashian's Revenge Porn is Social Media's Latest Headache' (*Engadget*, 11 July 2017) <<https://www.engadget.com/2017/07/11/rob-kardashian-blac-chyna-revenge-porn>> ('Social Media's Latest Headache') accessed 21 January 2018; Lenore Sobota and Kevin Barlow, 'ISU Investigating Assault, Porn Cases Tied to Social Media' (*Herald & Review*, 19 September 2017) <[http://herald-review.com/news/local/crime-and-courts/isu-investigating-assault-porn-cases-tied-to-social-media/article\\_f2ace38e-52ed-5fad-9169-ae799a5cc597.html](http://herald-review.com/news/local/crime-and-courts/isu-investigating-assault-porn-cases-tied-to-social-media/article_f2ace38e-52ed-5fad-9169-ae799a5cc597.html)> accessed 21 January 2018.

<sup>5</sup> *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) ('*Editorial Board*') para 63; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) ('*Delfi June 2015*') para 133; ECtHR, 'Internet: Case-Law of the European Court of Human Rights' (Council of Europe, June 2015) <[http://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf)> ('Case-Law of the European Court of Human Rights') accessed 21 January 2018, 22.

2. In response to Peaps' online post containing a fabricated nude image of Kola<sup>6</sup> and an unsubstantiated allegation that she was granting visas to True Religion terrorists at the behest of True Religion's leader, Parkta, Turtonia convicted Peaps under the ODPa and sentenced him to two years' imprisonment.<sup>7</sup>
3. Although the prosecution restricted Peaps' rights to freedom of expression,<sup>8</sup> it was justified because it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society. These requirements have been endorsed by the UNHRC,<sup>9</sup> the IACtHR,<sup>10</sup> the ECtHR,<sup>11</sup> and the ACommHPR.<sup>12</sup>

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<sup>6</sup> Para 12.3.2 of the Facts.

<sup>7</sup> Paras 8.3 and 12.1.1 of the Facts.

<sup>8</sup> Guðmundur Alfreðsson and Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999) 409; Dirk Ehlers, *European Fundamental Rights and Freedoms* (Walter de Gruyter, 2007) 106; HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 ('General Comment 34') para 11.

<sup>9</sup> *Womah Mukong v Cameroon* UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) para 9.7; *Sohn v Republic of Korea* UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4; *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) ('*Malcolm Ross*') para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 para 24; UNHRC August 2011 report (n 2) para 15; General Comment 34 (n 8) para 35; UNHRC, '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 ('UNHRC April 2013 Report') para 29.

<sup>10</sup> *Francisco Martorell v Chile* (IACtHR, 3 May 1996) para 55; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc 51 231–233; IACHR, 'Freedom of Expression and the Internet' (2013) OEA/SER L/II CIDH/RELE/IN F11/13 paras 54–64.

<sup>11</sup> *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) ('*Handyside*') para 49; *Sunday Times v UK (No 1)* App no 6538/74 (ECtHR, 26 April 1979) ('*Sunday Times*') para 45; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) ('*Ceylan*') para 24; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) ('*Murat Vural*') para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) ('*Perinçek*') para 124.

<sup>12</sup> ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; *Interights v Mauritania* AHRLR 87 Comm no 242/2001 (ACommHPR, 2004) paras 78–79; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80.



## A. THE PROSECUTION WAS PRESCRIBED BY LAW

4. A prosecution under a statute is prescribed by law if: (1) the statute is sufficiently precise; and (2) there are adequate safeguards.<sup>13</sup>
  1. *The ODPa was sufficiently precise because Peaps could reasonably foresee liability for distributing intimate images*
5. A statute is sufficiently precise if individuals can reasonably foresee that their conduct will attract liability under it.<sup>14</sup> Section 1 prohibits the distribution of intimate images where there is a “substantial and unjustified risk” that the “identified” individual did not consent to such disclosure.<sup>15</sup> As the caption accompanying the image explicitly identified Kola and the image appears to have been taken in a manner unbeknownst to her,<sup>16</sup> Peaps could have reasonably foreseen liability.
6. Although the definition of “public interest” in section 3(b) appears broad, statutes need not be absolutely precise. The degree of precision required depends on the content and

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<sup>13</sup> *Silver v UK* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) (*‘Silver’*) paras 85–90; *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) (*‘Malone’*) paras 67–68; *Weber and Saravia v Germany* App no 54934/00 (ECtHR, 29 June 2006) (*‘Weber and Saravia’*) paras 93–95; *Editorial Board* (n 5) paras 51–52; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) (*‘Ahmet’*) paras 57–59; UNHRC, ‘Concluding Observations on the Fourth Periodic Report of the United States of America’ (23 April 2014) CCPR/C/USA/CO/4 (*‘UNHRC April 2014 Report’*) para 22; UNHRC, ‘The Right to Privacy in the Digital Age, Report of the Office of the United Nations High Commissioner for Human Rights’ (30 June 2014) UN Doc A/HRC/27/37 (*‘UNHRC June 2014 Report’*) para 28.

<sup>14</sup> *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996) (*‘Wingrove’*) para 40; *Editorial Board* (n 5) paras 51–52; *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017) (*‘Dmitriyevskiy’*) para 78; General Comment 34 (n 8) para 25.

<sup>15</sup> Para 11.2 of the Facts.

<sup>16</sup> Paras 8.3, 9.1–9.2 of the Facts.

the field that the law is designed to cover<sup>17</sup> in order to adapt to developing socio-political contexts.<sup>18</sup> As social media has caused an uptake in the dissemination of intimate images in Turtonia and the “devastating harm” that resulted,<sup>19</sup> the ODPa had to be drafted in broader terms. Further, the inclusion of a public interest defence in statutes prohibiting the disclosure of private information strikes a fair balance between the rights to freedom of expression, and that of privacy and reputation.<sup>20</sup>

7. Peaps cannot argue that the application of the ODPa to a photoshopped image was not reasonably foreseeable. The application of criminal statutes to novel areas is permissible where it is “consistent with the essence of the offence”.<sup>21</sup> There was no indication that the ODPa would only apply in cases where a person’s actual intimate parts were exposed.<sup>22</sup> Further, the devastating damage to reputation and privacy caused by the

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<sup>17</sup> *Editorial Board* (n 5) para 52; *Centro Europa 7 SRL and Di Stefano v Italy* App no 38433 (ECtHR, 7 June 2012) (*‘Centro Europa’*) para 142; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) (*‘Delfi October 2013’*) para 72; *Delfi June 2015* (n 5) para 122; *Karáscony v Hungary* App nos 42461/13 and 44357/13 (ECtHR, 17 May 2016) (*‘Karáscony’*) para 125; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) (*‘Satakunnan’*) para 144.

<sup>18</sup> *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) (*‘Müller’*) para 29; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) (*‘Kokkinakis’*) para 40; *Gorzelik and others v Poland* App no 44158/98 (ECtHR, 17 February 2004) (*‘Gorzelik’*) para 64; *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007) (*‘Lindon’*) para 41; *Delfi October 2013* (n 17) paras 71, 75; Mary Anne Frank, ‘Drafting an Effective “Revenge Porn” Law: A Guide for Legislators’ (*SSRN*, 17 August 2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2468823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823)> (*‘A Guide for Legislators’*) accessed 21 January 2018; *Dmitriyevskiy* (n 14) para 79.

<sup>19</sup> Para 10.1 of the Facts.

<sup>20</sup> General Comment 34 (n 8) para 47; Danielle Keats Citron and Mary Anne Frank, ‘Criminalizing Revenge Porn’ (2014) 49 *Wake Forest Law Review* 345, 388; *A Guide for Legislators* (n 18) .

<sup>21</sup> *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010) para 185; *Del Rio Prada v Spain* App no 42750/09 (ECtHR, 21 October 2013) para 93; *Rohlena v Czech Republic* App no 59552/08 (ECtHR, 27 January 2015) para 50; *Perinçek* (n 11) para 134–135.

<sup>22</sup> Para 10.1 of the Facts.

distribution of fabricated intimate images parallels the harm caused by actual intimate images.<sup>23</sup>

2. *There were adequate safeguards because Turtonia did not have unfettered discretion to restrict speech*

8. Adequate safeguards exist where a state's discretion to sanction speech is fettered through laws that indicate "sufficient clarity the scope of any ... discretion and the manner of its exercise".<sup>24</sup> Turtonia did not have unfettered discretion to restrict speech under the ODPa because it must first establish that the intimate image was "knowingly distribute[d]" without consent from the depicted person, and that the statutory defences did not apply before liability could be imposed.<sup>25</sup>

9. Peaps cannot argue that the ODPa contained inadequate safeguards because the Turtonian Supreme Court declined to exercise its discretionary review power.<sup>26</sup> The right

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<sup>23</sup> Samantha Kopf, 'Avenging Revenge Porn' (2014) 9 *Modern American* 22, 22; Clare McGlynn and Erika Rackley 'Image-Based Sexual Abuse' (2017) 37 *Oxford Journal of Legal Studies* 1, 1–17; Clare McGlynn *et al*, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) *Feminist Legal Studies* 25 ('Beyond Revenge Porn'), 28; Diane Shima Rwigara, 'I Wanted To Be Rwanda's First Female President. Then Fake Nude Photos Appeared Online' *Washington Post* (2 August 2017) <[https://www.washingtonpost.com/news/global-opinions/wp/2017/08/02/what-happened-when-i-tried-to-run-to-become-rwandas-first-female-president/?utm\\_term=.f393b1d2c264](https://www.washingtonpost.com/news/global-opinions/wp/2017/08/02/what-happened-when-i-tried-to-run-to-become-rwandas-first-female-president/?utm_term=.f393b1d2c264)> accessed 21 January 2018; Harley Tamplin, 'City Worker "Made Fake Porn Pictures of Colleague After She Turned Him Down"' *Metro* (21 December 2017) <<http://metro.co.uk/2017/12/21/city-worker-made-fake-porn-pictures-colleague-turned-7177961/>> accessed 21 January 2018; Brittney McNamara, 'Justin Bieber's Nude Photo was Likely Photoshopped — But We Shouldn't Look at It Anyway' (*Teen Vogue*, 19 August 2016) <<https://www.teenvogue.com/story/justin-bieber-nude-photo-photoshopped-consent-shouldnt-look-at-it>> accessed 21 January 2018.

<sup>24</sup> *Silver* (n 13) para 90; *Malone* (n 13) para 68; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) para 34; *Liu v Russia (No 2)* App no 29157/09 (ECtHR, 26 July 2011) ('*Liu*') para 88.

<sup>25</sup> Para 10.2 of the Facts.

<sup>26</sup> Para 14.2 of the Facts.

to appeal is in itself an adequate safeguard<sup>27</sup> and the decision to allow appeals properly falls within the purview of domestic courts.<sup>28</sup> Further, there was no allegation that the Turtonian Supreme Court had improperly exercised its discretion.

10. Accordingly, the prosecution was prescribed by law.

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<sup>27</sup> *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) ('*Klass*') para 56; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) para 72; *Gurtekin v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014) para 28; *Malcolm Ross* (n 9) para 11.4–11.5; CCJE, 'Opinion No 18' (*Council of Europe*, 16 October 2015) <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)> accessed 21 January 2018, para 23; International Commission of Jurists, 'Judicial Accountability — A Practitioner's Guide' (*International Commission of Jurists*, June 2016) <[www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf](http://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf)> accessed 21 January 2018, 34.

<sup>28</sup> *Ashingdane v the United Kingdom* App no 8225/78 (ECtHR, 28 May 1985) para 57; *Krombach v France* App no 29731/96 (ECtHR, 13 February 2001) para 96; *Luordo v Turkey* App no 32190/96, (ECtHR, 17 July 2003) para 85; *Galstyan v Armenia* App no 26986/03, (ECtHR, 15 November 2007) para 125; *Tanfern Ltd v Cameron-Macdonald* [2000] 1 WLR 1311, paras 42–44; Galvin Drewry *et al*, *The Court of Appeal* (Hart Publishing, 2007) 70; Daniel David Ntanda Nsereko, *Criminal Law in Botswana* (Wolters Kluwer, 2011) para 904; Masood Ahmed, 'Case Management and Appeals' (*The Law Society Gazette*, 12 June 2017) <<https://www.lawgazette.co.uk/practice/case-management-and-appeals/5061430.article>> accessed 21 January 2018; UK Ministry of Justice, 'Part 52.21(5) of the Rules & Practice Directions' <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52#52.21>> accessed 21 January 2018; Federal Court of Australia, 'About the Court's Appellate Jurisdiction' <<http://www.fedcourt.gov.au/law-and-practice/guides/appeals/from-courts/appellate-jurisdiction>> accessed 21 January 2018; Supreme Court of Newfoundland, 'Frequently Asked Questions' <<http://www.court.nl.ca/supreme/appeal/faq.html>> accessed 21 January 2018; Supreme Court of Appeal of South Africa, 'About the Supreme Court of Appeal of South Africa' <<http://www.justice.gov.za/sca/aboutsca.htm>> accessed 21 January 2018.

**B. THE PROSECUTION PURSUED THE LEGITIMATE AIMS OF PROTECTING KOLA'S RIGHTS TO PRIVACY AND REPUTATION**

11. The protection of the rights to privacy and reputation are legitimate aims for restricting the right to freedom of expression.<sup>29</sup> Protecting the right to privacy includes restricting disclosures of an individual's intimate information,<sup>30</sup> while protecting the right to reputation includes punishing unsubstantiated allegations of misconduct.<sup>31</sup> Peaps' post purported to depict Kola's intimate parts and contained the allegation that she was sexually involved with an Aquarian terrorist.<sup>32</sup>
12. Accordingly, the prosecution pursued the legitimate aims of protecting Kola's rights to privacy and reputation.

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<sup>29</sup> ICCPR arts 17(1), 19(3)(a); *Mosley v UK* App no 48009/08 (ECtHR, 15 September 2011) ('*Mosley*') paras 111, 114; UNHRC, '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 para 74; UNHRC August 2011 Report (n 2) para 15; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (4 June 2012) UN Doc A/HRC/20/17 para 81; UNHRC May 2016 Report (n 2) para 7; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (6 September 2016) UN Doc A/71/373 para 7; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights* (3<sup>rd</sup> edn, Oxford University Press, 2013) para 18.44.

<sup>30</sup> *Bensaid v UK* App no 44599/98 (ECtHR, 6 February 2001) para 47; *Peck v UK* App no 44647/98 (ECtHR, 28 January 2003) para 57; *Hachette Filipacchi Associés v France* App no 71111/01 (ECtHR, 14 June 2007) ('*Hachette*') para 42; *S and Marper v UK* App nos 30562/04, 30566/04 (ECtHR, 4 December 2008) ('*S and Marper*') para 66; *Eerikäinen v Finland* App no 3514/02 (ECtHR, 10 February 2009) para 70; *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) ('*Von Hannover (No 2)*') para 103.

<sup>31</sup> *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) ('*Pedersen*') para 78; *Lindon* (n 18) paras 57, 67; *Instytut Ekonomichnykh Reform, TOV v Ukraine* App no 61561/08 (ECtHR, 17 October 2016) paras 8–9, 32.

<sup>32</sup> Paras 8.1–8.3 of the Facts.

### C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

13. A restriction of the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.<sup>33</sup>

1. *There was a pressing social need to prosecute Peaps because he unlawfully interfered with Kola's rights to privacy and reputation*

14. The right to freedom of expression must not be accorded undue weight at the expense of the rights to privacy and reputation.<sup>34</sup> In determining whether a fair balance has been struck between these competing rights, the factors to be considered include:<sup>35</sup> the nature of the publication; the steps taken by the publisher to guarantee the accuracy of the publication; the publication's contribution to a debate of public interest; and the extent to which the publication has been disseminated.

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<sup>33</sup> *Handyside* (n 11) para 48–49; *Cumpăună and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) ('*Cumpăună*') paras 88, 90; *Delfi June 2015* (n 5) para 131; *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) ('*Morice*') para 124; *Perinçek* (n 11) paras 196, 228; *Milisavljević v Serbia* App no 50123/06 (ECtHR, 4 April 2017) ('*Milisavljević*') para 31; General Comment 34 (n 8) paras 22, 33–34; UNHRC April 2013 Report (n 9) para 29.

<sup>34</sup> ECHR art 8; ICCPR art 17(2); *Chauvy v France* App no 64915/01 (ECtHR, 29 September 2004) para 70; *Hachette* (n 30) para 43; *MGN Limited v UK* App no 39401/04 (ECtHR, 18 April 2011) ('*MGN*') para 142; *Axel Springer* (n 3) paras 82–84; *Couderc* (n 3) paras 83–86, 88–90.

<sup>35</sup> *Cumpăună* (n 33) para 98–102; *Mladina D D Ljubljana v Slovenia* App no 20981/10 (ECtHR, 17 July 2014) para 43; *Haldimann v Switzerland* App no 21830/09 (ECtHR, 24 May 2015) ('*Haldimann*') para 50; *Bestry v Poland* App no 57675/10 (ECtHR, 3 February 2016) para 59; *Ólafsson v Iceland* App no 58493/13 (ECtHR, 16 June 2017) ('*Ólafsson*') para 48; *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 November 2017) ('*Egill Einarsson*') paras 40, 42.

15. Applying these factors, there was a pressing social need to prosecute Peaps. First, an invasion of privacy occurs even where the disclosed private information is fabricated.<sup>36</sup> The publication of false private information, such as sexual details,<sup>37</sup> can “violate the personal autonomy of [individuals] to determine how they should be presented to the outside world, causing them to suffer a loss of control over their identity”.<sup>38</sup> As a result of Peaps’ post that depicted Kola naked with Parkta, she immediately faced harassment and death threats even though the image was photoshopped.<sup>39</sup>
16. Moreover, while a publication can exist as a fact or a value judgment,<sup>40</sup> publications in the form of factual statements must be sufficiently supported with evidence.<sup>41</sup> This is because factual statements, by claiming to accurately reflect reality, are more likely to induce beliefs about individuals and affect their reputation.<sup>42</sup> Peaps framed his post in the style of a news report, published under the guise of XYZ News, a “well-respected”

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<sup>36</sup> European Parliament Declaration on Mass Communication Media and Human Rights (1970) Resolution 428, part C(2); *Armonas v Lithuania* App no 36919/02 (ECtHR, 25 February 2009) para 20; *Mosley* (n 29) para 55.

<sup>37</sup> *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981) para 52; *S and Marper* (n 30) para 66; *Mosley* (n 29) para 109; Daniel J Solove, *Understanding Privacy* (Harvard University Press, 2008) 147; Ivana Roagna, *Protecting the Right to Respect for Private and Family Life Under the European Convention on Human Rights* (Council of Europe Publishing, 2012) 16.

<sup>38</sup> Lisa Austin, ‘Privacy and Private Law: The Dilemma of Justification’ (2010) 55 *McGill Law Journal* 165, 202–203; John Hartshorne, ‘An Appropriate Remedy for the Publication of False Private Information’ (2012) 4 *Journal of Media Law* 93, 109; Patrick O’Callaghan, ‘False Privacy and Information Games’ (2013) 4 *Journal of European Tort Law* 282, 283.

<sup>39</sup> Paras 8.2 and 9.2 of the Facts.

<sup>40</sup> *Szima v Hungary* App no 29723/11 (ECtHR, 11 February 2013) para 30; *Ärzttekammer für Wien and Dorner v Austria* App no 8895/10 (ECtHR, 16 February 2016) para 67; *Egill Einarsson* (n 35) paras 40.

<sup>41</sup> *Lešník v Slovakia* App no 35640/97 (ECtHR, 11 June 2003) para 57; *Vides Aizsardzības Klubs v Latvia* App no 57829/00 (ECtHR, 27 May 2004) para 44; *Cumpănă* (n 33) para 101; *Pedersen* (n 31) para 76; *Do Carmo de Portugal e Castro Câmara v Portugal* App no 53139/11 (ECtHR, 4 January 2017) para 31; *Egill Einarsson* (n 35) para 40.

<sup>42</sup> Robert Trager *et al*, *The Law of Journalism and Mass Communication* (3<sup>rd</sup> edn, SAGE Publishing, 2012) 147; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 166; Michael Tugendhat and Iain Christie, *The Law of Privacy and the Media* (Moreham and Warby eds, 3<sup>rd</sup> edn, Oxford University Press, 2016) paras 8.08–8.10.

and “objective” news network in Turtonia.<sup>43</sup> As such, his post must be interpreted as a factual allegation that Kola granted visas to True Religion terrorists.<sup>44</sup> However, Peaps’ post did not contain any evidence to support this allegation.<sup>45</sup>

17. Secondly, a publisher’s right to freedom of expression is more justifiably restricted if he fails to act in good faith by attempting to verify the information conveyed.<sup>46</sup> The original image posted on Turton Power was accompanied by the caption “[i]f Kola had a boyfriend, it would be this guy! Ha!”.<sup>47</sup> This highlighted how the image could not have been taken seriously. Further, as a member of Turton Power,<sup>48</sup> Peaps was likely to be familiar with the Turton Power website and would be cognisant of the original intention of the post. Nevertheless, Peaps failed to verify the veracity of the image.<sup>49</sup>
18. Thirdly, the usage of visual material merely for the purpose of titillating public attention would not contribute to a debate of public interest, particularly where the written material sufficiently conveys the substance of the publication.<sup>50</sup> The caption in Peaps’ post already

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<sup>43</sup> Para 6.1 of the Facts.

<sup>44</sup> Para 8.3 of the Facts.

<sup>45</sup> Para 12.2 of the Facts.

<sup>46</sup> *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 May 2005) paras 90, 92; *Björk Eiðsdóttir v Iceland* App no 46443/09 (ECtHR, 10 July 2012) para 71; *Braun v Poland* App no 30162/10 (ECtHR, 4 February 2015) para 50; *Haldimann* (n 35) para 61; *Ólafsson* (n 35) para 53.

<sup>47</sup> Para 12.3.4 of the Facts.

<sup>48</sup> Para 7.1 of the Facts.

<sup>49</sup> Para 8.3 of the Facts.

<sup>50</sup> *MGN* (n 34) para 151; *Mosley* (n 29) para 130; Eric Barendt, ‘Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court’ (2009) 1 *Journal of Media Law* 49, 69.



covered the possibility of a sexual relationship between Kola and Parkta in detail,<sup>51</sup> and Peaps acknowledged that the image was only added for “illustrative purposes”.<sup>52</sup>

19. Finally, there is a greater need to protect an individual’s rights to privacy and reputation where the impugned publication is widely disseminated.<sup>53</sup> In particular, the internet widens the reach of publications, increasing the severity of harm posed to an individual’s rights to privacy and reputation.<sup>54</sup> Peaps chose to disseminate his post through Scoops, Turtonia’s most popular social media platform.<sup>55</sup> As a result, Peaps’ post garnered over 10,000 views on Scoops within the first hour of publication and was widely propagated in Turtonia.<sup>56</sup>
  
20. Accordingly, there was a pressing social need to prosecute Peaps.

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<sup>51</sup> Para 8.3 of the Facts.

<sup>52</sup> Para 12.2 of the Facts.

<sup>53</sup> *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004) para 47; *Gurgenidze v Georgia* App no 71678/01 (ECtHR, 17 October 2006) para 55; *Von Hannover (No 2)* (n 30) para 112.

<sup>54</sup> *Editorial Board* (n 5) para 63; *Delfi June 2015* (n 5) para 133; *Egill Einarsson* (n 35) para 46.

<sup>55</sup> Para 8.3 of the Facts.

<sup>56</sup> Para 9.2 of the Facts.

2. *The prosecution was proportionate because the two-year jail term was consistent with international standards*

21. Proportionality requires that states go no further than necessary to achieve the relevant aim in order to balance the respective interests of the community and the individual.<sup>57</sup> In assessing proportionality, the nature and severity of the punishment must be considered.<sup>58</sup>
22. It is necessary to impose imprisonment sentences where “essential aspects of private life are at stake”.<sup>59</sup> Due to the severe emotional and reputational damage that the dissemination of intimate images inflicts on victims,<sup>60</sup> distributors of such content may

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<sup>57</sup> *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990) (*‘Cossey’*) para 37; *Ozgur Gundem v Turkey* App no 23144/92 (ECtHR, 16 March 2000) (*‘Ozgur’*) para 43; *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002) (*‘Christine Goodwin’*) para 72; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR’ (1984) Annex, UN Doc E/CN.4/1984/4 (*‘Siracusa Principles’*) principle 11; HRC, ‘General Comment 22’ (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4 (*‘General Comment 22’*) para 8; General Comment 34 (n 8) para 34; Rolv Ryssdal, ‘Opinion: The Coming Age of the European Convention on Human Rights’ (1996) 1 *European Human Rights Law Review* 18, 26.

<sup>58</sup> *Ceylan* (n 11) para 37; *Gündüz v Turkey* App no 3571/97 (ECtHR, 4 September 2003) (*‘Gündüz’*) para 42; *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) (*‘Salov’*) para 115; *Kwiecień v Poland* App no 51744/99 (ECtHR, 9 January 2007) (*‘Kwiecień’*) para 56; *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) (*‘Leroy’*) para 47; *Balsyte-Lideikiene v Lithuania* App no 72596/01 (ECtHR, 4 December 2008) (*‘Balsyte-Lideikiene’*) paras 83–85; *Murat Vural* (n 11) para 64; *Perinçek* (n 11) para 272.

<sup>59</sup> *KU v Finland* App no 2872/02 (ECtHR, 2 March 2009) para 43.

<sup>60</sup> Shira Tarrant, *The Pornography Industry: What Everyone Needs to Know* (Oxford University Press, 2016) 123–124; Clay Calvert, ‘Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction’ (2014) 24 *Fordham Intellectual Property Media & Entertainment Law Journal* 673, 675–679; Shigenori Matsui, ‘The Criminalisation of Revenge Porn in Japan’ (2015) 24 *Washington International Law Journal Association* 289 (*‘The Criminalisation of Revenge Porn in Japan’*), 290–293; Amy Lai, ‘Revenge Porn as Sexual Harassment: Legislation, Advocacies, and Implications’ (2016) 19 *Journal of Gender Race & Justice* 251 (*‘Revenge Porn as Sexual Harassment’*) 251–254; Mudasir Kamal and William J Newman, ‘Revenge Pornography: Mental Health Implications and Related Legislation’ (2016) 44 *Journal of the American Academy of Psychiatry and the Law* 359, 362–363; Reut Amit, ‘Revenge Porn Terrorism’ *Huffington Post* (15 October 2014) <[http://www.huffingtonpost.com/reut-amit/revengporn-terrorism\\_b\\_5955830.html](http://www.huffingtonpost.com/reut-amit/revengporn-terrorism_b_5955830.html)> accessed 21 January 2018; Asia A Eaton *et al.*, ‘2017 Nationwide Online Study of Nonconsensual Porn Victimization And Perpetration’ (*Cyber Civil Rights Initiative*, June 2017) <<https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>> accessed 21 January 2018, 23–24.

face jail terms ranging 2 to 5 years in states such as Denmark,<sup>61</sup> Japan,<sup>62</sup> the UK,<sup>63</sup> and the US.<sup>64</sup> The two year imprisonment sentence imposed on Peaps cannot be said to be disproportionate, considering that Kola was subjected to death threats and had to resign.<sup>65</sup>

23. In any event, states are accorded a wide margin of appreciation to determine the appropriate punishment for publications that unlawfully interfere with the rights to privacy and reputation.<sup>66</sup> This is because national authorities are better placed to decide this based on the unique social context of the state.<sup>67</sup> In Turtonia, the issue of intimate

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<sup>61</sup> Yahoo! News Staff, 'Denmark Seeks Harsher Punishment for "Revenge Porn"' *Yahoo! News* (4 February 2017) <<https://www.yahoo.com/news/denmark-seeks-harsher-punishment-revenge-porn-194157750.html>> accessed 21 January 2018; The Local Staff, 'Denmark Seeks Harsher Punishment for "Revenge Porn"' *The Local* (6 February 2017) <<https://www.thelocal.dk/20170206/denmark-seeks-harsher-punishment-for-revenge-porn>> accessed 21 January 2018.

<sup>62</sup> The Criminalisation of Revenge Porn in Japan (n 60) 289, 296; ABC News Staff, 'Japan's Lower House Passes Bill to Ban "Revenge Porn"' *ABC News* (19 November 2014) <<http://www.abc.net.au/news/2014-11-19/japans-lower-house-passes-bill-banning-revenge-porn/5903104>> accessed 21 January 2018; Japan Today Staff, 'Man Gets Suspended Sentence in 1st Trial Over Revenge Porn' *Japan Today* (25 May 2015) <<https://japantoday.com/category/crime/man-gets-suspended-sentence-in-1st-trial-over-revenge-porn>> accessed 21 January 2018.

<sup>63</sup> UK Ministry of Justice, 'New Law to Tackle Revenge Porn' *Gov.uk* (12 October 2014) <<https://www.gov.uk/government/news/new-law-to-tackle-revenge-porn>> accessed 21 January 2018; BBC Staff, 'Revenge Porn: More than 200 Prosecuted under New Law' *BBC* (6 September 2016) <<http://www.bbc.com/news/uk-37278264>> accessed 21 January 2018.

<sup>64</sup> BBC Staff, "'Revenge Porn' Facebook Post Leads to Jail Sentence' *BBC* (3 December 2014) <<http://www.bbc.com/news/technology-30307657>> accessed 21 January 2018; Elizabeth Armstrong Moore, 'Man Going to Jail in Oregon's First Revenge Porn Sentencing' *Fox News* (5 December 2016) <<http://www.foxnews.com/tech/2016/12/05/man-going-to-jail-in-oregons-first-revenge-porn-sentencing.html>> accessed 21 January 2018.

<sup>65</sup> Paras 9.2 and 9.6 of the Facts.

<sup>66</sup> *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995) para 38; *Sürek v Turkey (No 1)* App no 26682/95 (ECtHR, 8 July 1999) ('*Sürek*') para 61; *Jerusalem v Austria* App no 26958/95 (ECtHR, 27 February 2001) para 33; *Pedersen* (n 31) para 68; *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) ('*SAS*') paras 129, 131; *Wirtschafts-Trend Zeitschriften-Verlags GMBH v Austria* App no 58547/00 (ECtHR, 27 October 2015) para 31; *Egill Einarsson* (n 35) para 36; *Hertzberg v Finland* UN Doc CCPR/C/OP/1 (HRC, 2 April 1982) para 10.3.

<sup>67</sup> *Perinçek* (n 11) paras 196–199; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) ('*Margin of Appreciation*') 153.

images has resulted in suicides and reached its “peak”.<sup>68</sup> Given that there is general consensus amongst Turtonians to firmly deter this practice,<sup>69</sup> Turtonia is in the better position to calibrate the appropriate punishment needed to curb such conduct.

24. Accordingly, the prosecution was proportionate.

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<sup>68</sup> Para 10.1 of the Facts.

<sup>69</sup> Para 10.1 of the Facts.

## II. TURTONIA DID NOT VIOLATE SCOOPS' FREEDOM OF EXPRESSION BY PROSECUTING SCOOPS UNDER THE ODP

25. Social media platforms encourage greater public discussion.<sup>70</sup> However, they are also exploited for deleterious purposes,<sup>71</sup> such as the dissemination of intimate images.<sup>72</sup> Hence, these platforms should shoulder responsibilities to assist states in ensuring that harmful online content is not unduly circulated.<sup>73</sup>

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<sup>70</sup> UNHRC April 2013 Report (n 9) para 23; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (22 May 2015) UN Doc A/HRC/29/32 ('UNHRC May 2015 Report') para 47.

<sup>71</sup> Christian Fuchs, 'Social Media, Riots, and Revolutions' (2011) 36 *Capital & Class* 383, 383–384; Karim Sorour and Bidit Dey, 'Energising the Political Movements in Developing Countries: The Role of Social Media' (2014) 38 *Capital & Class* 508, 514; Andrew MacAskill, 'Britain Urged to Prosecute Social Media Firms over Online Abuse' *Reuters* (13 December 2017) <<https://www.reuters.com/article/us-britain-socialmedia/britain-urged-to-prosecute-social-media-firms-over-online-abuse-idUSKBN1E7001>> accessed 21 January 2018; BBC Staff, 'Obama Warns Against Irresponsible Social Media Use' *BBC* (27 December 2017) <<http://www.bbc.com/news/world-us-canada-42491638>> accessed 21 January 2018; Ainsley Thomas, 'Emotional Abuse in the Age of Social Media' (*Medium*, 16 September 2017) <<https://medium.com/the-method/emotional-abuse-in-the-age-of-social-media-65ba491edc01>> accessed 21 January 2018.

<sup>72</sup> Revenge Porn as Sexual Harassment (n 60) 252; Lori Janjigian, 'Nearly 10 Million Americans Are Victims of Revenge Porn, Study Finds' *Business Insider* (13 December 2016) <<http://www.businessinsider.com/revenge-porn-study-nearly-10-million-americans-are-victims-2016-12>> accessed 21 January 2018; CBS Minnesota Staff, 'Man Faces Revenge Porn Charge After Posting Photos Of Ex On Snapchat' *CBS Minnesota* (6 November 2017) <<http://minnesota.cbslocal.com/2017/11/06/revenge-porn-snapchat/>> accessed 21 January 2018; The Telegraph Staff, 'Police Officer May Have Been Victim of "Revenge Porn" As Force Launches Investigation' *The Telegraph* (14 November 2017) <<http://www.telegraph.co.uk/news/2017/11/14/police-officer-may-have-victim-revenge-porn-force-launches-investigation/>> accessed 21 January 2018; Social Media's Latest Headache (n 4); Roni Dori, "'I'm Going to be a Revenge Porn Victim for the Rest of My Life'" (*Haaretz*, 12 January 2018) <<https://www.haaretz.com/world-news/europe/.premium-1.834399>> accessed 21 January 2018.

<sup>73</sup> UNHRC May 2015 Report (n 70) para 54; Electronic Frontier Foundation, 'The Manila Principles on Intermediary Liability Background Paper' (*EFF*, 22 March 2015) <<https://www.eff.org/sites/default/files/manila-principles-background-paper-0.99.pdf>>, 38 accessed 21 January 2018; *Delfi June 2015* (n 5) para 162.

26. Scoops only removed Peaps' post after the post had generated 145,000 views and 21,000 shares.<sup>74</sup> Scoops allowed Peaps' post to be widely circulated on its highly popular<sup>75</sup> platform despite Kola's request for removal, which was noted by its human review system.<sup>76</sup> In response, Turtonia convicted Scoops under the ODPa and sentenced it to a fine of US\$200,000.<sup>77</sup> This was a justified restriction of Scoops' right to freedom of expression because it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

**A. THE PROSECUTION WAS PRESCRIBED BY LAW BECAUSE THE ODPa WAS SUFFICIENTLY PRECISE**

27. As stated above,<sup>78</sup> a prosecution under a statute is prescribed by law if the statute is sufficiently precise,<sup>79</sup> such that liability can be reasonably foreseen.<sup>80</sup> Section 1 prohibits an "organisation or other publisher" from distributing intimate images.<sup>81</sup> As the term

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<sup>74</sup> Para 9.2 of the Facts.

<sup>75</sup> Para 5.1 of the Facts.

<sup>76</sup> Para 9.2 of the Facts; Para 4 of the Clarifications.

<sup>77</sup> Para 13.1.1 of the Facts.

<sup>78</sup> Para 5 of this Memorial.

<sup>79</sup> *Silver* (n 13) paras 85–90; *Malone* (n 13) paras 67–68; *Weber and Saravia* (n 13) paras 93–95; *Editorial Board* (n 5) paras 51–52; *Ahmet* (n 13) paras 57–59; UNHRC April 2014 Report (n 13) para 22; UNHRC June 2014 Report (n 13) para 28.

<sup>80</sup> *Wingrove* (n 14) para 40; *Editorial Board* (n 5) paras 51–52; *Dmitriyevskiy* (n 14) para 78; General Comment 34 (n 8) para 25.

<sup>81</sup> Para 10.2 of the Facts.

“organisation” traditionally refers to commercial entities,<sup>82</sup> the intentional inclusion of this term suggests that Scoops, a large commercial entity,<sup>83</sup> would reasonably fall within the ambit of section 1.

28. Scoops cannot argue that section 1 of the ODPa, which imputed knowledge on it for distributing Peaps’ post, was imprecise. Even if a statute is broadly worded, it is left to the national courts to “dissipate such interpretational doubts as may remain”.<sup>84</sup> Unless “arbitrary or manifestly unreasonable”, such interpretations should not be interfered with<sup>85</sup> as national courts possess a greater understanding of the context surrounding the domestic statutes.<sup>86</sup> Although the ODPa did not define the knowledge requirements,<sup>87</sup> it was the role of the Turtonian court to interpret the provision. As the notice sent to Scoops was handled by human reviewers who examined its content,<sup>88</sup> the Turtonian court’s interpretation was reasonable.

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<sup>82</sup> Andrew Brady Spalding, ‘Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets’ (2010) 62 Florida Law Review 351, 361; Peter Yeoh, ‘Bribery Act 2010: Implications for Regulated Firms’ (2012) 20 Journal of Financial Regulation and Compliance 264, 266; The Hindu Business Line Staff, ‘Bribe-Giving Corporate Heads may Get 7 Years Jail’ *The Hindu Business Line* (6 February 2014) <<http://www.thehindubusinessline.com/news/national/bribe-giving-corporate-heads-may-get-7-years-jail/article5661219.ece>> accessed 21 January 2018; Ethics & Compliance Magazine, ‘Double Standards? The UK Gets Serious on Foreign Bribery’ (*Ethics & Compliance Magazine*, 11 February 2016) <<http://magazine.ethics-compliance.eu/2016/02/double-standards-the-uk-gets-serious-on-foreign-bribery/>> accessed 21 January 2018.

<sup>83</sup> Para 5.1 of the Facts.

<sup>84</sup> *Satakunnan* (n 17) para 144.

<sup>85</sup> *Pasko v Russia* App no 69519/01 (ECtHR, 10 May 2010) para 78.

<sup>86</sup> *Von Hannover (No 2)* (n 30) para 116; *Perinçek* (n 11) para 136; *Dmitriyevskiy* (n 14) para 79.

<sup>87</sup> Para 10.2 of the Facts.

<sup>88</sup> Para 13.2.1 of the Facts; Para 5 of the Clarifications.

29. Additionally, a statute is sufficiently precise even if legal advice is required to assess the consequences of an action.<sup>89</sup> Such legal advice should be sought by entities engaging in professional activities that involve a high degree of caution.<sup>90</sup> The ODPa was passed in response to the problem of intimate images being disseminated on social media.<sup>91</sup> Scoops, being the most popular social media platform in Turtonia,<sup>92</sup> should have sought legal advice on the scope of the ODPa.

30. Accordingly, the prosecution was prescribed by law.

**B. THE PROSECUTION PURSUED THE LEGITIMATE AIMS OF PROTECTING KOLA'S RIGHTS TO PRIVACY AND REPUTATION**

31. The protection of individuals' rights to privacy and reputation are legitimate aims for which the right to freedom of expression may be restricted.<sup>93</sup> In particular, the distribution of intimate images on social media has caused devastating reputational damage and privacy loss for the individuals depicted.<sup>94</sup> For example, individuals have

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<sup>89</sup> *Sunday Times* (n 11) para 49; *Editorial Board* (n 5) para 51; *Centro Europa* (n 17) para 141; *Delfi June 2015* (n 5) para 121.

<sup>90</sup> *Delfi October 2013* (n 17) para 72; *Delfi June 2015* (n 5) para 129; *Karáscony* (n 17) para 125.

<sup>91</sup> Para 10.2 of the Facts.

<sup>92</sup> Para 5.1 of the Facts.

<sup>93</sup> ICCPR arts 17(2), 19(3)(a).

<sup>94</sup> James Dawkins, 'A Dish Served Cold: The Case for Criminalising Revenge Pornography' (2015) 45 *Cumberland Law Review* 395 ('A Dish Served Cold'), 399; *The Criminalisation of Revenge Porn in Japan* (n 60) 301–302; Snehal Desai, 'Smile for the Camera: The Revenge Pornography Dilemma, California's Approach, and Its Constitutionality' (2015) 42 *Hastings Constitutional Law Quarterly* 443, 467; *Beyond Revenge Porn* (n 23) 30.



faced ruinous consequences and have even resorted to suicide in Brazil,<sup>95</sup> Italy,<sup>96</sup> the UK,<sup>97</sup> and the US.<sup>98</sup> The ODPa was enacted in response to a “growing problem” in Turtonia, where the distribution of intimate images had resulted in several suicides.<sup>99</sup> In particular, the distribution of Peaps’ post was also followed by public vitriol against Kola, culminating in her resignation.<sup>100</sup>

32. Accordingly, the prosecution pursued the legitimate aim of protecting Kola’s rights to privacy and reputation.

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<sup>95</sup> Miriam Berger, ‘Brazilian 17-Year-Old Commits Suicide After Revenge Porn Posted Online’ (*Buzzfeed News*, 21 November 2013) <[https://www.buzzfeed.com/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-porn-pos?utm\\_term=.gd91yPE6og#.vfe0GXRw9a](https://www.buzzfeed.com/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-porn-pos?utm_term=.gd91yPE6og#.vfe0GXRw9a)> accessed 21 January 2018.

<sup>96</sup> Caroline Mortimer, Katie Forster, ‘Investigation Launched Into Death of Italian Woman Who Killed Herself After Explicit Images Went Viral’ *The Independent* (14 September 2016) <<http://www.independent.co.uk/news/world/europe/tiziana-cantone-sex-tape-suicide-internet-meme-revenge-porn-naples-a7307041.html>> accessed 21 January 2018; The Guardian Staff, ‘Italy Grapples with Suicide of Woman Taunted Over Online Sex Video’ *The Guardian* (16 September 2016) <<https://www.theguardian.com/world/2016/sep/16/italy-grapples-with-suicide-of-woman-taunted-over-online-sex-video>> accessed 21 January 2018.

<sup>97</sup> Natalie Corner, ‘Family of Revenge Porn Teen Who Committed Suicide Over Online Blackmail Beg Others Not to Suffer in Silence’ *The Mirror* (12 November 2015) <<http://www.mirror.co.uk/tv/tv-news/family-revenge-porn-teen-who-6813481>> accessed 21 January 2018.

<sup>98</sup> Katie Zavadski and Kate Briquet, ‘Nude Snapchat Leak Drove Teen Girl to Suicide’ *Daily Beast* (6 October 2016) <<https://www.thedailybeast.com/nude-snapchat-leak-drove-teen-girl-to-suicide>> accessed 21 January 2018; John Wayne Ferguson, ‘Long Investigation Leads to Arrests in Teen’s Suicide’ *The Daily News* (16 March 2017) <[http://www.galvnews.com/news/free/article\\_3cbd8fb0-a526-5001-b9c6-2d4cfcd91751.html](http://www.galvnews.com/news/free/article_3cbd8fb0-a526-5001-b9c6-2d4cfcd91751.html)> accessed 21 January 2018.

<sup>99</sup> Para 10.1 of the Facts.

<sup>100</sup> Para 9.6 of the Facts.

### C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

33. As stated above,<sup>101</sup> a restriction of the freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.<sup>102</sup>

1. *There was a pressing social need to prosecute Scoops because it did not regulate Peaps' post*

34. States may impose liability on to social media intermediaries when these intermediaries fail to regulate unlawful content on their platforms.<sup>103</sup> The ECtHR<sup>104</sup> and CJEU<sup>105</sup> have devised a framework to determine whether there is a pressing social need to do so. The pertinent factors to consider include: the nature of the intermediary; the nature of the user content; and the steps taken by the intermediary to regulate its user content.

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<sup>101</sup> Para 13 of this Memorial.

<sup>102</sup> *Handyside* (n 11) para 48–49; *Cumpăună* (n 33) paras 88, 90; 33–34; *Morice* (n 33) para 124; *Delfi June 2015* (n 5) para 131; *Perinçek* (n 11) paras 196, 228; *Milisavljević* (n 33) para 31; UNHRC April 2013 Report (n 9) para 29.

<sup>103</sup> *Delfi June 2015* (n 5) paras 141–143, 162; *Google France, Google Inc v Louis Vuitton Malletier SA* C-236/08 (CJEU, 23 March 2010) (*‘Google France’*) para 120; Council Directive (EC) 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1 (*‘EU E-Commerce Directive’*) art 14(1).

<sup>104</sup> *Delfi October 2013* (n 17) para 85; *Delfi June 2015* (n 5) paras 142–143; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 May 2016) (*‘MTE’*) paras 68–69; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) (*‘Pihl’*) paras 27–28; *Tamiz v UK* App no 3877/14 (ECtHR, 12 October 2017) (*‘Tamiz’*) paras 85–87.

<sup>105</sup> *Google France* (n 103) para 114; *L’Oreal SA v eBay* C-324/09 (CJEU, 12 July 2011) (*‘L’Oreal SA’*) paras 111–113.

35. Applying these factors, there was a pressing social need to prosecute Scoops. First, there is a greater need to impose liability on active intermediaries that exercise substantial control over their user content.<sup>106</sup> This element of control is present where an intermediary optimises or promotes its user content.<sup>107</sup> In contrast, neutral intermediaries act as “technical service providers”.<sup>108</sup> By being able to promote certain content via the “boost[ing]” of some posts over others,<sup>109</sup> Scoops was an active intermediary that exercised substantial control.
36. Further, significance should be placed on the presence of commercial interests that these intermediaries possess in distributing content.<sup>110</sup> Scoops’ very business was the distribution of its users’ content.<sup>111</sup> It even incentivised users to create compelling content to increase their influencer scores,<sup>112</sup> motivating them to upload controversial content. Peaps was similarly motivated when he uploaded Kola’s nude image to “illustrate”<sup>113</sup> the

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<sup>106</sup> *Delfi June 2015* (n 5) paras 145–146; Eleonora Rabinovich, ‘Challenges Facing Freedom of Expression: Intermediary Liability in Argentine Case-Law’ (2012) *Association for Civil Rights* 9, 9; Lisl Brunner, ‘The Liability of an Online Intermediary for Third-Party Content - The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*’ (2016) 16 *Human Rights Law Review* 163 (‘Intermediary Liability after *Delfi v Estonia*’) 167–168.

<sup>107</sup> *L’Oreal SA* (n 105) paras 116, 123; Jaani Riordan, *The Liability of Internet Intermediaries* (1<sup>st</sup> edn, Oxford University Press, 2016) para 12.119; Intermediary Liability after *Delfi v Estonia* (n 106) 168.

<sup>108</sup> *Delfi June 2015* (n 5) paras 114–146; *Google France* (n 103) para 114; EU E-Commerce Directive (n 103) art 4.

<sup>109</sup> Para 5.1–5.2 of the Facts.

<sup>110</sup> *Delfi June 2015* (n 5) paras 112–113, 126; Intermediary Liability after *Delfi v Estonia* (n 106) 169; Robert Spano, ‘Intermediary Liability for Online User Comments under the European Convention on Human Rights’ (2017) 17 *Human Rights Law Review* 665, 671.

<sup>111</sup> Para 5.1 of the Facts.

<sup>112</sup> Para 5.3 of the Facts.

<sup>113</sup> Para 12.2 of the Facts.

relationship between Kola and Parkta, even though the caption would have sufficed in conveying his message.

37. Secondly, internet-related misconduct is more effectively regulated through the imposition of responsibility on intermediaries,<sup>114</sup> as they have been developing technical means to detect and manage intimate images.<sup>115</sup> Scoops had a similar system where human reviewers could evaluate posts that had been reported as being “harmful and malicious”.<sup>116</sup> As Scoops’ human reviewers were aware of the existence of Peaps’ post within 13 hours of it being posted,<sup>117</sup> it should be held to a higher standard.

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<sup>114</sup> Ronald Mann and Seth Belzley, ‘The Promise of Internet Liability’ (2005) 47 *William & Mary Law Review* 239, 265; Aleksandra Kuczerawy, ‘The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression’ (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 266, para 7; Lilian Edwards, ‘Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights’ (*WIPO*, 2010) <[http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf)> accessed 21 January 2018, 26.

<sup>115</sup> Lia Eustachewich, ‘Facebook Launches New Tools to Block Revenge Porn’ *New York Post* (5 April 2017) <<http://nypost.com/2017/04/05/facebook-launches-new-tools-to-block-revenge-porn/>> accessed 21 January 2018; James Walker, ‘Facebook Uses Photo-Matching Tech to Address Revenge Porn Issue’ (*Digital Journal*, 5 April 2017) <<http://www.digitaljournal.com/tech-and-science/technology/facebook-uses-photo-matching-tech-to-address-revenge-porn-issue/article/489612>> accessed 21 January 2018; Olivia Solon, ‘Facebook Asks Users For Nude Photos in Project to Combat Revenge Porn’ *The Guardian* (7 November 2017) <<https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos>> accessed 21 January 2018.

<sup>116</sup> Para 9.2 of the Facts; Para 4 of the Clarifications.

<sup>117</sup> Para 9.2 of the Facts; Paras 5, 11 of the Clarifications.

38. Additionally, intimate images can go viral long before orders for their removal can be issued.<sup>118</sup> Recognising this problem, social media intermediaries such as Twitter,<sup>119</sup> Facebook,<sup>120</sup> Snapchat,<sup>121</sup> and Google<sup>122</sup> have taken steps in curbing the spread of intimate images. In contrast, Scoops’ “swiping” function allowed users to forward a post to another twenty individuals, resulting in the circulation of images at an exponential rate.<sup>123</sup> This function aided in the dissemination of Peaps’ post, which attracted 10,000 views within its first hour of being published without being “boosted”.<sup>124</sup>

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<sup>118</sup> A Dish Served Cold (n 94) 398–399; Katy Winter, ‘Victim of Revenge Porn, Whose Intimate Images Have Been Viewed Over 50,000 Times Breaks Her Anonymity in a Bid to Help Others’ *Daily Mail* (24 October 2014) <<http://www.dailymail.co.uk/femail/article-2806317/Victim-revenge-porn-intimate-images-viewed-50-000-times-breaks-anonymity-bid-help-others.html>> accessed 21 January 2018; Elle Hunt, “Revenge Porn”: One in Five Report They Have Been Victims in Australian Survey’ *The Guardian* (7 May 2017) <<https://www.theguardian.com/world/2017/may/08/revenge-porn-research-one-in-five-australians-have-been-victims>> accessed 21 January 2018; Joseph Perkins, ‘Erin Andrews A Victim of Internet Rape’ (*Examiner*, 14 September 2009) <<http://www.examiner.com/article/erin-andrews-a-victim-of-internet-rape/>> accessed 21 January 2018.

<sup>119</sup> Jonathan Vanian, ‘Twitter Wants to Crack Down on Revenge Porn’ *Fortune* (27 October 2017) <<http://fortune.com/2017/10/27/nudity-revenge-porn-twitter/>> accessed 21 January 2018.

<sup>120</sup> Lulu Chang, ‘Facebook is Dealing with More Than 50,000 Cases of Revenge Porn Every Month’ (*Digital Trends*, 22 May 2017) <<https://www.digitaltrends.com/social-media/facebook-sexual-abuse-moderation/>> accessed 21 January 2018.

<sup>121</sup> Miles Klee, ‘The New Era of Revenge Porn Has Begun on Snapchat’ (*Daily Dot*, 3 April 2015) <<https://www.dailydot.com/irl/snapchat-revenge-porn-consent-postsmash-college-photos/>> accessed 21 January 2018.

<sup>122</sup> Armit Singhal, “Revenge Porn” and Search’ (*Google Public Policy Blog*, 19 June 2015) <<https://publicpolicy.googleblog.com/2015/06/revenge-porn-and-search.html>> accessed 21 January 2018.

<sup>123</sup> Para 5.2 of the Facts.

<sup>124</sup> Para 9.2 of the Facts; Para 7 of the Clarifications.

39. Finally, intermediaries may be required to proactively remove content that attracts an unusually high volume of traffic<sup>125</sup> or can be classified as being clearly unlawful.<sup>126</sup> As Peaps' post garnered 145,000 views and the attention of Turtonia's major newspaper,<sup>127</sup> it attracted a high volume of traffic. Further, Kola vehemently claimed that Peaps' post was unfounded and XYZ News also distanced itself from Peaps post,<sup>128</sup> meaning that there was a risk that Peaps' post was clearly unlawful.

40. Accordingly, there was a pressing social need to impose liability on Scoops.

2. *The prosecution was proportionate because the fine was consistent with international standards*

41. As stated above,<sup>129</sup> a restriction is proportionate if it goes no further than necessary to achieve the relevant aim.<sup>130</sup> In assessing proportionality, the nature and severity of the punishment must be considered.<sup>131</sup>

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<sup>125</sup> *Delfi October 2013* (n 17) para 86; *Delfi June 2015* (n 5) para 159; Giancarlo Frosio, 'The Death of "No Monitoring Obligations": A Story of Untameable Monsters' (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 199 ('The Death of "No Monitoring Obligations"') paras 18, 31.

<sup>126</sup> *Delfi October 2013* (n 17) para 86; The Death of 'No Monitoring Obligations' (n 125) para 11; Commission, 'Tackling Illegal Content Online: Towards an Enhanced Responsibility of Online Platforms' (2017) COM 555, 10; Thibault Verbiest *et al*, 'Study on the Liability of Internet Intermediaries' (*SSRN*, 12 November 2007) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2575069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575069)> accessed 21 January 2018, 37–39.

<sup>127</sup> Para 9.2 of the Facts.

<sup>128</sup> Para 9.2 of the Facts.

<sup>129</sup> Para 21 of this Memorial.

<sup>130</sup> *Cossey* (n 57) para 37; *Ozgur* (n 57) para 43; *Christine Goodwin* (n 57) para 72; *Siracusa Principles* (n 57) principle 11; *General Comment 22* (n 57) para 8; *General Comment 34* (n 8) para 34.

<sup>131</sup> *Ceylan* (n 11) para 37; *Gündüz* (n 58) para 42; *Salov* (n 58) para 115; *Kwiecień* (n 58) para 56; *Leroy* (n 58) para 47; *Balsyte-Lideikiene* (n 58) paras 83–85; *Murat Vural* (n 11) para 64; *Perinçek* (n 11) para 272.

42. First, other states have blocked intermediaries<sup>132</sup> or imposed jail terms on their directors<sup>133</sup> for failing to remove unlawful content despite being put on notice. In contrast, Scoops has only received a monetary fine.<sup>134</sup>
43. Secondly, even when a company is found liable, fines are adjusted to the size of the company to ensure their effectiveness.<sup>135</sup> Scoops was the most popular social media platform in Turtonia with an annual revenue of US\$100 million.<sup>136</sup> A larger fine of US\$200,000 had to be imposed to effectively promote responsible behaviour from Scoops. In any event, the fine imposed only amounted to 0.2% of Scoops' annual revenue. As a comparison, social media intermediaries may face up to US\$380,000 fine

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<sup>132</sup> Arjun Kharpal, 'Russia Threatens Block on Google, Twitter, Facebook' *CNBC* (22 May 2015) <<http://www.cnbc.com/2015/05/22/russia-threatens-blockon-google-twitter-facebook.html>> accessed 21 January 2018; Samuel Gibbs, 'WhatsApp Blocked in Brazil for 48 Hours by Court' *The Guardian* (17 December 2015) <<http://www.theguardian.com/technology/2015/dec/17/whatsapp-blocked-brazil-48-hours-facebook>> accessed 21 January 2018; Beeline Telecom Blog, 'Как и почему происходит блокировка сайтов. [How and Why Websites are Blocked/Published on the Habrahabr Website] (in Russian)' (*Habrahabr*, 8 August 2012) <<http://habrahabr.ru/company/beeline/blog/149249/>> accessed 21 January 2018.

<sup>133</sup> Sorchia Pollack, 'Google Executive Arrested as Brazil Bans Anti-Muslim Film' *Time* (27 September 2012) <<http://newsfeed.time.com/2012/09/27/google-executive-arrested-as-brazil-bans-anti-muslim-film/>> accessed 21 January 2018;

<sup>134</sup> Para 13.1 of the Facts.

<sup>135</sup> *Microsoft Corp v Commission of the European Communities* T-201/04 (CJEU, 17 September 2007) ('*Microsoft Corp*') paras 1360, 1363; Reuters Staff, 'Italy Antitrust Body Fines Whatsapp over Customer Data Terms' *Reuters* (12 May 2017) <<https://www.reuters.com/article/italy-antitrust-whatsapp/italy-antitrust-body-fines-whatsapp-over-customer-data-terms-idUSL8N1IE4GQ>> accessed 21 January 2018; Foo Yun Chee, 'EU Fines Google Record \$2.7 Billion in First Antitrust Case' *Reuters* (27 June 2017) <<https://www.reuters.com/article/us-eu-google-antitrust/eu-fines-google-record-2-7-billion-in-first-antitrust-case-idUSKBN19I108>> accessed 21 January 2018; European Commission, 'Fines for Breaking EU Competition Law' (2011) <[http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf)> ('Fines for Breaking EU Competition Law') accessed 21 January 2018, 1.

<sup>136</sup> Para 5.1 of the Facts.

for facilitating the circulation of intimate photos in Australia<sup>137</sup> and the US\$200,000 fine should not be seen as excessive.

44. Accordingly, the prosecution was proportionate.

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<sup>137</sup> NDTV Staff, 'Big Fines Planned for 'Revenge Porn' in Australia' *NDTV* (6 December 2017) <<https://www.ndtv.com/world-news/big-fines-planned-for-revenge-porn-in-australia-1784158>> accessed 21 January 2018; RT Staff, 'Social Media Sites May Face Fines of \$400,000 Under Australia's Revenge Porn Bill' *RT* (7 December 2017) <<https://www.rt.com/news/412215-australia-revenge-porn-fines/>> accessed 21 January 2018.



### III. TURTONIA DID NOT VIOLATE PEAPS' FREEDOM OF EXPRESSION BY PROSECUTING PEAPS UNDER THE IA

45. The duty incumbent on states to combat speech that incite hostility has, in recent years, been complicated by the mass mobilization of deliberate online falsehoods.<sup>138</sup> In particular, social media has been abused for the dissemination of false information that “exploit[s] existing fault-lines within a society and heighten[s] tensions”.<sup>139</sup> Thus, states must curtail such deliberate misuse of social media to ensure public order.<sup>140</sup>
46. In response to Peaps’ unsubstantiated allegation on social media that True Religion terrorists were granted visas to enter Turtonia,<sup>141</sup> Turtonia convicted Peaps under the IA and sentenced him to a fine of US\$200,000. This was a justified restriction of Peaps’

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<sup>138</sup> Larry Greenemeier, ‘When Hatred Goes Viral: Inside Social Media’s Efforts to Combat Terrorism’ *Scientific American* (24 May 2017) <<https://www.scientificamerican.com/article/when-hatred-goes-viral-inside-social-medias-efforts-to-combat-terrorism/>> accessed 21 January 2018; Francis Chan, ‘Indonesian Police Uncover “Fake News Factory”’ *The Straits Times* (17 September 2017) <<http://www.straitstimes.com/asia/se-asia/indonesian-police-uncover-fake-news-factory>> accessed 21 January 2018; Caitlin Dickerson, ‘How Fake News Turned a Small Town Upside Down’ *The New York Times Magazine* (26 September 2017) <<https://www.nytimes.com/2017/09/26/magazine/how-fake-news-turned-a-small-town-upside-down.html>> accessed 21 January 2018; Matthew Duss *et al*, ‘Fear, Inc. 2.0 The Islamophobia Network’s Efforts to Manufacture Hate in America’ (*Center for American Progress*, 11 February 2015) <<https://www.americanprogress.org/issues/religion/reports/2015/02/11/106394/fear-inc-2-0/>> (‘Fear Inc 2.0’) accessed 21 January 2018; William Saletan, ‘Hate Makes Us Weak How Russia Exploits American Racism and Xenophobia for its Own Gain’ (*Slate*, 31 March 2017) <[http://www.slate.com/articles/news\\_and\\_politics/politica/2017/03/how\\_russia\\_capitalizes\\_on\\_american\\_racism\\_and\\_xenophobia.html](http://www.slate.com/articles/news_and_politics/politica/2017/03/how_russia_capitalizes_on_american_racism_and_xenophobia.html)> (‘How Russia Exploits American Racism and Xenophobia’) accessed 21 January 2018; Naja Bentzen, ‘“Fake News” and the EU’s Response’ (*EP Think Tank*, 2 April 2017) <<https://epthinktank.eu/2017/04/02/fake-news-and-the-eus-response/>> (‘Fake News and the EU’s Response’) accessed 21 January 2018.

<sup>139</sup> Singapore Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’ (*Ministry of Law*, 2018) <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annexe%20A%20-%20Green%20Paper%20on%20Deliberate%20Online%20Falsehoods.pdf>> accessed 21 January 2018, para 51.

<sup>140</sup> UNHRC, ‘Annual Report of the United Nations High Commissioner for Human Rights’ (11 January 2013) UN Doc A/HRC/22/17/Add.4, 42; UNHRC, ‘Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda’ (3 March 2017) FOM GAL/3/17 preamble.

<sup>141</sup> Para 12.1 of the Facts.

right to freedom of expression because it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

**A. THE PROSECUTION WAS PRESCRIBED BY LAW BECAUSE THE IA WAS SUFFICIENTLY PRECISE**

47. As stated above,<sup>142</sup> a prosecution under a statute is prescribed by law if the statute is sufficiently precise,<sup>143</sup> such that liability can be reasonably foreseen.<sup>144</sup> Section 1(b) of the IA imposes liability for “knowingly or recklessly” communicating false information with the intent to “incite civil unrest, hatred or damage the national unity”.<sup>145</sup> Peaps only conducted a cursory online check for the source of the image.<sup>146</sup> This lack of effort demonstrated Peaps’ recklessness as to the truth of his post. Further, Peaps’ assertion that True Religion members infiltrated Turtonia was made in the midst of rising tensions between Turtonians and Aquarian immigrants.<sup>147</sup> As similar allegations of terrorist

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<sup>142</sup> Para 5 of this Memorial.

<sup>143</sup> *Silver* (n 13) paras 85–90; *Malone* (n 13) paras 67–68; *Weber and Saravia* (n 13) paras 93–95; *Editorial Board* (n 5) paras 51–52; *Ahmet* (n 13) paras 57–59; UNHRC April 2014 Report (n 13) para 22; UNHRC June 2014 Report (n 13) para 28.

<sup>144</sup> *Wingrove* (n 14) para 40; *Editorial Board* (n 5) paras 51–52; *Dmitriyevskiy* (n 14) para 78; General Comment 34 (n 8) para 25.

<sup>145</sup> Para 11.1 of the Facts.

<sup>146</sup> Para 12.2 of the Facts.

<sup>147</sup> Paras 4.1 and 8.3 of the Facts.

infiltration made amidst nationwide tension have been used to incite civil unrest,<sup>148</sup> Peaps' requisite intention could also be demonstrated.

48. Peaps cannot argue that the phrase "civil unrest, hatred, or damage [to] the national unity" was not sufficiently precise. As stated above,<sup>149</sup> the precision required of a statute depends on the content and the field that the law is designed to cover,<sup>150</sup> so as to adapt to developing socio-political contexts.<sup>151</sup> As the mass mobilization of false information is a recent phenomenon that has occurred in various contexts,<sup>152</sup> such as sowing hatred

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<sup>148</sup> Vahab Aghai, *Terrorism, an Unconventional Crime: Do We Have the Wisdom and Capability to Defeat Terrorism?* (Xlibris Corporation, 2011) 142; Josh Rogin, 'Belgium Warned of More Terror Before Airport Attack' *Chicago Tribune* (22 March 2016) <<http://www.chicagotribune.com/news/opinion/commentary/ct-brussels-airport-terrorist-attack-belgium-20160322-story.html>> accessed on 21 January 2018; Molly Ball, 'Donald Trump and the Politics of Fear' *The Atlantic* (2 September 2016) <<https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116/>> accessed 21 January 2018; The Guardian Staff, 'Ethiopia Blames 'Foreign Enemies' for Inciting Unrest' *The Guardian* (10 October 2016) <<https://www.theguardian.com/world/2016/oct/10/ethiopia-blames-foreign-enemies-inciting-unrest>> accessed on 21 January 2018; AON Risk Solutions Crisis Management Centre, '2017 Risk Maps: Aon's Guide to Political Risk, Terrorism & Political Violence' (AON, 2017) <<http://www.aon.com/2017-political-risk-terrorism-and-political-violence-maps/pdfs/2017-Aon-Risk-Maps-Report.pdf>> accessed 21 January 2018.

<sup>149</sup> Para 6 of this Memorial.

<sup>150</sup> *Editorial Board* (n 5) para 52; *Centro Europa* (n 17) para 142; *Delfi October 2013* (n 17) para 72; *Delfi June 2015* (n 5) para 122; *Karáscony* (n 17) para 125; *Satakunnan* (n 17) para 144.

<sup>151</sup> *Müller* (n 18) para 29; *Kokkinakis* (n 18) para 40; *Gorzelik* (n 18) para 64; *Lindon* (n 18) para 41; *Delfi October 2013* (n 17) paras 71, 75; A Guide for Legislators (n 18); *Dimitriyevskiy* para 79.

<sup>152</sup> Anthony J Gaughan, 'Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration' (2017) 12 *Duke Journal of Constitutional Law & Public Policy* 57; Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Elections' (2017) 31 *Journal of Economic Perspectives* 211 ('Social Media and Fake News in the 2016 Elections') 221; Sheldon Burshtein, 'The True Story on Fake News' (2017) 29 *Intellectual Property Journal* 397 ('The True Story on Fake News'); Kate Connolly *et al*, 'Fake News: An Insidious Trend That's Fast Becoming a Global Problem' *The Guardian* (2 December 2016) <<https://www.theguardian.com/media/2016/dec/02/fake-news-facebook-us-election-around-the-world>> accessed 21 January 2018.

towards a community or generating public distrust of politicians,<sup>153</sup> the IA had to be drafted in broader terms to “keep pace with changing circumstances”.<sup>154</sup>

**B. THE PROSECUTION PURSUED THE LEGITIMATE AIM OF PROTECTING PUBLIC ORDER**

49. Prosecuting speech that incites hostility pursues the legitimate aim of protecting public order,<sup>155</sup> as the presence of hostility would undermine public order.<sup>156</sup> The IA was also passed in light of civil unrest resulting from the spread of false speech in Turtonia.<sup>157</sup> In the wake of Peaps’ post, mass anti-Aquarian protests occurred, culminating in the deaths of two Aquarian immigrants.<sup>158</sup>

50. Accordingly, the prosecution pursued the legitimate aim of protecting public order.

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<sup>153</sup> Rebecca Tushnet, ‘It Depends on What the Meaning of “False” is: Falsity and Misleadingness in Commercial Speech Doctrine’ (2007) 41 *Loyola of Los Angeles Law Review* 227; Anthony J. Gaughan, ‘Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration’ (2017) 12 *Duke Journal of Constitutional Law & Public Policy* 57; Fake News and the EU’s Response (n 139).

<sup>154</sup> *Müller* (n 18) para 29; *Kokkinakis* (n 18) para 40; *Lindon* (n 18) para 41; *Delfi October 2013* (n 17) paras 71, 75; *Satakunnan* (n 17) para 143; *Dmitriyevskiy* (n 14) para 79.

<sup>155</sup> ICCPR art 19(3)(b).

<sup>156</sup> *Gündüz* (n 58) para 28; *Alinak v Turkey* App no 40287/98 (ECtHR, 29 March 2005) paras 27–28; *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) (‘*Féret*’); *Malcolm Ross* (n 9) para 11.5; General Comment 34 (n 8) para 31; UNHRC, ‘Report of the Special Rapporteur on the Protection of the Right to Freedom of Opinion and Expression’ (7 September 2012) UN Doc A/67/357 paras 36–40; UNHRC April 2013 Report (n 9) para 28; Case-Law of the European Court of Human Rights (n 5) 50.

<sup>157</sup> Para 11.1 of the Facts.

<sup>158</sup> Paras 9.4 and 9.5 of the Facts.

### C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

51. As stated above,<sup>159</sup> a restriction of the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.<sup>160</sup>

1. *There was a pressing social need to prosecute Peaps because his post amounted to an incitement to hostility*

52. States have an obligation to combat speech that incites hostility.<sup>161</sup> In determining whether a publication amounts to such an incitement, the UN Rabat Plan<sup>162</sup> considers the following factors: the publication's context; the publisher's intention; the likelihood of discrimination, hostility, or violence occurring; and the medium used.

53. Applying these factors, there was a pressing social need to prosecute Peaps. First, existing tensions between different communities is relevant when examining the context of the

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<sup>159</sup> Para 13 of this Memorial.

<sup>160</sup> *Handyside* (n 11) para 48–49; *Cumpănă* (n 33) paras 88, 90; 33–34; *Morice* (n 33) para 124; *Delfi June 2015* (n 5) para 131; *Perinçek* (n 11) paras 196, 228; *Milisavljević* (n 33) para 31; UNHRC April 2013 Report (n 9) para 29.

<sup>161</sup> ICCPR 171 art 20(2); UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add 4 para 14; UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No 35 Combating Racist Hate Speech' (26 September 2013) UN Doc CERD/C/GC/35 ('General Recommendation 35') para 15; UNHRC, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (26 December 2013) UN Doc A/HRC/25/58 para 58.

<sup>162</sup> Rabat Plan (n 161) para 14; UNHRC, 'Report of the Special Rapporteur in the Field of Cultural Rights' (14 March 2013) UN Doc A/HRC/23/34 para 28; UNHRC, 'Report of the Special Rapporteur on Minority Issues' (5 January 2015) UN Doc A/HRC/28/64 ('UNHRC January 2015 Report') paras 48.

publication.<sup>163</sup> Peaps' allegation, that True Religion terrorists infiltrated Turtonia under the guise of being immigrants,<sup>164</sup> was made amidst rising anti-Aquarian sentiments.<sup>165</sup> Such sentiments were exemplified by the rise of Turton Power, an anti-immigrants nationalist group that attempted to resort to violence against Kola.<sup>166</sup>

54. Secondly, an individual's intention is objectively discerned from publication's content, in light of its surrounding circumstances.<sup>167</sup> Although Peaps' post contained no explicit calls to hostility,<sup>168</sup> incitement need not be explicit and can take the form of insults or slanders against a particular group.<sup>169</sup> Peaps misled the public into believing that the Aquarian immigrants were dangerous by framing his accusations about the infiltration of Aquarian terrorists as a report from various "ministerial staffer[s]",<sup>170</sup> under the name of a trusted news source.<sup>171</sup> Peaps' membership in Turton Power, the anti-Aquarian

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<sup>163</sup> *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) ('*Jersild*') para 31; *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) para 60; *Incal v Turkey* App no 41/1997/825/1031 (ECtHR, 9 June 1998) para 58; *Malcolm Ross* (n 9) para 11.6; *Leroy* (n 58) para 45; *Soulas v France* App no 15948/03 (ECtHR, 10 July 2009) paras 37–39; *Perinçek* (n 11) para 205; Toby Mendel, 'Hate Speech Rules Under International Law' (*Centre for Law and Democracy*, February 2010) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>> accessed 21 January 2018, 8.

<sup>164</sup> Para 8.3 of the Facts.

<sup>165</sup> Para 4.1 of the Facts.

<sup>166</sup> Para 4.1 of the Facts.

<sup>167</sup> *Jersild* (n 163) para 31; *Arslan v Turkey* App no 23462/94 (ECtHR, 8 July 1999) para 48; *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) paras 48–49.

<sup>168</sup> Para 8.3 of the Facts.

<sup>169</sup> *Féret* (n 156) para 73; *Vejdeland v Sweden* App no 1813/07 (ECtHR, 9 February 2012) para 55; *Dmitriyevskiy* (n 14) para 99; Council of Europe, 'ECRI General Policy Recommendation No 15 On Combating Hate Speech' (*Council of Europe*, 8 December 2015) <[https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N15/REC-15-2016-015-ENG.pdf](https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf)> accessed 21 January 2018, para 25.

<sup>170</sup> Para 4.1 of the Facts.

<sup>171</sup> Para 6.1 of the Facts.

nationalist group,<sup>172</sup> further supports the presence of an intention to advocate hatred.

55. Thirdly, as incitement is an inchoate crime,<sup>173</sup> there only needs to be a “reasonable probability” that the speech would incite hostility against a group.<sup>174</sup> The spread of false information about a group that is framed in a form of a factual statement rather than an opinion is more likely to fuel prejudice against that group.<sup>175</sup> As argued above,<sup>176</sup> Peaps framed his allegations as a factual statement,<sup>177</sup> convincing the Turtonians that many Aquarians were terrorists. In light of the existing anti-Aquarian sentiments over the job losses and the dilution of culture,<sup>178</sup> Peaps’ serious allegations were likely to have sparked a greater public outcry.

56. Finally, the means of dissemination is relevant in considering the likelihood of violence that can arise from the publication.<sup>179</sup> The extensive reach offered by social media allows publications to effectively engage a wide range of audience, raising the probability of a

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<sup>172</sup> Para 4.1 of the Facts.

<sup>173</sup> Rabat Plan (n 161) para 29; General Recommendation 35 (n 161) para 16; Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge University Press, 2015) (‘Religious Hatred and International Law’) 182.

<sup>174</sup> *Malcolm Ross* (n 9) para 11.6; Rabat Plan (n 161) para 29; UNHRC, ‘Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General’ (11 January 2013) UN Doc A/HRC/22/17/Add 4 para 29; *Religious Hatred and International Law* (n 173) 244.

<sup>175</sup> Council of Europe, ‘ECRI General Policy Recommendation No 15 on Combating Hate Speech’ (21 March 2016) <[https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N15/REC-15-2016-015-ENG.pdf](https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf)> accessed 21 January 2018, 25; *How Russia Exploits American Racism and Xenophobia* (n 138); *Fear Inc 2.0* (n 138).

<sup>176</sup> Para 16 of this Memorial.

<sup>177</sup> Para 8.3 of the Facts.

<sup>178</sup> Para 4.1 of the Facts.

<sup>179</sup> Rabat Plan (n 161) para 29; General Comment 34 (n 8) para 34.

furor.<sup>180</sup> In particular, anti-Aquarian protests of an unprecedented scale and the deaths of two Aquarians occurred within 3 days of Peaps' post being uploaded on social media.<sup>181</sup>

57. Accordingly, there was a pressing social need to prosecute Peaps.

2. *The prosecution was proportionate because the fine was consistent with international standards*

58. As stated above,<sup>182</sup> a restriction is proportionate if it goes no further than necessary to achieve the relevant aim.<sup>183</sup> In assessing proportionality, the nature and severity of the punishment must be considered.<sup>184</sup>

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<sup>180</sup> UNHRC January 2015 Report (n 162) para 75; UNESCO, 'Countering Online Hate Speech' (UNESCO, 2015) <<http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>> accessed 21 January 2018, para 36.

<sup>181</sup> Paras 9.4 and 9.5 of the Facts.

<sup>182</sup> Para 21 of this Memorial.

<sup>183</sup> *Cossey* (n 57) para 37; *Ozgur* (n 57) para 43; *Christine Goodwin* (n 57) para 72; Siracusa Principles (n 57) principle 11; General Comment 22 (n 57) para 8; General Comment 34 (n 8) para 34.

<sup>184</sup> *Ceylan* (n 11) para 37; *Gündüz* (n 58) para 42; *Salov* (n 58) para 115; *Kwiecień* (n 58) para 56; *Leroy* (n 58) para 47; *Balsyte-Lideikiene* (n 58) paras 83–85; *Murat Vural* (n 11) para 64; *Perinçek* (n 11) para 272.



59. Publishers of speech that incite hostility generally face imprisonment terms. For example, states like the UK,<sup>185</sup> Denmark,<sup>186</sup> Turkey,<sup>187</sup> and Russia<sup>188</sup> have imposed imprisonment terms ranging from three years to life imprisonment. Although section 1(b) of the IA also provides for imprisonment, Peaps was only fined.<sup>189</sup> Further, the quantum of the fine was not excessive given that the deaths of two Aquarian immigrants<sup>190</sup> and Kola's resignation<sup>191</sup> followed in the wake of Peaps' publication.
60. Secondly, heavier sentences are meted out to individuals who engage in incitement on social media platforms,<sup>192</sup> as there is a need to deter individuals from abusing the far-

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<sup>185</sup> Crown Prosecution Service, 'Violent Extremism and Related Criminal Offences' (*Crown Prosecution Service*, 8 April 2016) <[www.cps.gov.uk/publications/prosecution/cases\\_of\\_inciting\\_racial\\_and\\_religious\\_hatred\\_and\\_hatred\\_based\\_upon\\_sexual\\_orientation.html#ba](http://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html#ba)> accessed 21 January 2018.

<sup>186</sup> Reuters Staff, 'Danish Bookseller Sentenced to Four years for Inciting Terrorism' *Reuters* (5 December 2014) <[www.reuters.com/article/us-denmark-trial-idUSKCN0JJ0L020141205](http://www.reuters.com/article/us-denmark-trial-idUSKCN0JJ0L020141205)> accessed 21 January 2018.

<sup>187</sup> Human Rights Watch, 'Global: 140 Countries Pass Counterterror Laws since 9/11' (*Human Rights Watch*, 29 June 2012) <[www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-9/11](http://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-9/11)> accessed 21 January 2018.

<sup>188</sup> Russian Legal Information Agency, 'Russia's Supreme Court Upholds 7-Year Sentence for Journalist for Inciting Terrorism' (*Russian Legal Information Agency News*, 23 July 2015) <[http://rapsinews.com/judicial\\_news/20150723/274250392.html](http://rapsinews.com/judicial_news/20150723/274250392.html)> accessed 21 January 2018.

<sup>189</sup> Para 11.2.2 of the Facts.

<sup>190</sup> Para 9.5 of the Facts.

<sup>191</sup> Para 9.6 of the Facts.

<sup>192</sup> Steven Morris, 'Student Jailed for Racist Fabrice Muamba Tweets' *The Guardian* (27 March 2012) <<https://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets>> accessed 21 January 2017; Steven Morris and Dan Sabbagh, 'April Jones: Matthew Woods Jailed Over Explicit Facebook Comments' *The Guardian* (8 October 2012) <<https://www.theguardian.com/uk/2012/oct/08/april-jones-matthew-woods-jailed?uni=Article:in%20body%20link>> accessed 21 January 2018; Conal Urquhart, 'Attacks on Muslims Soar In Wake of Woolwich Murder' *The Guardian* (25 May 2013) <<https://www.theguardian.com/uk/2013/may/25/woolwich-murder-attacks-on-muslims>> accessed 21 January 2018; Thomas Burrows, 'Blogger is Jailed for Five Years in Russia for Urging People to Protest' *Daily Mail* (30 December 2015) <<http://www.dailymail.co.uk/news/article-3378855/Russian-court-jails-blogger-five-years-extremist-posts.html>> accessed 21 January 2018; Jason Burke, 'Bell Pottinger: South African Opposition Calls for Harsher Punishment' *The Guardian* (5 September 2017) <<https://www.theguardian.com/world/2017/sep/05/bell-pottinger-south-african-opposition-calls-for-harsher-punishment>> accessed 21 January 2018; Tom Rollins, 'Egypt's Cyber Crime Bill' (*Mada*, 24 May 2015) <<https://www.madamasr.com/en/2015/05/24/feature/politics/egypts-cyber-crime-bill/>> accessed 21 January 2017.

reaching effects of these platforms.<sup>193</sup> As Peaps' post gathered over 21,000 shares and 145,000 views on Scoops within three days,<sup>194</sup> the US\$100,000 was justified to deter future abuses of such platform.

61. In any event, states enjoy a wider margin of appreciation to determine the appropriate punishment where individuals engage in incitement,<sup>195</sup> as national authorities are more sensitive to a state's unique social context.<sup>196</sup> Considering that Turtonia had been suffering from previous incidents of civil unrest due to the dissemination of false information,<sup>197</sup> a US\$100,000 fine was not excessive.

62. Accordingly, the prosecution was proportionate.

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<sup>193</sup> Anita Bernstein, 'Abuse and Harassment Diminish Free Speech' (2014) 35 Pace Law Review 1; Dominic Casciani, 'England Riots: Court Rejects Facebook Sentence Appeals' *BBC* (18 October 2011) <<http://www.bbc.com/news/uk-15347868>> accessed 21 January 2018; Natasha Lomas, 'Germany's Social Media Hate Speech Law is Now in Effect' *TechCrunch* (2 October 2017) <<https://techcrunch.com/2017/10/02/germanys-social-media-hate-speech-law-is-now-in-effect/>> accessed 21 January 2018.

<sup>194</sup> Para 9.2 of the Facts.

<sup>195</sup> *Klass* (n 27) para 59; *Ceylan* (n 11) para 34; *Sürek* (n 66) para 61; *Şener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para 40; *Hatton v UK* App no 36022/97 (ECtHR, 8 July 2003) paras 106–111; *Lambert v France* App no 46043/14 (ECtHR, 5 June 2013) paras 31–41; Council of Europe, 'Freedom of Expression in Europe' (2007) <[http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf)> accessed 21 January 2018, 77.

<sup>196</sup> *SAS* (n 66) para 129; *Perinçek* (n 11) para 96; Margin of Appreciation (n 67) 153.

<sup>197</sup> Para 11.1 of the Facts.

#### IV. TURTONIA DID NOT VIOLATE SCOOPS' FREEDOM OF EXPRESSION BY PROSECUTING SCOOPS UNDER THE IA

63. Although social media facilitates political debate, it has also been abused by individuals who engage in destructive smear campaigns against politicians.<sup>198</sup> Considering the difficulty in distinguishing legitimate speech from abusive publications, social media platforms must work in tandem with states to ensure that the exercise of the freedom of expression does not unjustifiably encroach on the rights of others.<sup>199</sup>
64. Notwithstanding that XYZ News distanced itself from Peaps' post and that Kola also fervently denied the allegations therein,<sup>200</sup> Scoops only acted upon receiving a letter from Kola's legal counsel. In response, Turtonia convicted Scoops under the IA and sentenced it to a fine of US\$100,000.<sup>201</sup> This was a justified restriction of Scoops' right to freedom of expression because it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

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<sup>198</sup> Reuters Staff, 'French Polling Watchdog Warns Over Russian News Agency's Election Report' *Reuters* (2 April 2017) <<https://www.reuters.com/article/us-france-election-russia/french-polling-watchdog-warns-over-russian-news-agencys-election-report-idUSKBN1740JG>> accessed 21 January 2018; Cynthia Kroet, 'Russia Spread Fake News During Dutch Election: Report' *Politico* (4 April 2017) <<https://www.politico.eu/article/russia-spread-fake-news-during-dutch-election-report-putin/>> accessed 21 January 2018; Alan Feuer, 'Leading the Legal War Against Fox' *The New York Times* (22 September 2017) <<https://www.nytimes.com/2017/09/22/nyregion/douglas-wigdor-fox-news.html>> ('Leading the Legal War Against Fox') accessed 21 January 2018; Philip Howard and Bence Kollanyi, 'Social Media Companies Must Respond to the Sinister Reality Behind Fake News' *The Guardian* (1 October 2017) <<https://www.theguardian.com/media/2017/sep/30/social-media-companies-fake-news-us-election>> accessed 21 January 2018; Alberto Nardelli and Craig Silverman, 'Hyperpartisan Sites and Facebook Pages are Publishing False Stories and Conspiracy Theories about Angela Merkel' (*Buzzfeed*, 14 January 2017) <[https://www.buzzfeed.com/albertonardelli/hyperpartisan-sites-and-facebook-pages-are-publishing-false?utm\\_term=.pjNpZ9EGML#.aoPpm816dk](https://www.buzzfeed.com/albertonardelli/hyperpartisan-sites-and-facebook-pages-are-publishing-false?utm_term=.pjNpZ9EGML#.aoPpm816dk)> accessed 21 January 2018.

<sup>199</sup> *Delfi October 2013* (n 17) para 85; *Delfi June 2015* (n 5) paras 110–111; UNHRC May 2015 Report (n 70) para 54.

<sup>200</sup> Para 9.1 of the Facts.

<sup>201</sup> Para 13.1.2 of the Facts.

**A. THE PROSECUTION WAS PRESCRIBED BY LAW BECAUSE THE IA WAS SUFFICIENTLY PRECISE**

65. As stated above,<sup>202</sup> a prosecution under a statute is prescribed by law if the statute is sufficiently precise,<sup>203</sup> such that liability can be reasonably foreseen.<sup>204</sup> Section 1(a) imposes liability for “knowingly” communicating false information that can damage an individual’s reputation.<sup>205</sup> Scoops had received a letter from Kola’s legal counsel threatening a defamation suit for distributing Peaps’ post.<sup>206</sup> Further, unsubstantiated allegations of political misconduct are often used to attack the reputation of politicians.<sup>207</sup> Given that Peaps’ post alleged that Kola was issuing visas to Aquarian terrorists,<sup>208</sup> Scoops could have reasonably foreseen liability.

66. Additionally, the IA makes clear references to the fact that liability can be imposed on Online Service Providers for “storing material at a user’s discretion”.<sup>209</sup> As Scoops is an

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<sup>202</sup> Para 5 of this Memorial.

<sup>203</sup> *Silver* (n 13) paras 85–90; *Malone* (n 13) paras 67–68; *Weber and Saravia* (n 13) paras 93–95; *Editorial Board* (n 5) paras 51–52; *Ahmet* (n 13) paras 57–59; UNHRC April 2014 Report (n 13) para 22; UNHRC June 2014 Report (n 13) para 28.

<sup>204</sup> *Wingrove* (n 14) para 40; *Editorial Board* (n 5) paras 51–52; *Dmitriyevskiy* (n 14) para 78; General Comment 34 (n 8) para 25.

<sup>205</sup> Para 11.2 of the Facts.

<sup>206</sup> Para 9.2 of the Facts.

<sup>207</sup> John Garrard and James L Newell, *Scandals in Past and Contemporary Politics* (Manchester University Press, 2006) 49; The Economist Staff, ‘State Capture’ *Economist* (2 Nov 2011) <https://www.economist.com/blogs/easternapproaches/2011/11/czech-politics>, accessed 21 January 2018; Ernesto Londoño, ‘Ex-President of Brazil Sentenced to Nearly 10 Years in Prison for Corruption’ *New York Times* (12 July 2017) <<https://www.nytimes.com/2017/07/12/world/americas/brazil-lula-da-silva-corruption.html>> accessed 21 January 2018; The Economist Staff, ‘Will the Prime Minister Resign?’ *Economist* (25 July 2017) <<http://country.eiu.com/article.aspx?articleid=1145720698&Country=Pakistan&topic=Politics>>, accessed 21 January 2018.

<sup>208</sup> Para 8.3 of the Facts.

<sup>209</sup> Para 11.2 of the Facts.

Online Service Provider that hosts content as its main business,<sup>210</sup> it was reasonably foreseeable that liability for storing Peaps' post may arise.

67. Accordingly, the prosecution was prescribed by law.

**B. THE PROSECUTION PURSUED THE LEGITIMATE AIM OF PROTECTING KOLA'S RIGHT TO REPUTATION**

68. Holding intermediaries liable for distributing false information is necessary to ensure the protection of the reputation of others.<sup>211</sup> As information published on social media platforms is often unverified,<sup>212</sup> the risk of untrue statements being proliferated on these platforms is increased.<sup>213</sup> Such false information, when directed towards politicians, can

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<sup>210</sup> Para 5.1–5.3 of the Facts.

<sup>211</sup> ICCPR art 19.3(a).

<sup>212</sup> Konrad Nicklewicz, 'Weeding Out Fake News: An Approach to Social Media Regulation' (2017) *European View* 1 ('Weeding Out Fake News'), 36–37; Brooke Borel, 'Fact-Checking Won't Save Us From Fake News' (*FiveThirtyEight*, 4 January 2017) <[https://fivethirtyeight.com/features/fact-checking-wont-save-us-from-fake-news/?ex\\_cid=story-twitter](https://fivethirtyeight.com/features/fact-checking-wont-save-us-from-fake-news/?ex_cid=story-twitter)> accessed 21 January 2018; Shan Wang, 'A Threat to Society: Why a German Investigative Nonprofit Signed On to Help Monitor Hoaxes on Facebook' (*NiemanLabs*, 16 February 2017) <<http://www.niemanlab.org/2017/02/a-threat-to-society-why-a-german-investigative--signed-on-to-help-monitor-hoaxes-on-facebook/>> accessed 21 January 2018.

<sup>213</sup> Jan Oster, 'Communication, Defamation and Liability of Intermediaries' (2015) 35 *Legal Studies* 348, 351; Tom Porter, 'Russian Bankers Sue BuzzFeed over Publication of Trump Dossier' *Newsweek* (27 May 2017) <<http://www.newsweek.com/alfa-bank-buzzfeed-trump-dossier-616763>> accessed 21 January 2018; *Leading the Legal War Against Fox* (n 198).

adversely impact their reputation.<sup>214</sup> This is evident in Turtonia, where the IA was drafted in response to the spread of false information that caused a politician to lose an election.<sup>215</sup> Here, the publication of Peaps' post also culminated in Kola's resignation.<sup>216</sup>

69. Accordingly, the prosecution pursued the legitimate aim of protecting Kola's right to reputation.

### C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

70. As stated above,<sup>217</sup> a restriction on the right freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.<sup>218</sup>

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<sup>214</sup> Social Media and Fake News in the 2016 Elections (n 152) 221; The True Story on Fake News (n 152) 399; Bethan McKernan, 'How Fake News in the Middle East is a Powder Keg Waiting to Blow Up' *The Independent* (10 September 2017) <<http://www.independent.co.uk/news/world/middle-east/middle-east-fake-news-consequences-israel-saudi-arabia-syria-lebanon-hezbollah-mossad-qatar-uae-a7936621.html>> accessed 21 January 2018; Alberto Nardelli and Craig Silverman, 'Italy's Most Popular Political Party is Leading Europe in Fake News and Kremlin Propaganda' (*Buzzfeed*, 29 November 2016) <[https://www.buzzfeed.com/albertonardelli/italys-most-popular-political-party-is-leading-europe-in-fak?utm\\_term=.tq07zwWmj1#.alAMrZqw96](https://www.buzzfeed.com/albertonardelli/italys-most-popular-political-party-is-leading-europe-in-fak?utm_term=.tq07zwWmj1#.alAMrZqw96)> accessed 21 January 2018; Shan Wang, 'The French Election Is Over. What's Next for the Google- and Facebook-backed Fact-checking Effort There?' (*NiemanLab*, 8 May 2017) <<http://www.niemanlab.org/2017/05/the-french-election-is-over-whats-next-for-the-google-and-facebook-backed-fact-checking-effort-there/>> accessed 21 January 2018.

<sup>215</sup> Para 11.1 of the Facts.

<sup>216</sup> Para 9.6 of the Facts.

<sup>217</sup> Para 13 of this Memorial.

<sup>218</sup> *Handyside* (n 11) para 48–49; *Cumpănă* (n 33) paras 88, 90; 33–34; *Morice* (n 33) para 124; *Delft June 2015* (n 5) para 131; *Perinçek* (n 11) paras 196, 228; *Milisavljević* (n 33) para 31; UNHRC April 2013 Report (n 9) para 29.

1. *There was a pressing social need to prosecute Scoops because it did not regulate Peaps' post*

71. As stated above,<sup>219</sup> to assess whether there is a pressing social need to impose liability onto intermediaries, the pertinent factors to consider include:<sup>220</sup> the nature of the intermediary; the nature of the user content; and the steps taken by the intermediary to regulate its user content.
72. Applying these factors, there was a pressing social need to prosecute Scoops. First, as argued above,<sup>221</sup> liability should be imposed on Scoops because it exercised control over its user content by “boosting” certain posts upon payment by its users.<sup>222</sup> Further, as argued above,<sup>223</sup> Scoops incentivised its users to create compelling content, even those in the nature of “gossip”.<sup>224</sup> This emphasises the need to impose liability on Scoops for hosting defamatory content.
73. Secondly, Scoops’ removal of Peaps’ post was overly delayed. Not only was Scoops informed of the possible falsity of Peaps’ post through the online complaint, Kola’s office also released a public statement to the same effect.<sup>225</sup> XYZ News further claimed that it

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<sup>219</sup> Para 34 of this Memorial.

<sup>220</sup> *Delfi October 2013* (n 17) para 85; *Delfi June 2015* (n 5) paras 142–143; *MTE* (n 104) paras 68–69; *Pihl* (n 104) paras 27–28; *Tamiz* (n 104) paras 85–87; *Google France* (n 103) para 114; *L’Oreal SA* (n 105) paras 111–113.

<sup>221</sup> Para 35 of this Memorial.

<sup>222</sup> Paras 5.1 and 5.2 of the Facts.

<sup>223</sup> Para 36 of this Memorial.

<sup>224</sup> Para 5.3 of the Facts.

<sup>225</sup> Para 9.1 of the Facts.

had nothing to do with the post.<sup>226</sup> Despite these circumstances, Scoops only took down Peaps' post 50 hours after being informed of its falsity,<sup>227</sup> when it reached 21,000 shares and 145,000 views.<sup>228</sup>

74. Finally, significance must be placed on the “echo-chamber” effect that social media has.<sup>229</sup> Consumers of false information are often not offered alternative information because the algorithms used are designed to provide these users with similar factually incorrect content,<sup>230</sup> and users tend to prefer information that support their existing views.<sup>231</sup> Scoops employed an algorithm to ensure that users receive content similar in nature to their indicated interests.<sup>232</sup> This mechanism would have exacerbated the misleading effect of Peaps' post and lead to a “lack of shared reality”<sup>233</sup> that is dangerous to a democratic society.

75. Accordingly, there was a pressing social need to impose liability on Scoops.

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<sup>226</sup> Paras 7.1 and 9.1 of the Facts.

<sup>227</sup> Para 9.2 of the Facts.

<sup>228</sup> Para 9.2 of the Facts.

<sup>229</sup> Weeding Out Fake News (n 212) 17 .

<sup>230</sup> UNHRC May 2016 Report (n 2) para 55; Weeding Out Fake News (n 212) 17 ; Roheeni Saxena, ‘The Social Media “Echo Chamber” Is Real’ (*ArsTechnica*, 14 March 2017) <<https://arstechnica.com/science/2017/03/the-social-media-echo-chamber-is-real/>> accessed 21 January 2018.

<sup>231</sup> Weeding Out Fake News (n 212) 18 ; The Economist Staff, ‘Yes, I’d Lie To You’ *Economist* (10 September 2016) <<https://www.economist.com/news/briefing/21706498-dishonesty-politics-nothing-new-manner-which-some-politicians-now-lie-and>> accessed 21 January 2018; Zaynep Tufekci, ‘Mark Zuckerberg is in Denial’ *The New York Times* (15 November 2016) <<https://www.nytimes.com/2016/11/15/opinion/mark-zuckerberg-is-denial.html>> accessed 21 January 2018.

<sup>232</sup> Para 5.1 of the Facts.

<sup>233</sup> David Lazer *et al*, ‘Combating Fake News: An Agenda for Research and Action’ (*Shorenstein Center*, February 2017) < <https://shorensteincenter.org/combating-fake-news-agenda-for-research/>> accessed 21 January 2018, 5.



2. *The prosecution was proportionate because the fine was consistent with international standards*

76. As stated above,<sup>234</sup> a restriction is proportionate if it goes no further than necessary to achieve the relevant aim.<sup>235</sup> In assessing proportionality, the nature and severity of the punishment must be considered.<sup>236</sup>
77. Other states impose harsher punishments on intermediaries for distributing false information. For example, Germany,<sup>237</sup> the Philippines,<sup>238</sup> and Russia<sup>239</sup> have introduced legislation that subject intermediaries to fines between US\$200,000 and US\$60 million. In contrast, the fine levied against Scoops was only US\$100,000.

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<sup>234</sup> Para 21 of this Memorial.

<sup>235</sup> *Cossey* (n 57) para 37; *Ozgur* (n 57) para 43; *Christine Goodwin* (n 57) para 72; Siracusa Principles (n 57) principle 11; General Comment 22 (n 57) para 8; General Comment 34 (n 8) para 34.

<sup>236</sup> *Ceylan* (n 11) para 37; *Gündüz* (n 58) para 42; *Salov* (n 58) para 115; *Kwiecień* (n 58) para 56; *Leroy* (n 58) para 47; *Balsyte-Lideikiene* (n 58) paras 83–85; *Murat Vural* (n 11) para 64; *Perinçek* (n 11) para 272.

<sup>237</sup> CNBC Staff, ‘Germany Approves Bill Curbing Online Hate Crime, Fake News’ *CNBC* (6 April 2017) <<https://www.cnbc.com/2017/04/06/germany-fake-news-fines-facebook-twitter.html>> accessed 21 January 2018; The Guardian Staff, ‘Germany Approves Plans to Fine Social Media Firms Up to €50m’ *The Guardian* (30 June 2017) <<https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m>> accessed 21 January 2018; Joe Miller, ‘Germany Votes for 50m Euro Social Media Fines’ *BBC* (30 June 2017) <<http://www.bbc.com/news/technology-40444354>> accessed 21 January 2018.

<sup>238</sup> Eimor Santos, ‘Bill Filed vs Fake News: Up to P\$10M fines, 10-year Jail Time for Erring Public Officials’ *CNN Philippines* (22 June 2017) <<http://cnnphilippines.com/news/2017/06/22/senate-bill-fake-news-fines-government-officials.html>> accessed 21 January 2018; Eric Lieberman, ‘Philippines to Ramp Up Crackdown on Fake News’ *The Daily Caller* (31 August 2017) <<http://dailycaller.com/2017/08/31/philippines-to-ramp-up-crackdown-on-fake-news/>> accessed 21 January 2018; The Straits Times Staff, ‘Jail Term, Fine Await Publishers of Fake News in the Philippines’ *The Straits Times* (1 September, 2017) <<http://www.straitstimes.com/asia/se-asia/jail-terms-fines-await-publishers-of-fake-news-in-the-philippines>> accessed 21 January 2018.

<sup>239</sup> The Moscow Times Staff, ‘United Russia Tries to Fight “Fake News” (In Its Own Way)’ *The Moscow Times* (13 July 2017) <<https://themoscowtimes.com/news/united-russia-tries-to-fight-fake-news-58376>> accessed 21 January 2018.

78. Additionally, as argued above,<sup>240</sup> the severity of the fine is justified based on the scale of Scoops' business.<sup>241</sup> Since the fine is only about 0.2% of Scoops' annual revenue, it cannot be said to be excessively onerous.

79. Accordingly, the prosecution was proportionate.

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<sup>240</sup> Para 43 of this Memorial.

<sup>241</sup> *Microsoft Corp* (n 135) paras 1360, 1363; *Fines for Breaking EU Competition Law* (n 135) 1.

## PRAYERS SOUGHT

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For the foregoing reasons, the Respondent respectfully requests this Court to adjudge and declare that:

1. Turtonia did not violate Peaps' right to freedom of expression by prosecuting him under the ODP.
2. Turtonia did not violate Scoops' right to freedom of expression by prosecuting it under the ODP.
3. Turtonia did not violate Peaps' right to freedom of expression by prosecuting him under the IA.
4. Turtonia did not violate Scoops' right to freedom of expression by prosecuting it under the IA.

Respectfully submitted 22 January 2018,

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Agent for the Respondent