**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**APP. NO. 11257/16**

**BETWEEN**

**MAGYAR JETI ZRT**

**Applicant**

**- and -**

**HUNGARY**

**Respondent Government**

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**THIRD-PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19**

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## I. INTRODUCTION

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression ("ARTICLE 19"), an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. It takes its name from Article 19 of the Universal Declaration on Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, and develops long-term strategies to address them. It advocates for the implementation of the highest standards of freedom of expression nationally and globally.

2. ARTICLE 19 welcomes the opportunity to intervene as a third party in this case, by leave of the President of the Court granted on 2 September 2016 pursuant to Rule 44(3) of the Rules of Court. As directed, these submissions do not address the facts or merits of the Applicant's case.

3. In these submissions, ARTICLE 19 addresses the background against which the present case falls for consideration, including the importance of freedom of expression on the Internet and the role of hyperlinks in facilitating this (Part II); comparative jurisprudence on liability for hyperlinking (Part III); and the proper approach to liability for hyperlinking and its relationship with liability for content (Part IV).

## II BACKGROUND

### (a) Importance of the right to freedom of expression on the Internet

4. The significance of the Internet as a medium for disseminating and receiving ideas has been widely recognised at the European and international level. As this Court has acknowledged: "the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest."[1] In General Comment 34 on Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee emphasised the importance of new information and communication technologies, and urged states to "take all necessary steps to foster the independence of these new media and ensure access of individuals thereto".[2] The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (the Special Rapporteur on FOE) likewise noted in his 2011 report to the Human Rights Council that the Internet has become "one of the most powerful instruments for increasing… access to information, and for facilitating active citizen participation in building democratic societies"[3] and is "a key means by which individuals can exercise their right to freedom of expression."[4]

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[1] ECtHR, *Ahmet Yildirim v. Turkey*, Application No. 3111/10 (18 December 2012), [48] and [54].

[2] General Comment 34 on Article 19 of the ICCPR at para 15, available at http://bit.ly/1xmySgV.

[3] UN Special Rapporteur, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/17/27 (16 May 2011), [2], available at http://bit.ly/QD35W5 .

[4] *Ibid*, [2.2].

5. Similarly, the Joint Declaration on Freedom of Expression and the Internet – issued by four special mandates on freedom of expression in June 2011 – stressed "the transformative nature of the internet in terms of giving a voice to billions of people around the world, of significantly enhancing their ability to access information and of enhancing pluralism and reporting."[5]

6. In light of the Internet's significance, the Joint Declaration advocated that greater attention be dedicated to "developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content."[6]

7. Consistent with this position, this Court has recognised that Article 10 of the Convention imposes on Contracting States a positive obligation to create an appropriate regulatory framework to ensure the effective protection of journalists' freedom of expression on the internet: see *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (2011).[7] This obligation, it is submitted, must extend in principle to the protection of publishers of journalistic material.

### (b) Hyperlinks and their role in facilitating freedom of expression

8. Hyperlinks are central to the success of the Internet as outlined above; indeed, it is no exaggeration to say that the Internet itself is a series of hyperlinks, and that the use of these links has become a basic feature of everyday online interaction. However, it is important to note that there is a fundamental difference between the use of a hyperlink to another webpage and the publication of the content on the linked webpage; all that a hyperlink does is to refer the reader to content that is already published elsewhere.

9. As the English High Court has explained:

> The Web consists of a network of computers connected by means of the Internet... The web pages are written in a language called HTML (Hypertext Markup Language)... HTML permits so-called links to other material such as images to be included in the text of a web page. Such links may be permanent, or clickable. When the browser software encounters a permanent link in the page that it is interpreting, it sends a request for the file specified by the link. If the link is clickable it does so when the link is clicked. The link may point to any item accessible from the internet, so I could include a link to the Mars Explorer photographs in the HTML version of the judgment, if I thought it might help. These links, so-called hypertext links, are central to the success of the Web.[8]

10. By helping users find information related to the content in which they are interested, hyperlinks play a crucial role in receiving and imparting information

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[5] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint declaration on freedom of expression and the internet* (1 June 2011), available at http://bit.ly/2dtEhfJ.

[6] *Ibid*.

[7] Application No. 33014/05 (5 May 2011).

[8] *Motion UK Ltd v Inpro Licensing SARL* [2006] EWHC 70 (Pat), 15.

and ideas. Without hyperlinks, most of the information on the Internet would be difficult or impossible to find. As Matthew Collins explains:

> Hyperlinks are the synapses connecting different parts of the world wide web. Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it.[9]

11. This has been recognised by the Superior Court of California, which noted that "links to websites are the mainstay of the Internet and indispensable to its convenient access to the vast world of information."[10]

12. Likewise the Supreme Court of Canada, in the case of *Crookes v Newton* (2011),[11] described hyperlinks as "an indispensable part of [the internet's] operation" and recognised that "[t]he internet cannot, in short, provide access to information without hyperlinks." It therefore concluded that, in the context of defamation proceedings,

> Limiting [hyperlinks'] usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression"; the resulting "'chill' in how the Internet functions could be devastating.[12]

13. Most recently, the Court of Justice of the European Union has highlighted the "highly restrictive consequences" that wide liability for the use of hyperlinks could have, noting that "the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter" and that "hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information."[13]

14. ARTICLE 19 also believes that the present case can be distinguished from the case of *Mouvement Raelien Suisse v Switzerland*[14] which related to a ban on a poster campaign which directed viewers to a website (and which was found to be speech closer to commercial speech than political speech). In determining whether a refusal to authorise the poster campaign was a proportionate interference with Article 10 rights it was held that regard could be had to the content of the hyperlinks on the website. The issue raised in this case is whether imposing <u>liability</u> for the content of <u>the hyperlinked</u> site is a proportionate interference.

15. In light of the above, it is respectfully submitted that the margin of appreciation in cases involving interference with freedom of expression on the Internet,

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[9] Matthew Collins, *The Law of Defamation and the Internet* (3rd ed., 2010), [5.42].

[10] *DVD Copy Control Association Inc. v A.T. McLaughlin*, No. CV 786804 (Cal. Super. Ct. 2000). The judgment was overturned on appeal but on a different point.

[11] [2011] 3 SCR 269.

[12] *Ibid*, [34]-[35].

[13] *GS Media BV v Sanoma Media Netherlands*, Case No. C160/15, 8 September 2016, [44]-[45].

[14] Application No. 16354/06 (13 July 2012),

particularly concerning publisher-liability for hyperlinks, should be a relatively narrow one.

## III COMPARATIVE LEGAL APPROACHES TO LIABILITY FOR HYPERLINKING

16. The use of hyperlinks has given rise to a considerable volume of litigation over the past decade, predominantly in the context of defamation and copyright infringement. While the details of the applicable rules differ, a few key principles have emerged which, in ARTICLE 19's submission, are of relevance in cases such as the present.

### (a) Hyperlinking alone does not constitute publication

#### *(i) Hyperlinks as reference tools*

17. In the vast majority of cases, hyperlinks operate as a reference mechanism, which does not suggest that the person using[15] them either agrees with or endorses the linked content. Nor does the fact that a hyperlink is included on a website necessarily mean that readers will follow it; hyperlinking provides the opportunity for readers to access additional content rather than delivering or presenting it to them.

18. For these reasons, courts in a number of jurisdictions have concluded that the use of hyperlinks does not – without more – constitute publication of the linked content for the purposes of defamation proceedings.

    18.1. In the Canadian case of *Crookes v Wikimedia Foundation* (2008),[16] the issue was whether the Defendant could be liable for publishing an article containing hyperlinks to three further articles, the contents of which were said to be defamatory. The Court compared the hyperlinks to footnotes, noting that "[w]here a footnote leads a reader to further material, that does not make the author… a publisher of what the reader finds when the footnote is followed" (at [28]). Thus, although it acknowledged that hyperlinks allow readier access to the relevant material than footnotes, the Court concluded that hyperlinking alone could not amount to republication of the linked content – particularly as "a reader may or may not follow the hyperlinks provided" (at [30]).

    18.2. This approach was confirmed by the Supreme Court of Canada in *Crookes v Newton* (2011).[17] The Supreme Court agreed that the hyperlinks under consideration functioned as references to further content, which were "fundamentally different from other acts involved in publication". This was both because providing references involved no exertion of control over the additional content (at [26]-[27]), and because a positive act on the part of

[15] Note that in these submissions we refer to "using" a hyperlink rather than "publishing" a hyperlink to highlight the distinction between the use of the link and the publication of the linked content.

[16] 2008 BCSC 1424.

[17] [2011] 3 SCR 269.

the reader was required before he or she gained access to that content (at [30]). As noted at paragraph 12 above, the Court was fortified in its conclusion by the importance of hyperlinks in facilitating freedom of expression on the Internet.

18.3. In the Australian case of *Cripps v Vakras* (2014),[18] the Supreme Court of Victoria considered whether an online article, and a second article by the same author which was hyperlinked to the first, could be treated as a "composite" publication for the purposes of defamation proceedings. The Court held that it could not, noting that the first article contained seven hyperlinks (in relation to six of which there were no complaints) and that readers would not necessarily have accessed any of them, including the link to the second article (at [26]). The hyperlinks were described as "no more than a choice that is offered to the reader to quickly and conveniently pursue further reading of separate publications" (also at [26]). Accordingly, the Court limited the claim to allegedly defamatory material contained in the body of the first article.

18.4. Most recently, in the American case of *Life Designs Ranch Inc v Sommer* (2015),[19] the Defendant had built a spoof website purportedly published by the Plaintiff; the site in turn contained hyperlinks to the website of an organisation called HEAL, which was said to contain content defamatory of the Plaintiff. The Washington State Court held that the Defendant could not be liable for republication of that content, as the existing jurisprudence established that a hyperlink was "not qualitatively different from a mere reference" and so did not constitute republication.

19. One of the best examples of hyperlinks can be found with search engines, such as Google, which automatically assemble lists of hyperlinks – together with "snippets" of their contents – in response to users' instructions. Courts have held that, without more, providing such a list of hyperlinks should not be regarded as publication of the linked content or even the "snippet".

19.1. In the English case of *Metropolitan International Schools Ltd v Designtechnica Corp* (2009),[20] the High Court considered the liability of a search engine for the content of allegedly defamatory "snippets" of text presented alongside hyperlinked search results. The Court noted that the function of the links was to point a user "in the direction of an entry somewhere on the Web that corresponds, to a greater or lesser extent, to the search terms he has typed in", and that the links remained "for him to access or not, as he chooses" (at [51]). The Court drew an analogy between conducting an internet search and consulting a library catalogue, noting that it was "hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue" (at [52]). Thus, by analogy – and given the lack of human involvement in the generation of the "snippets" – the search engine could not be regarded as their publisher.

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[18] [2014] VSC 110.

[19] 2015 WL 7015867 (Wash. Ct. App. Nov. 12, 2015).

[20] *Metropolitan International Schools Ltd v Designtechnica Corporation* [2009] EWHC 1765 (QB).

19.2. A similar conclusion was reached by the Supreme Court of New South Wales in the case of *Bleyer v Google Inc* (2014)[21] and by the Supreme Court of British Columbia in *Niemela v Google* (2015).[22] In the latter case, the Court entered summary judgment for Google in respect of a defamation claim on the basis that Google could not be said to be the publisher of either the content linked to the URLs thrown up as search results or the associated "snippets". Reliance was placed on both *Crookes v Newton* and *Metropolitan International Schools* (see above).

***(ii) Lack of control over linked website***

20. Outside the defamation context, a further and important reason has been identified for exercising caution in relation to liability for hyperlinking: namely, that linked content is liable to change over time without the person who used the hyperlink being made aware of the change. Thus, in the German *Radikal* case (1997),[23] the Defendant was prosecuted for providing a hyperlink to an online magazine, which had been banned in Germany for publishing guidance on how to sabotage railway lines. The Prosecution argued that using the link was akin to distributing illegal material. However, the Defendant was found to have used the hyperlink <u>before</u> the unlawful article had been published. In those circumstances, the Court considered that she could not be found guilty simply because she had failed to conduct regular checks of the linked page. Such an approach would have placed an unduly heavy burden on any person who used hyperlinks, as well as raising difficult questions as to how often checks for changes to the linked content would have to be conducted. The same considerations are relevant in defamation proceedings.

***(iii) Repeating or adopting the content of the hyperlink***

21. Nevertheless, there have been defamation cases in which courts have recognised that circumstances may arise in which using a hyperlink does amount to publication of the linked content because of how it is presented. In *Crookes v Wikimedia* (above), the court gave the (hypothetical) example of a website stating that "[t]he truth about [X] is found <u>here</u>" (at [34]). A similar approach was adopted by the Supreme Court of New South Wales in *Visscher v Maritime Union of Australia (No 6)* (2014),[24] where the critical question was held to be whether, by the inclusion of a hyperlink, a defendant had "accepted responsibility for the publication of the hyperlinked material" by (for example) approving, adopting, promoting or otherwise ratifying it (at [29]).

22. In *Crookes v Newton* (above) a majority of the Supreme Court of Canada proposed an even higher threshold, suggesting that publication should only be found where "a hyperlinker presents content from the hyperlinked material in a

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[21] [2014] NSWSC 897.

[22] 2015 BCSC 1024.

[23] Amtsgericht Berlin-Tiergarten, June 30, 1977, MMR, 1998/1, p 49.

[24] [2014] NSWSC 350.

way that actually repeats the defamatory content" (at [42]).[25] Similarly, in the recent case of *Slozer v Slattery and Holzhafer* (2015)[26] the Pennsylvania Superior Court found that accompanying a link with a "like" designation was not sufficient to establish republication as it was "not equivalent to a reiteration of the defamatory content."

#### *(iv) Summary*

23. As the above demonstrates, there is a high degree of international consensus that publication of a hyperlink should not, without more, be considered to amount to the "publication" of the linked content, for which the publisher may be liable. Further, there is a degree of consensus that only if the publisher repeats or expressly adopts the linked content should "publication" (for the purposes of potential liability in defamation) be found.

24. In ARTICLE 19's submission, for the courts of a Contracting State to hold that the user of a hyperlink was liable in defamation for the content of the linked material would be likely to constitute a violation of the user's Article 10 rights; involving a disproportionate interference in its right to freedom of expression. Furthermore, such potential liability would necessarily discourage the use of hyperlinks (a chilling effect), with serious implications for individuals' rights of access to information. This would have wide ramifications and impact on *all* those who use hyperlinks, including not only the media but others such as academics, scientists and lawyers.[27] As such, the accessibility of information on the Internet would be reduced.

### (b) Knowledge of unlawful content is required

25. As well as concluding that hyperlinking alone does not constitute "publication" for the purposes of defamation proceedings, case-law in a number of jurisdictions suggests that where the hyperlink is to unlawful material, no liability should be imposed unless the person who used the link was aware that the linked content was unlawful.

26. Thus, in the context of linked content that is in breach of copyright law, it has been held that actual or constructive knowledge of the unlawful nature of the material is necessary:

    26.1. In *Belgacom Skynet v IFPI* (2001),[28] the Court of Appeal in Brussels considered the circumstances in which an ISP could be held liable where its customers had created pages that included links to MP3 files which had been copied without the consent of the rights holders. The Court held that liability could arise only where the ISP's attention had been drawn to the

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[25] The minority considered that publication occurred where "read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to" (at [50]).

[26] 2015 WL 7282971 (Pa. Superior Ct. Nov. 18, 2015).

[27] These submissions, which contain a number of hyperlinks, are one example.

[28] 2001 No. 1999/AR/3372.

relevant links, and it had been presented with a prima facie case had been that the copies were unlawful.

26.2. In *GS Media BV v Sanoma Media Netherlands* (2016),[29] GS Media published a hyperlink directing viewers to a website where certain photos were made available. These photos had been published without the consent of the copyright owner. The CJEU held that the creation of the hyperlink did not constitute a "communication to the public" for the purposes of copyright infringement where the person posting the link did not seek financial gain, and (critically) where they acted without actual or constructive knowledge that the linked copyright works had been published unlawfully. In so holding it was, as noted above, conscious of the impact liability for hyperlinks would have on freedom of expression online.

27. The position is similar in relation to online defamation. In *Tamiz v Google Inc* the English Court of Appeal found that Google was not a publisher of defamatory postings on the Blogger website when it had not created the blogs and did have any prior knowledge of, or effective control over, their content.[30] In *Bunt v Tilley* the English High Court stated that liability in defamation cannot arise without a defendant's "knowingly involvement in the publication of the relevant words" (see [36]). The requirement of actual or constructive knowledge would also be consistent with legislative provisions such as those that exist in England to protect individuals who innocently disseminate defamatory material from defamation actions.[31]

28. It is respectfully submitted that nobody should be liable for using a hyperlink where they did not know or had no reason to believe that her or she technically contributed to the dissemination of content that was unlawful. Such an approach recognises the vital importance of hyperlinks to the free flow and exchange of information on the Internet. Imposing a lower standard would be inappropriate, as it would require anyone presenting a hyperlink to decide whether the underlying third party content is lawful. Rarely will this be feasible; it necessarily involves evaluating the merits of potential causes of action and any defences, as well as cross-jurisdictional issues (legality varying in different States).[32] It would be expensive and complex. As such, it would have a significant chilling effect, discouraging the use of hyperlinks. This does not create a vacuum; complaints about the linked content can and should be directed at the publisher of that

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[29] Case No. C160/15.

[30] [2013] EWCA Civ 68, [25]. If the defamatory material was allowed to remain on a Blogger blog after notification of the presence of that material, the publisher of the blog might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material: [34].

[31] Section 1 of the Defamation Act 1996 which provides a defence if a person shows that he was not the author, editor or publisher of the statement complained of; he took reasonable care in relation to its publication; and he did not know and had no reason to believe that what he did caused or contributed to the publication of a defamatory statement.

[32] See UN Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/17/27 (16 May 2011), [42] which, in the context of intermediaries, notes that "as private entities, [they] are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences." This is equally relevant to the creators of hyperlinks.

content. Removal of that content following due process would automatically result in the disablement of the hyperlink.

## IV PROPER APPROACH TO HYPERLINKING LIABILITY

29. It follows from the factors set out in Part II that liability for the use of hyperlinks is a complex and critical issue that should be approached with the utmost caution. The use of hyperlinks is part of the basic grammar of the Internet and is fundamental to its continued operation; any broadly drawn principles of liability would have significant legal and practical consequences.

30. In particular, any finding that an online publisher could be properly liable for the content of hyperlinked sites without repetition or express adoption of their content – and knowledge that it was unlawful – would effectively indicate to a wide range of groups – including ISPs, advertisers, hosting services and website publishers – that they could be penalised for the content of websites over which they have no control. This would be unreasonable and unjust, and the result would be a chilling effect which would greatly limit internet users' ability to exercise their right to impart and receive ideas and information online.

31. In ARTICLE 19's submission, the proper approach to liability for hyperlinks in defamation proceedings involves application of the following principles, all of which are reflected in the comparative jurisprudence discussed in Part III.

    31.1. First, and as an overarching principle, it is only in exceptional cases that a person using a hyperlink should be held liable for linked content.

    31.2. Second, liability should be imposed only where the hyperlink is presented in such a way as to repeat or expressly adopt the linked content.

    31.3. Third, liability should be imposed only where it was established that the maker of the hyperlink knew or ought to have known that the content was unlawful.

    31.4. Fourth, all defences available to primary publishers – including, for example, the defence of reasonable publication on a matter of concern, innocent publication and words of others - as described in ARTICLE 19's defamation principles[33] – should be available to the makers of hyperlinks in the event that they are susceptible to liability in respect of linked content.

    31.5. Fifth, in order to ascertain whether the applicable sanction is proportionate, a court or tribunal should consider any action that has been or may be taken against the primary publisher of the linked material. Thus, for example, it will always be disproportionate to require removal of a hyperlink where no steps have been taken to require removal of the underlying content, or to award damages against the user of a hyperlink where no steps have been taken to pursue the author of the linked material.

32. In ARTICLE 19's submission, the application of these principles by Contracting States' courts and tribunals – and by this Court in the exercise of its supervisory

[33] Article 19, *Defining Defamation: Principles on freedom of expression and protection of reputation* (July 2000), available at http://bit.ly/2cY9M0N; and Revised Defining Defamation Principles (forecoming), draft available at: http://bit.ly/2do4ag7.

jurisdiction – is critical in ensuring that any liability (and consequent sanction) imposed on the user of a hyperlink constitutes a proportionate interference with the right to freedom of expression.

## VI CONCLUSION

33. This case is important; it involves an issue that courts around the world have been considering carefully for the past decade. Given the centrality of hyperlinks to millions of internet users' ability to access and share ideas and information, the manner in which the Court deals with this issue is likely to have far-reaching and significant consequences for the exercise of freedom of expression online both now and in the future.

34. In ARTICLE 19's submission, the Court's approach may properly be informed by the development of domestic jurisprudence on liability for hyperlinking. This jurisprudence has consistently taken account of the fact that hyperlinks are primarily used for referencing purposes; that Internet users always have a choice as to whether to follow them; and that the content of hyperlinked sites is liable to change over time without the knowledge of the person or body using the link. Resulting principles have included that hyperlinking alone is not enough to establish publication of (and hence potential liability for) linked content, and that some level of knowledge of that content is required for liability to arise. For the reasons set out above, ARTICLE 19's submits that, for the purposes of establishing liability for hyperlinks, it should be established that the maker of the link knew or ought to have known that the content was unlawful.

35. This approach ensures that liability for defamation is only found, and sanctions only imposed, where this constitutes a proportionate interference with the rights guaranteed by Article 10, and recognises that the primary remedy should be with the publisher of the underlying content. As such it protects against the self-censorship that a broad test imposing liability for defamation on the makers of hyperlinks would necessarily entail and the devastating "chill" that this would have on the functioning of the Internet.

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