TEAM 309A

2013-14 SOUTH EAST EUROPE REGIONAL ROUNDS

PRICE MEDIA LAW MOOT COURT COMPETITION

THON SANG AND CENTIPLEX

(Applicants)

v

REPUBLIC OF MHUGAN

(Respondent)

MEMORIAL FOR APPLICANT

4952 WORDS

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LIST OF ABBREVIATIONS

¶	Paragraph
ACHR	American Convention on Human Rights
AfCHR	African Charter on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
App no	Application Number
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
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
IEHC	High Court of Ireland
IP	Internet Protocol
IT	Information Technology
ISP	Internet Service Provider
MHD	Mhuganian Dollar
No.	Number
OSCE	Organization for Security and Co-operation in Europe
SPA	Search Privacy Act
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom

UN	United Nations
UNCHR	United Nations Commission on Human Rights
US	United States of America
WA	Wiretap Act

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(by order of appearance)

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STATEMENT OF RELEVANT FACTS

1. The Republic of Mhugan is a former British colony which obtained its independence in 1959 and since then has had a parliamentary form of government with the population of approximately 20 million people. The Mhuganian economy is fuelled by a combination of information technology industries, manufacturing and financial services.

2. Bansit Sangnont, also known by his stage name Rho, is a Mhuganian pop music singer-songwriter. In 2011 Rho gained international success thanks to his music video of his song „Poke Poke“ which went viral on YouTube. Since that time, Rho has performed all over the world, gaining millions of fans.

3. In 2013, rumours that he has been physically and/or emotionally abusive to his wife started to spread around. Rho denied all the allegations.

COOPERATION BETWEEN CENTIPLEX AND DEXIAN

4. Centiplex Corporation, based in Mhugan, is the leading Internet services company in Mhugan. Centiplex, among other services, also runs an Internet search engine and a blogging platform. As a result of good business and marketing methods, Centiplex has a virtual monopoly in Mhugan for the services it provides.

5. Dexian, a United States based company, is a global information services company, whose business consists mainly of collecting, aggregating, analyzing, and disseminating information relating to individuals. The methods Dexian is using in dealing with individual records are not familiar to the public since the company finds such information to be a trade secret.

6. Centiplex and Dexian have established a commercial relationship in which Centiplex, as Dexian’s client, buys and sells data to Dexian. On that grounds Centiplex has provided to

Dexian list of search queries, indexed by the IP address of the computers the query originated from, including the date and time of the query. Centiplex's Terms of Service are silent about the use or disclosure of data.

SANG BLOGGING ABOUT RHO AND ACQUIRING THE RECORDED VOICEMAIL

7. Thon Sang works as a programmer at a software development company in Mhugan. He is also an active blogger, who posts news and his own comments about celebrities on his blog on Centiplex's platform.

8. Centiplex's blog platform is supported with the advertisements, however all the ad revenue is going only to Centiplex. Sang posts comments on his blog along with the information he finds on the internet. He also has original content, like the pictures he takes outside the restaurants where celebrity people goes. He blogged about the rumours of Rho being abusive to his wife and said to the readers to boycott Rho's music if such information is true. The blog recently gained in popularity and became a "go-to" place for Mhuganian celebrity gossip on the Internet.

9. On May 1, 2013, Sang posted a recording of a voicemail in which a person, identifying himself as "Bansit", talks about his wife. In the voicemail, "Bansit" was furious with his wife not being obedient and that he needs to give her "a good smacking". Sang received that voicemail from his source who asked him to stayed anonymous. The next day, in a new post Sang posted that he had bought Rho's profile from Dexian and paid 20.000,00 MHD for it. He said that even if the sum was considered substantial, there was no price for getting the truth to the readers. Rho's searches included "how to control your wife" and "whipping techniques". That information further boosted popularity of Sang's blog. On May 4, 2013, Rho held the press conference with his wife by his side. In that press conference he

denied ever abusing his wife. He admitted that the said voicemail was indeed his, but that he only needed to let of some steam. He also called Sang vicious, unethical and unprofessional rumour monger who is a criminal deserved to be punished. Rho's wife did not speak at the press conference.

10. On May 5, 2013, Sang posted that he is not convinced by Rho's explanations given at his latest press conference, therefore he will leave the material on the blog so the readers can judge for themselves. Sang also clarified how his source came across the message. He explained that he or she entered Rho's friend Aklamit's phone number by mistake when checking his own voicemail. They share the same default password that neither of them had changed. Not knowing that the mailbox was not his/hers, the source listened to the first message. After suspecting that the "Bansit" in the voicemail was actually Rho, the source downloaded the message to his/hers computer and decided to send the recording to Sang, as he blogs about celebrities.

THE WIRETAP ACT

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

12. On May 8, 2013, Rho sued Sang under the WA for knowingly disseminating the contents of unlawfully obtained communications. The court ruled that Sang's knowledge on how his source acquired the message is sufficient to hold him liable under the WA. Consequently, the court awarded statutory damages to Rho of 400.000,00 MHD.

13. Under the WA, Rho also applied for a search engine order against Centiplex, requiring that web pages containing the prohibited material do not appear on the first page of search results. The order also applies to links that lead either directly, or merely indicate that it will lead to the unlawful material. The court granted the order and Centiplex immediately began to comply with it.

14. The court order remains in force unless the court rules against it, but if the plaintiff prevails in any of the appeals, the order becomes permanent. Both civil and criminal penalties are provided in case of violation of search engine order.

THE SUBPOENA TO SANG

15. Rho as well sued the source of the voicemail message and subpoenaed Sang for the identity of that person. Sang pointed out his privilege not to reveal the source when filing a motion with the court to quash the subpoena. The court denied the motion to quash with the explanation that this privilege applies only to 'professional journalist' defined as someone "who, for gain or livelihood, are regularly engaged in the gathering, writing, or editing of news intended for a newspaper, magazine, or other professional medium that regularly disseminates news to the public".

THE SEARCH PRIVACY ACT

16. On May 15, 2013, the Mhuganian Parliament enacted the Search Privacy Act ('SPA') under which it is illegal for a search engine to sell information about a person's search queries not having that person's consent. The SPA defines "sale" as a "transfer in exchange for anything of value". Information is considered to be information about a person's search queries if these queries are associated with any identifiers such as name, address, phone number, IP address. The SPA does not apply to any subsequent transfers of the same

information after an initial transfer by the search engine. The SPA also contains exceptions for disclosures to law agencies, or court order and disclosures incident to search engine's ordinary course of business. The SPA is supposed to become effective on May 1, 2014.

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

STATEMENT OF JURISDICTION

The Applicants, Thon Sang and Centiplex, on its own behalf and on behalf of its users, have approached the Universal Freedom of Expression Court, the special chamber of the Universal Court of Human Rights, with a prayer that this Honorable Court reviews the issues presented below in accordance with all relevant legal materials.

The jurisdiction in the case at hand is dependent upon two prerequisites, both of which have been fulfilled. Firstly, the Universal Court of Human Rights has been established in order to protect the rights enshrined in the UDHR. All of the issues presented relate to rights arising from the UDHR. Secondly, all national remedies in the state of Mhugan have been exhausted. Therefore, the Universal Court of Human Rights has the power to act as the final adjudicator in the proceedings.

QUESTIONS PRESENTED

A. Whether the damages imposed on Sang for disseminating the recorded voicemail are consistent the UDHR?

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

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

D. Whether the 2013 Search Privacy Act is valid under the UDHR?

SUMMARY OF ARGUMENTS

A. The damages imposed on Sang for disseminating the recorded voicemail contravene the UDHR because they are not consistent with the right to freedom of speech and expression as enshrined in Article 19. Further, the damages are not permissible under Article 29(2) since they are not prescribed by law, nor they are necessary in a democratic society. Moreover, they will cause a chilling effect.

B. The subpoena to Sang to disclose the source of the recorded voicemail contravenes the UDHR. Firstly, the subpoena contravenes Article 19. Bloggers are entitled to the journalistic privilege and denying them that right is detrimental to their freedom of expression. Further, the subpoena is not permissible under Article 29(2) because it is not prescribed by law, nor it is necessary in a democratic society. Finally, denying the right to journalistic privilege will cause a chilling effect.

C. The search engine order against Centiplex contravenes the UDHR. It infringes on the right to freedom of speech and expression, enshrined in Article 19, of both Cetiplex and its users. Furthermore, the requirement contravenes the right to property enshrined in Article 17. It requires excessive technical measures which would detriment the quality of their work and lead to losing clientele. At last, the order is not permissible under Article 29(2). The order is not prescribed by law as it is not foreseeable. It does not pursue the legitimate aim since there was no real threat to the rights and freedoms of others. Further, it is not necessary in a democratic society because there is no pressing social need and the least restrictive measure exists.

D. The SPA contravenes the provisions of the UDHR. The restrictions on the disclosure of search queries are not permissible under Article 29(2). It does not follow the legitimate aim of protecting the privacy of others and is not necessary in a democratic society.

ARGUMENTS

A. THE DAMAGES IMPOSED TO SANG FOR DISSEMINATING THE RECORDED VOICEMAIL CONTRAVENE UDHR

1. Applicants submit that the damages imposed on Sang for disseminating the recorded voicemail are not consistent with the right to freedom of speech and expression under Article 19, because restrictions are not justified under Article 29(2) [**I**].[1]

I. The damages imposed on sang are not consistent with Article 19

2. Applicants claim that Sang's blog post falls within the scope of Article 19.[2] The scope of this article protects freedom of expression through any media, including blog posts. It was stated by the US Supreme Court in *Reno v ACLU* that freedom of expression extends to the ideas shared on the Internet.[3] Moreover, as the same Court stated in *Bartnicki v*

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[1] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 29(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19(3); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 13(2).

[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19(2); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 13.

[3] *Reno v American Civil Liberties Union* 521 US 844 (1997); *O'Grady v Superior Court of Santa Clara* County 44 Cal Rptr 3d 72 (2006) 139 Cal App 4th 1423; UNCHR, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2011) UN Doc A/HRC/17/27; Richard Clayton and Hugh Tomlinson, The Law of Human Rights (1st edn, OUP 2000) 1059; UNCHR 'General comment no. 34 Article 19 Freedoms of opinion and expression' (2011) CCPR/C/GC/34 http://www.refworld.org/docid/4ed34b562.html accessed 8 November 2013; Eric Barendt, Freedom of Speech (2th edn, Oxford University Press Inc 2007).

Vooper, recordings are also protected under this article.[4] Furthermore, the ECtHR held in *Sunday Times v UK*[5] that speech that shocks, offends or disturb is also protected. In the present case, Sang maintains a well-recognized and largely-read blog in Mhugan which receives more than 100 000 hits daily. Although recorded voicemail that Sang posted might be considered as unfavourable it is nevertheless protected.

3. Applicants submit that the restriction on Sang's freedom of expression is not justified under Article 29(2). According to the three-part test,[6] a restriction is justified if it is i) prescribed by law, ii) pursues a legitimate aim and iii) is necessary in a democratic society. In the present case, Applicants will not contest the existence of a legitimate aim. However, the restriction is not prescribed by law [*i*] and is not necessary in a democratic society [*ii*].[7]

i. The restriction is not prescribed by law

4. As stated by the ECtHR in *The Sunday Times v UK*,[8] a restriction is prescribed by law if it is accessible and foreseeable. A law is accessible if it gives the citizens an

[4] *Bartnicki v Vooper* 532 US 514 (2001); *Terry Gene Bollea v Gawker Media LLC* 913 F Supp 2d 1325 (2012).

[5] *The Sunday Times v UK* (1979) 2 EHRR 245; Fressoz and Roire v France, Handyside v UK (1976) 1 EHRR 737. Also see Oberschlick v Austria (1995) 19 EHRR 389.

[6] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976); *The Sunday Times v United Kingdom* App no 13166/87 (ECtHR, 26 November 1991*); Éditions Plon v France* App no 58148/00 (ECtHR, 18 May 2004); *Herrera-Ulloa v Costa Rica* Petition no 12367 (IACtHR, 2 July 2004); Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression' (Centre for Law and Democracy) http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf accessed 18 October 2013.

[7] *The Sunday Times v United Kingdom* App no 13166/87 (ECtHR, 26 November 1991); *Herrera-Ulloa v Costa Rica* Petition no 12367 (IACtHR, 2 July 2004); UNCHR 'General comment no. 34 Article 19 Freedoms of opinion and expression' (2011) CCPR/C/GC/34 <http://www.refworld.org/docid/4ed34b562.html> accessed 8 November 2013.

[8] *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979); *Silver and Others v United Kingdom* App no 7136/75 (ECtHR, 25 March 1983); *Malone v United Kingdom* App no 8691/79 (ECtHR, 2 August 1984); *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999); *Gaweda v Poland* App no 26229/95 (ECtHR, 14 March 2002); *Gillan and. Quinton v United Kingdom* App no 4158/05 (ECtHR, 12 January 2010).

adequate indication of the legal rules applicable to a given case.[9] Moreover, it is foreseeable if it is precise enough to enable citizens to regulate their conduct[10] and predict the consequences of non-compliance.[11]

5. In the present case, the provision of the WA is not precise enough because term *access* and *download* are not clearly defined. According to the provision it is illegal to intentionally intercept or obtain unauthorized *access* to any telephone or electronic communication.[12] Moreover, it is illegal for any person to disseminate the contents of communication that has been unlawfully intercepted or obtained.[13]

6. The Superior Court of New Jersey clarified in *State v Riley* that the term *access* covers only the entry into a database or a computer system, but not the use of it once the entry has been achieved.[14] If the intention of the Mhugan legislator was to regulate further activities in the same matter as the initial access such a provision should have been prescribed in the WA. Otherwise, the vagueness of the provision leads to unforeseeability.

7. In the present case, Sang's source obtained *access* accidentally when he was trying to check his/her voicemail. At that occasion, the source entered Aklamit's phone number by mistake and typed the default password which neither of them had changed.[15] Therefore, considering that the source's access was unintentional and the WA does not regulate any further activities after initial access, the voicemail was obtained legall. The other

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

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

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

[12] ¶11, Statement of Relevant Facts.

[13] ¶11, Statement of Relevant Facts.

[14] *William White v Mary White* 781 A 2d 85 (2001) 344 NJ Super 211; *State of New Jersey v Kenneth Riley* 988 A 2d 1252 (2009) 412 NJ Super 162; *Marcus v Rogers* 59 A 3d 602 (2013) 213 NJ 44.

[15] ¶10, Statement of Relevant Facts.

provision of the WA regulates only the dissemination of unlawfully obtained content. Consequently, Sang is not liable for the disseminating the voicemail because it was not obtained unlawfully under the WA.

ii. The damages imposed were not necessary in a democratic society

8. A measure is necessary in a democratic society if it corresponds to a) a pressing social need and b) is proportionate.

a) There is no pressing social need

9. Determining a pressing social need[16] requires a fair balance between the general and individual interests at stake. In the present case, a balance must be made between the freedom of expression of an individual and the public figures right to privacy and attacks upon their reputation.

10. The ECtHR stated in *Von Hannover v Germany*[17] that a state has to assess certain criteria when restricting the right to freedom of expression. Firstly, it must be determined how well-known is the person, since public and private persons have different expectation of privacy. Moreover, the Court also stated that in balancing free speech and privacy, public interest in publication is determinative. Public interest includes not only debate on political matters and public officials but also everyday activities of public figures.[18]

[16] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976); *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979); *Observer and Guardian v United* Kingdom App no 13585/88 (ECtHR, 26 April 1979).

[17] *Von Hannover v Germany* App 60641/08 (ECtHR, 7 February 2012).

[18] *Reynolds v Times Newspapers* [1994] 4 All ER 609 (UK); *Moseley v United Kingdom* App no 48009/08 (ECtHR, 10 May 2011); Diane L Zimmerman, 'Requiem for a Hevyweight: a farewall to Warren and Brandeis's Privacy Tort' (1983) 68 Cornell Law Review 291, 346; MA Sanderson, 'Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy rights?' (2004) 6 European Human Right Law Review 631, 641.

As stated in *New York Times v Sullivan*[19] by the US Supreme Court public figures have lesser expectation of privacy and should tolerate a greater degree of criticism.[20] In the present case, Rho as an internationally famous singer[21] is a public figure and as such attracts attention which makes stories about him newsworthy. Which is more important, Sang's post about Rho's violent behaviour contributes to a debate of public interest considering that he serves as a role model.

11. Secondly, the consequences of publishing must be considered. The ECtHR stated in *Axel Springer*[22] that a person cannot complain about a loss of reputation which is the foreseeable consequence of his/her own actions. In the present case, the posted voicemail was the original one that Rho left to his friend. Thus, the readers had direct insight and could judge for themselves what it meant.[23] Moreover, in order to establish liability for an infringement of reputation, the provided information must be false.[24] However, in the present case Rho confirmed that the voice recording was indeed his.[25]

b) The damages are not the least restrictive measure

12. Applicants submit that the imposed damages are not least restrictive. As stated by the IACtHR in *Herrera Ulloa v Costa Rica*[26], a measure cannot be qualified as least

[19] *New York Times v Sullivan* 376 US 254 (1964); Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986).

[20] *Aubry v. Éditions Vice-Versa inc* [1998] 1 SCR 591.

[21] ¶2, Statement of Relevant Facts.

[22] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012).

[23] ¶10, Statement of Relevant Facts.

[24] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986); *Bladet Tromsø and Stensaas* App no 21980/93 (ECtHR, 20 May 1999).

[25] ¶9, Statement of Relevant Facts.

[26] *Herrera-Ulloa v Costa Rica* Petition no 12367 (IACtHR, 2 July 2004).

restrictive simply because it was useful or desirable. On the contrary, any restriction must be as minimal as possible.[27]

13. Applicants claim there were several less restrictive measures available for the protection of Rho's privacy and reputation. For example, less restrictive measure would be ordering Sang to publish an apology. Moreover, considering the fact that Rho's voicemail is still available on the Internet,[28] another less restrictive measure would be to issue an order to remove the voice recording from Sang's blog.

14. Furthermore, the damages imposed will cause a chilling effect. The ECtHR in *Axel Springer* held that chilling effect occurs when a person or media restrains from imparting information or ideas of public interest in fear of criminal or other sanctions.[29] As explained above,[30] the provisions of the WA are too vague. Ultimately, they will result in self-censhorship of the bloggers and who in fear of damages will restrain from imparting information. Moreover, it will lead to a chilling effect on free flow of information in society.

B. THE SUBPOENA TO SANG TO DISCLOSE THE SOURCE OF THE RECORDED VOICEMAIL CONTRAVENES THE UDHR

[27] *Amnesty International and others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

[28] Clarifications South Asia #11.

[29] *Lamont v Postmaster General*, 381 U.S. 301 (1965); *Time Inc v Hill* 385 US 374 (1967); *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986); *Axel Springer AG v Germany App no* 39954/08 (ECtHR, 7 February 2012); Leslie Kendrick, 'Speech, Intent and the Chilling Effect' (2012) 54 William & Mary Law Review http://ssrn.com/abstract=2094443.

[30] ¶5, Arguments.

15. Applicants submit that the subpoena to Sang contravenes Article 19[31] on the right to the freedom of expression [**I**]. Moreover, the restriction is not permissible under Article 29(2) [**II**].

I. The subpoena contravenes Article 19

16. Applicants submit that journalistic privilege falls under the scope of Article 19 [*i*] and that Sang is entitled to journalistic privilege [*ii*].

i. Journalistic privilege falls under the scope of Article 19

17. Applicants submit that journalistic activities in imparting information through media fall under the scope of this Article. As stated by the ECtHR, in *Goodwin v UK*,[32] protection of journalistic sources is one of the basic conditions for freedom of the press. Moreover, the US Supreme Court in *Branzburg v Hayes* stated that journalists to gather news often have to agree not to identify the source of information.[33]

ii. Sang is entitled to journalistic privilege

18. Applicants submit that Sang qualifies as a journalist and thus is entitled to journalistic privilege. In the landmark case of *Branzburg v Hayes*, the US Supreme Court

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

[32] *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 ; Resolution No. 2: Journalistic Freedoms and Human Rights, 4th European Ministerial Conference on Mass Media Policy - Prague, 7-8 December 1994.

[33] *Branznburg v Hayes* 408 U.S. 665, 679-680 (1972).

declared that freedom of the press is a fundamental personal right which is not confined to newspaper and periodicals.[34] Moreover, in *Blumenthal v Drudge*[35], blogger was qualified for journalistic privilege under the First Amendment. In addition, bloggers role in disseminating and gathering information has been recognized by the Council of Europe[36] and the HR Committee. Consequently, they have the same responsibilities and thus are entitled to same legal protection as journalists when they fulfil certain criteria. They must be a) a natural or legal person who is b) regularly or professionally engaged in the collection and dissemination of information to the public via c) any means of mass communication.

19. In the present case, through blog posts Sang is regularly engaged in journalistic activities on a daily basis.[37] The unknown source decided to share the recorded voicemail with Sang as he maintains a well-recognized and largely-read blog in Mhugan. His blog receives more than 100 000 hits per day.[38] Therefore, Sang fulfils all the requirements and should be regarded as a journalist and entitled to a journalistic privilege.

II. The subpoena is not consistent with Article 29(2)

20. In the present case, Applicants will not challenge the existence of legitimate aim. However, the restriction on freedom of expression is not prescribed by law [*i*] nor is necessary in a democratic society [*ii*].

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[34] *Branzburg v. Hayes*, 23 February 1972, No. 70-85.

[35] *Sidney Blumenthal and Jacqueline Blumenthal v. Matt Drudge and America Online, Inc.*, U.S. District Court, District of Columbia, Case Number, 97 CV-1968.

[36] Council of Europe: Committee of Ministers, Recommendation No R (2000) 7 of the Committee of Ministers to member states on the right of journalist not to disclose their sources of information, 8 March 2000, http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)007&expmem_EN.asp accessed 8 November 2013.

[37] ¶2, Arguments.

[38] Id.

i. The restriction is not prescribed by law

21. Applicants submit that the restriction is not prescribed by law since the definition of a professional journalist[39] in Mhuganian law is neither precise nor foreseeable.[40]

22. The definition of professional journalist lacks foreseeability and precision since Sang, regarding his activity,[41] considered himself as a journalist. However, due to the vagueness of definition, Sang could not know if the definition is applicable to him. Consequently, he could not regulate his conduct. Altogether, this provision is too vague and leads to a chilling effect[42] since other members of non-traditional media will refrain from publishing stories because they will assume they are not qualified as journalists.

ii. The restriction is not necessary in a democratic society

23. Applicants submit that the restriction is not necessary in democratic society because a) there was no pressing social need and b) the least restrictive measure was not applied.

24. Firstly, in the present case there is no pressing social need since there is no overriding public interest. As the ECtHR stated in *Goodwin v UK*,[43] the protection of the journalistic sources is essential for press freedom unless there is an overriding public interest. Reasons of overriding public interest can be human health, public safety and beneficial

[39] ¶15, Statement of Relevant Facts.

[40] *The Sunday Times v United Kingdom* App no 13166/87 (ECtHR, 26 November 1991); *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999).

[41] ¶4, Arguments.

[42] Herrera Ulloa and Rohrmoser v Costa Rica Written Comments Submitted by Article 19, Global Campaign for Free Expression; *Gooding v Wilson*, 405 US 518 (1972).

[43] *Goodwin v United Kingdom*, 27 March 1996, Application No. 17488/90.

consequences of primary importance.[44] In short, there is no overriding public interest in the present case.

25. Secondly, the US Supreme Court stated in *Shelton v Tucker* that the restriction is proportionate only when it is the least onerous one.[45] Moreover, an order for disclosing source is in accordance with the law only if there are no reasonable alternative measures to the disclosure or they have been exhausted by the persons seeking disclosure.[46] In the present case there were other reasonable alternative measures. For example, the Court could have subpoenaed telecommunication company to get the IP address of the unknown source.[47]

26. Moreover, Applicants submit that this measure will cause chilling effect. As the US Supreme Court stated in *Lamont v Postmaster General*[48] chilling effect occurs when an act prevents full usage of the freedom of speech and expression. Since Sang is a well-known blogger, the imposed subpoena will inflict fear and uncertainty among other members of non-traditional media regarding their status as a journalist. In addition, sources will avert from revealing information to members of alternative media.

C. THE ORDER AGAINST THE SEARCH ENGINE CONTRAVENES UDHR

27. Applicants submit that the order contravenes the right to freedom of expression under Article 19 [**I**], and the right to protection of property under Article 17 [**II**]. In any event, the order is not permissible under Article 29(2) [**III**].

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[44] Guidance document on Article 6(4) of the „Habitats Directive“ 92/43/EEC.

[45] *Shelton v Tucker*, 364 US 479 (1960); *Cumpănă and Mazăre v Romania (2005).*

[46] *Council of Europe Committee of Ministers* Recommendation No. R (2000) 7 Principle 3(b)(i).

[47] Nathanieal Gleicher : John Doe Subpoenas: Toward a Consitent Legal Standard.

[48] *Lamont v Postmaster General*, 381 U.S. 301 (1965).

I. The order restricts Article 19

28. Applicants submit that the order violates the right to freedom of expression of Centiplex [*i*] and Centiplex's users [*ii*].

i. The order violates the freedom of expression of Centiplex

29. The protection of the right to freedom of expression extends to organizations and corporate entities. The ECtHR held in *Autronic*[49] that Article 10 of the ECHR applies to "everyone", whether natural or legal persons, and concerns not only the content of the information but also the means of transmission or reception.

30. Centiplex, as the leading Internet services company in Mhugan, runs an Internet search engine.[50] Just as legal persons, search engines are also entitled to the right to freedom of expression. Moreover, in *Search King v Google Inc* and *Langdon v Google Inc*,[51] two US federal courts have held that search results are fully protected by the First Amendment. This manifests in their freedom to control the composition of their index and publish references, as well as to rank, select and present them.[52] Without the appropriate freedom to do so in relation to stories about matters of public concern, many of those stories would not be effectivelly accessible.[53] The impugned order infringes Article 19 by restricting Centiplex's freedom of choice what to include or exclude in its speech product. Therefore,

[49] *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990).

[50] ¶4, Statement of Relevant Facts.

[51] *Search King Inc v Google Tech Inc* Case No Civ-02-1457-M (WD Okla Jan 27, 2003); *Langdon v Google Inc* 474 F. Supp 2d 622 (2007); *KinderStart com LLC v Google Inc* C 06-2057 JF (RS) (ND Cal Mar 16, 2007); *Perfect 10 Inc v Google Inc* 653 F 3d 976 (2011).

[52] Joris Vredy Jan van Hoboken, 'Search engine freedom: on the implications of the right to freedom of expression for the legal governence of Web search engines' (Dissertation thesis, University of Amsterdam 2012); Council of Europe, 'Recommendation CM/Rec (2012) 3 of the Committee of Ministers to member States on the protection of human rights regarding search engines' 4 April 2012.

[53] *Times Newspapers Ltd v The United Kingdom* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009).

subjecting Centiplex to such a burden is detrimental to its freedom to decide freely how to rank and select references in response to user queries; that is to say, it is detrimental to its freedom of expression.

ii. The order violates the freedom of expression of Centiplex's users

31. Applicants submit that the order violates the freedom of expression of Centiplex's users, both information providers' and end-users'.

32. Article 19 includes the freedom to hold opinions without interference and to impart information and ideas. In *New York Times v Sullivan,*[54] the US Supreme Court stated that the circulation of information and ideas should be uninhibited, robust and wide-open.

33. Further, the interest of information providers is to be present on the Centiplex's platform and to find their way to an audience. If selection intermediaries block or discriminate against a speaker on grounds that listeners would not have selected, that speaker's ability to speak freely is undermined.[55] Being included in search results is of significant importance.[56] Several studies have shown that end-users consider a high ranking in a popular search engine as an independent sign of information quality.[57]

34. It should be noted that more than 80% of all search queries in Mhugan are conducted through Centiplex.[58] Consequently, being removed from the first page of search

[54] *New York Times v Sullivan* 376 US 254 (1964).

[55] Jennifer A. Chandler, 'A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet', (2008) 35(3) Hofstra Law Review <http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v35n03_CC5_Chandler_final.pdf 2008.> accessed 18 October 2013.

[56] *Google Inc v Copiepresse* Cause List No 2007/AR/1703 May 5, 2011 (Court of Appeal, 9th Chamber, Brussels).

[57] Eszter Hargittai, 'The Social, Political, Economic and Cultural Dimensions of Search Engines', 12(3) Special Section of the Journal of Computer Mediated Communication <http://webuse.org/pdf/Hargittai-SocialPoliticalEconomicJCMC07.pdf> accessed 18 October 2013.

[58] ¶4, Statement of Relevant Facts.

results restricts not only the freedom of information providers to impart information and ideas online, but also their freedom to reach an audience through Centiplex.

35. Additionally, the pressure on search engines to prevent any perceived harm resulting from the opening up of the World Wide Web can easily result in the 'self-censorship' of perfectly valid online sources.[59]

36. On the other hand, the interest of the end-users is to inform themselves freely. They should be allowed to decide for themselves what is useful, relevant, harmful, informative or entertaining. In *Red Lion Broadcasting Co. v Federal Communications Commission*,[60] the US Supreme Court ruled that it was the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences. Furthermore, the ECtHR stated that any restriction imposed on the means of transmission or reception necessarily interferes with the right to receive and impart information.[61]

37. However, given the fact that the order against Centiplex applies to any search[62] whatsoever, the free access to information is obviously suppressed. Consequently, as the diversity of information[63] is being limited, Centiplex's end-users are hindered in their freedom to find information online.

II. The order contravenes Article 17

[59] Susan Gerhart, 'Do Search Engines Suppress Controversy?', 9(01)First Monday <http://firstmonday.org/ojs/index.php/fm/article/view/1111/1031#g10> accessed 20 October 2013.

[60] *Red Lion Broadcasting Co v FCC* 395 US 367 (1969).

[61];*Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988); *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990); The UN Special Rapporteur on Freedom of Opinion and Expression Abid Hussain UN Doc. E/CN.4/1995/32.

[62] ¶13, Statement of Relevant Facts.

[63] John Weckert, 'What Is So Bad About Internet Content Regulation?' (2000) 2(2) Ethics and Information Technology 105 < http://link.springer.com/article/10.1023%2FA%3A1010077520614> accessed 19 October 2013.

38. Applicants claim a violation of Article 17, which guarantees the right to property. In *Van Marle*, the ECtHR stated that the right to property includes the goodwill of a business.[64] Further, in *Scarlet v SABAM*[65] the ECJ held that the filtering system breaches the freedom of ISPs to conduct business. By guarding the quality of its search results, Centiplex has built up a clientele. However, if users find Centiplex's results to be unreliable, Centiplex will be punished by the marketplace, as users will shift[66] to other easily available search engines. Consequently, there is a discrimination compared to Google, the second operator in Mhugan.

39. Further, the interference with the right to property must be in the public interest.[67] Restraining Centiplex's freedom to engage in innovative activities that guarantee citizenship and freedom of expression of the entire society[68] is not in the public interest.

40. In addition, the TRIPS Agreement[69] requires that secret information should not be used in a manner contrary to honest commercial practices. However, requiring de-indexing against its will disables Centiplex in securing the value of its trade secret. It also has a negative impact on innovation and technological development through the Internet.[70] Since

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[64] *Van Marle and Others v The Netherlands* App no 8685/79 (ECtHR, 26 June 1986).

[65] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011].

[66] Eugene Volokh; Donald M. Falk, 'First Amendment Protection for Search Engine Search Results' http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf; George G. Brenkert, 'Corporate Control of Information: Business and the Freedom of Expression' (2010) 115(1) Business and Society Review.

[67] *Sporrong and Lönnroth v Sweden* App no 7152/75 (ECtHR, 23 September 1982).

[68] IACHR, 'National Jurisprudence on Freedom of Expression and Access to Information' (2013)OEA/Ser.L/V/II.147 CIDH/RELE/INF.10/13 March 5, 2013 Office of the Special Rapporteur for Freedom of Expression Inter- American Commission on Human Rights.

[69] Agreement on Trade-Related Aspcts of Intellectual Property Rights (15 April 1994) 1869 UNTS 299; 33ILM 1197 (1994).

[70] Joana Varon Ferraz, Carlos Affonso de Souza, Bruno Magrani, Walter Britto, 'Content Filtering in Latin America: Reasons and Impacts on Freedom of Expression' <http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Content-Filtering-Latin-America.pdf> accessed 21 October 2013.

the freedom of sciences[71] exists for the sake of those who will benefit from it, that is everyone in Mhugan as an IT country, restraining Centiplex's right to property will reflect on the entire Mhuganian Internet economy.[72]

III. The order is not permissible under Article 29

41. Applicants submit that the order is not permissible under Article 29(2) as it does not pass a three-part, cumulative test.[73] The order is not prescribed by law [*i*], it does not pursue a legitimate aim [*ii*] and it is not necessary in a democratic society [*iii*].

i. The order is not prescribed by law

42. Applicants submit that the order is not prescribed by law as it is not foreseeable.[74] According to the e-Commerce Directive[75] measures to terminate or prevent an infringement may be taken if they meet three conditions: a) they must be directed at clearly identifiable Internet content, b) the competent national authorities must have taken provisional or final decision on its' illegality and c) they must respect the safeguards of Article 10(2) of the ECHR. Further, in *Malone*,[76] the ECtHR held that there must be a measure of legal protection against arbitrary interference by public authorities with the right to freedom of

[71] Charter of Fundamental Rights of the European Union [2000] OJ C 364/00.

[72] John Weckert, 'What Is So Bad About Internet Content Regulation?' (2000) 2(2) Ethics and Information Technology 105 < http://link.springer.com/article/10.1023%2FA%3A1010077520614> accessed 19 October 2013.

[73] Joana Varon Ferraz, Carlos Affonso de Souza, Bruno Magrani, Walter Britto, 'Content Filtering in Latin America: Reasons and Impacts on Freedom of Expression' <http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Content-Filtering-Latin-America.pdf> accessed 21 October 2013.

[74] ¶4, Arguments.

[75] E-Commerce Directive (n 18), artt 12(3), 13(2) & 14(3); Council of Europe, 'Declaration on Freedom of Communication on the Internet' (28 May 2003) prin 6.

[76] *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) ; UN Rapporteur (str.24 LA).

expression. Firstly, in the present case the order against Centiplex is vague because it does not identify which criteria Centiplex should apply so as to comply with the ruling. It fails to specify the sort of expression that should be prohibited[77] since it applies to any search made.[78] Consequently, due to the lack of a guiding principle,[79] Centiplex is not able to regulate its conduct and it is left to govern itself. Furthermore, the inherent drawbacks of current filtering techniques ("dynamic" and "blacklist" filtering) disable Centiplex to foresee the consequences and the reach of the order. Statistics show that such orders go beyond their scope and censor lawful Internet content.[80] In conclusion, the order is not prescribed by law because a) the Mhuganian authorities are not in a position to determine whether the content is illegal or not, as it does not target clearly identifiable content, b) filtering techniques do not present enough transparency to generate foreseeability of the norm.[81] Consequently, it represents an arbitrary use of the law[82] by penalizing legitimate expressions.

ii. The order does not have a legitimate aim

43. Applicants submit that the aim of protecting the right and freedoms of others is not satisfied. When defining under national law the obligations of service providers, due care

[77] Joana Varon Ferraz, Carlos Affonso de Souza, Bruno Magrani, Walter Britto, 'Content Filtering in Latin America: Reasons and Impacts on Freedom of Expression' <http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Content-Filtering-Latin-America.pdf> accessed 21 October 2013.

[78] ¶13, Statement of Relevant Facts.

[79] Craddock; Council of Europe, 'Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters' (26 March 2008).

[80] Richard Clayton showed, by reverse-engineering the blacklist, that *'25% [of blocked sites] are legitimate "free" hosting sites'*. R Clayton, 'The IWF Blocking List, Recent UK Experiences' (Dublin, 30 June 2009) <http://www.cl.cam.ac.uk/~rnc1/talks/090630-inex.pdf>, accessed 23 October 2013.

[81] Directive (EC) 2000/31 of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') ('E-Commerce Directive') [2000] OJ L178/1.

[82] Joana Varon Ferraz, Carlos Affonso de Souza, Bruno Magrani, Walter Britto, 'Content Filtering in Latin America: Reasons and Impacts on Freedom of Expression' <http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Content-Filtering-Latin-America.pdf> accessed 21 October 2013.

must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding rights of users to information.[83] As it has been stated in *P&G v Bankers Trust Company*[84] that before issuing such an order it should be considered whether a publication threatens an interest more fundamental than the freedom of expression itself. Furthermore, it explained that private litigants' interest in protecting their vanity or their self interest simply does not qualify as a ground for imposing a prior restraint. Thus, a legitimate aim cannot be a pretext for a measure taken for another improper purpose. In conclusion, the aim pursued does not have a sufficient weight to justify the restriction.[85]

iii. The order is not necessary in a democratic society

44. Applicants submit that the order is not necessary in a democratic society. It does not correspond to a pressing social need[86] and it is not proportionate to the legitimate aim.[87] As it will further be explained, there is no real threat to Rho's privacy and reputation and the order has no rational relationship to this threat.[88] Consequently, there is no pressing social need for the search result removal. Furthermore, when considering the lawfulness of the order, the disadvantages caused must not be disproportionate to the aims pursued.[89] Applicants submit that the disadvantages regarding Centiplex's economic activity and the general right to freedom of expression are not proportionate to the legitimate aim.

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[83] Council of Europe, 'Declaration on Freedom of Communication on the Internet' (28 May 2003); BGH 17 July 2003, I ZR 259/00 (*Paperboy*).

[84] *Procter & Gamble Co v Bankers Trust Co* 78 F 3rd 219 (1996).

[85] Olivier De Schutter, *International Human Rights Law* (Cambridge 2010).

[86] ¶9, Arguments.

[87] ¶12, Arguments.

[88] Ilona Cheyne, 'The Precautionary Principle in EC and WTO Law: Searching for a Common Understanding' (2006) 8(4) Environmental Law Review 257.

[89] *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others* [1990] ECR I-4023 (ECJ).

45. The order puts an excessive burden on Centiplex as it obliges it to create adequate conditions to prevent the web pages at issue from appearing on the first page. However, it is hard to control the web-sites to which a user is directed by using a search engine, because a search word (which was not specified)[90] may be used in several different contexts.[91] Such an order would ultimately oblige Centiplex to perform manual review.[92] Not only would it entail unduly high costs for the company, but it would also significantly reduce the amount of accessible information. Moreover, the order actually requires the monitoring of activities on websites, as it involves actively seeking facts indicating illegal activity. This kind of general obligation to monitor is strictly prohibited.[93]

46. Furthermore, as stated in *Observer and Guardian v UK*, the consideration of the justification of interferences is intensely practical one.[94] That is to say, the rumours about Rho being abusive to his wife began to surface already in early 2013.[95] However, by the time of the domestic proceedings, the rumours were already spread to the public at large, considering the fact that Sang's blog was receiving a million hits per day.[96] Moreover, the material in question remained online.[97] Therefore, any person who knows the exact URL of

[90] ¶13, Statement of Relevant Facts.

[91] Thibault Verbiest, Gerald Spindler, Giovanni Maria Riccio, Aurélie Van der Perre, 'Study on the Liability of Internet Intermediaries' (12th November 2007) < http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf> accessed 10 October 2013.

[92] Id.

[93] Joana Varon Ferraz, Carlos Affonso de Souza, Bruno Magrani, Walter Britto, 'Content Filtering in Latin America: Reasons and Impacts on Freedom of Expression' <http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Content-Filtering-Latin-America.pdf> accessed 21 October 2013.

[94] *The Observer and The Guardian v United Kingdom* App no 13585/88 (ECtHR, 26 November 1991).

[95] ¶8, Statement of Relevant Facts.

[96] ¶9, Statement of Relevant Facts.

[97] Clarifications South Asia #11..

the website containing the material, or by means of circumventing filters[98], may access the information. Consequently, any attempt at protecting Rho's reputation is futile and such order cannot be a necessary one.

47. In addition, Applicants allege that the order is too excessive as it applies to indirect links. In *Crookes v Newton*,[99] the Supreme Court of Canada focused on the importance of hyperlinks in facilitating access to information on the internet. The WA prescribes the removal of all the web pages that either lead directly to the prohibited material, or merely indicate that it will lead, regardless of how many links it actually takes to reach that material.[100] However, a difference should be struck down between these two categories. Regarding the latter situation, the link leads the user merely to a root page which then enables him to find the incriminated material. It is possible that the setter of the link is not even aware that a page to which he links to has changed its content and leads to the voicemail. The order therefore unnecessarily restricts the free flow of information in the World Wide Web.

48. The restriction is not proportionate to the legitimate aim considering that the order adopted is not the least onerous.[101] In contrast, an alternative would be requesting Sang to remove the voicemail, as far less harmful to freedom of expression. Moreover, the placing of an excessive burden on Centiplex, followed by harsh penalties for non-compliance (resulting from the technical difficulties of removing contents) is disproportionate to the

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[98] Cormac Callanan & others, 'Internet Blocking: Balancing Cybercrime Responses in Democratic Societies' (October 2009), <http://www.aconite.com/sites/default/#les/Internet_blocking_and_Democracy.pdf>, accessed 17 October 2013.

[99] *Crookes v Newton* 2011 SCC 47.

[100] ¶13, Statement of Relevant Facts.

[101] *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others* [1990] ECR I-4023 (ECJ).; *Open Door and Dublin Well Woman v Ireland* App no. 14235/88 (ECtHR, 29 October 1992).

legitimate aim. In addition, in case the order remained permanent, it would chill protected speech and would imperil the openness and neutrality of the Internet.[102]

D. THE 2013 SEARCH PRIVACY ACT CONTRAVENES UDHR

49. Applicants submit that the SPA contravenes the UDHR since the restrictions are not permissible under Article 29(2) [**I**].[103]

I. The restrictions are not permissible under the Article 29(2)

50. Applicants will not argue that the restrictions are not prescribed by law, however it is submitted that the restrictions are not justified under Article 29(2) since they do not pursue a legitimate aim [*i*] and are not necessary in a democratic society [*ii*].

i. The restrictions do not pursue a legitimate aim

51. Applicants submit that the restrictions do not have a legitimate aim since they do not correspond to none of the explicitly and exhaustively listed legitimate grounds for state interference prescribed in Article 29(2). If the aim for implementing the SPA was to provide an individual with a right to control the storage and circulation of data about himself, that aim was not achieved.[104] Under the SPA, a person's consent is not required for non-sale transfers

[102] Joris Vredy Jan van Hoboken, 'Search engine freedom: on the implications of the right to freedom of expression for the legal governence of Web search engines' (Dissertation thesis, University of Amsterdam 2012).

[103] ¶3, Arguments.

[104] Report of the Commitee on Data protection; Tugendhat and Christie, *The Law of privacy and the media* (2nd edn, OUP 2011); European Parliment and Council Directive 95/46/EC of 24 October 1995 on the protection of the individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

of information.[105] Moreover, it is not required for any subsequent transfer after the initial one made by the search engine.[106] In conclusion, the aim of the enactment was not privacy protection considering that the provisions enable, after an initial transfer, an unlimited circulation of information about individuals without their approval.

ii. The restrictions are not necessary in democratic society

52. Applicants submit that the restrictions are not necessary in a democratic society. There is no pressing social need [a] and the restrictions are not proportionate [b].

a) There is no pressing social need

53. In case this Court finds that the legitimate aim of the SPA is the protection of the right to privacy, Applicants submit that the users do not have a reasonable expectation of privacy.

54. In *US v Forrester, the U S Court of Appeal*[107] clarified that there is no reasonable expectation of privacy for Internet users because they should know that the information is provided to and used by Internet Service Providers ('ISP').[108] Moreover, all the users, by use of ISPs' services, implicitly agree with their terms of service.[109] In the present case, in its Terms of Service, Centiplex retains the right to disclose or use any data that it collects from its search engine.[110] Furthermore, there is no reasonable expectation of the

[105] ¶16, Statement of Relevant Facts.

[106] ¶16, Statement of Relevant Facts.

[107] United States v Forrester 512 F 3d 500 (9th Circuit 2007).

[108] Brandon T. Crowthe, '(Un)Reasonable Expectation of Digital Privacy' (2012) <http://ehis.ebscohost.com/eds/pdfviewer/pdfviewer?sid=f5855752-5dd3-4ca7-968f-aead4cd6aeda%40sessionmgr4&vid=4&hid=5> accessed 18 October 2013.

[109] Omer Tene : What Google Knows: Privacy and Internet Search Engines, Utah Law Review, Vol 2008, No 4

[110] ¶6, Statement of Relevant Facts.

privacy for information which is voluntary given to a third party.[111] By making a search request, users turn that information over to Centiplex. However, privacy protection is generally waived if the information revealed is in the public's interest.[112] For instance, these search queries are beneficial for computer science researchers in studying new information retrieval algorithms. Further, social scientists could investigate the use of language in queries as well as discrepancies between user interests revealed by their queries as opposed to those revealed by face-to-face surveys. In addition, by analyzing queries, the ISP is able to predict future events that are of public interest, such as flu trends around the world.[113] Moreover, search queries are used by search engines to successfully improve the quality of search results, as well as to personalize their services and to predict their users' future interests. Ultimately, information collected through online forms is not protected by privacy laws because it is provided voluntarily.[114] Consequently, a website that collects information from its users is free to sell it to direct marketers and many do.[115] All these arguments lead to the conclusion that Centiplex is merely interested in optimizing the chance of satisfying users' query, and not in identifying its users.

55. Furthermore, Centiplex stores only these search queries, not the hyperlinks users click on after obtaining their search results. A hyperlink points to a whole document or to a specific element within a document and reveals much more information about the person's Internet activity. On the contrary, a search query is only the word entered in the

[111] Smith v Maryland 442 US 735 (1979); United States v Miller, 425 US 435 (1976).

[112] Ashley Packard, *Digital Media Law* (Wiley-Blackwell 2010).

[113] <http://www.google.org/flutrends/> accessed 12 October 2013.

[114] *United States v Miller*, 425 US 435 (1976); Ashley Packard, *Digital Media Law* (Wiley-Blackwell 2010.

[115] Ashley Packard, *Digital Media Law* (Wiley-Blackwell 2010).

search box.[116] As the New Hampshire Supreme Court stated in *Remsburg v Docusearch, Inc.*, the information is being sold because of the information itself, and not to gain advantage of the person's reputation or prestige.[117]

56. Finally, the fact that a search query is connected to an IP address does not diminish the users' privacy keeping in mind that Centiplex provides them with a dynamic IP address.[118] As stated in *State v Reid,*[119] a dynamic IP address assigned to the computer is different for each Internet session. Generally, only the ISP can translate it into the name of an actual user or subscriber.[120] However, Centiplex does not reveal the identity of its users. It provides search queries indexed by the IP address connected only with the date and time of the query. On the other hand, it should be noted that Rho uses a variety of ISPs and that Sang knew exactly whose profile he was buying. Therefore, Centiplex did not sell Rho's information in the first place. Since it is not clear whether the SPA applies also to search engines based outside of Mhugan, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry.[121]

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[116] *United States v Forrester* 512 F 3d 500 (9th Circuit 2007); Omer Tene : What Google Knows: Privacy and Internet Search Engines, Utah Law Review, Vol 2008, No 4.

[117] *Remsburg v Docusearch* Inc 149 NH 148 (2003).

[118] Clarifications South East Europe #7.

[119] *State v Reid* 945 A 2d 26 (2008) 194 NJ 386.

[120] Id.

[121] Omer Tene, 'What Google Knows: Privacy and Internet Search Engines' <http://epubs.utah.edu/index.php/ulr/article/view/136/118> accessed 17 October 2013.

b) The restrictions are not proportionate

57. The SPA disables Centiplex to sell search queries related to an IP address.[122] The Hong Kong Privacy Commissioner[123] concluded that an IP address followed by the time and date was insufficient to qualify it as a personal data. As mentioned above, Centiplex provides search queries along with the IP addresses to enable the free information flow and to improve the development of the social services. Therefore, the aim is not to identify a user. Instead of limiting Centiplex's business, the provision should entirely forbid ISPs to reveal the identity of a user behind an IP, in both sale and non-sale transfers, with the exception of a warrant or court order. Such a provision would be a less onerous restriction since the anonymization of users would provide a much higher level of privacy protection.

[122] ¶16, Statement of Relevant Facts.

[123] Office of the Privacy Commissioner for Personal Data, Hong Kong, 'Annual Report: Notes on Appeal Cases Lodged with the Administrative Appeals Board <http://www.pcpd.org.hk/textonly/english/publications/annualreport2008_25.html> accessed 24 October 2013.

PRAYER

In the light of the arguments presented and the authorities cited, Thon Sang and Centiplex respectfully request this Court to adjudge and declare that:

A. The damages imposed on Sang for disseminating the recorded voicemail contravene the UDHR.

B. The subpoena to Sang to disclose source of the recorded voicemail contravenes the UDHR.

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

D. The 2013 Search Privacy Act contravenes the UDHR.

On behalf of the Applicants,

Team 309A