IN THE EUROPEAN COURT OF HUMAN RIGHTS
APP NO. 64569/09
BETWEEN:-

DELFI AS

Applicant

- v -

ESTONIA

Respondent Government

THIRD-PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19

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 right to freedom of expression and the right to freedom of information. 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 and 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 the leave of the President of the Court, which was granted on 9 May 2014 pursuant to Rule 44 (3) of the Rules of Court. These submissions do not address the facts or merits of the applicant's case.

3. In our view, the core issue raised by the present case is whether holding online news media strictly liable for third-party content as publishers is compatible with Article 10 of the Convention. We believe that this case therefore presents the Court with an important opportunity to address the rules governing intermediary liability, which have a major impact on freedom of expression online.[1] In these submissions, ARTICLE 19 addresses the following: (i) the importance of online comments to matters of public debate; (ii) relevant international standards and comparative law material on intermediary liability; (iii) the proper approach to liability of online news media for third-party comments consistent with the right to freedom of expression; and (iv) the proper approach to harmonious interpretation between the convention and EU law in this area.

I. THE VALUE OF COMMENTS BY PRIVATE USERS

Online comments are an expression of public debate on matters of public interest

4. Among the most innovative features of the Internet is the ease with which it allows any person to express their views to a potential audience of millions - and even billions – of people. Not so many years ago, the possibility of such mass communication on a daily basis was available only to those persons with control of a radio station, a television station or a printing press. Today, it is possible for anyone with access to a computer or even a mobile phone to express his or her views to the entire world.

5. The use of the Internet as a forum for debate, however, is not a recent phenomenon. One of the most popular applications of the Internet among scientists and researchers in the 1980s was the development of bulletin board services such as Usenet, which became the forerunners of Internet discussion forums in the 1990s.[2] These Internet-based applications enabled ordinary users to discuss and debate issues of popular and specialist interest, including issues of public importance, in much the same way as casual, face-to-face conversations in communal places.

6. The subsequent rise of the Internet as a medium of mass communication from the mid-1990s onwards has meant that private individuals can now question, confront and test ideas with anyone around the world with Internet access on topics of mutual interest and without seeking the prior approval of publishers. One of the revolutionary aspects of the Internet is that the publication of information and opinions to the world at large is no longer the preserve of a small number of gatekeepers, whether news organisations, private corporations or public institutions. The value of comment platforms, therefore, is that they enable and promote public debate in its purest form.

Merely posting a comment online is not journalism

7. As online comments have transformed the practice of public debate, the UN Special Rapporteur on Freedom of Expression noted "*the way in which information is transmitted largely depends on intermediaries, or private corporations which provide services and platforms that facilitate online communication or transactions between third parties*".[3] In other words, the ability of private individuals to exchange and express views and opinions upon a multitude of issues via the Internet nonetheless depends on a global network largely comprised of intermediaries.

8. These intermediaries, moreover, are not necessarily private companies engaged in for-profit activities (though many of them are). In many cases, intermediaries may be other private individuals who have taken a positive decision to host and facilitate debate by allowing other internet users to post comments on their website or blog. Indeed, it was the sheer popularity of websites which hosted such internet-based discussions that led traditional forms of media such as newspapers and television stations not only to develop their own websites but also to encourage private users to post comments here and exchange ideas and opinions with other private users.[4]

9. For this reason, ARTICLE 19 submits that to view online comments as a form of *journalism* would be a mistake. The mere fact that most news websites now provide for comments by private users is nothing to the point, for the same is true of the vast majority of websites, both big and small, which have very little to do with the provision of news. ARTICLE 19 instead submits that online comments by Internet users are correctly understood as an expression of the debate on matters of public interest by the public itself. As the US District Court found in

Reno v ACLU, it is "*no exaggeration to conclude that the content on the Internet is as diverse as human thought*." [5] The fact that users' comments have proved to be a valuable resource for newspapers and now form part of their business model is therefore irrelevant to their intrinsic value for free speech.

10. Moreover, ARTICLE 19 submits that it would be wrong for the Court to view online comments as the functional equivalent of letters to editors in the offline world. In practice, the traditional practice of newspaper editors selecting letters for publication and editing them for sense, etc. has typically involved a great deal of judgment. The decision of a website to host comments by private users, by contrast, is entirely a different matter, both in terms of kind and degree. As the above account makes clear, this practice of comments forums on websites was one that originated on the Internet and had very little to do with the editorial practices of newspapers. As a matter of fact and form, therefore, comments sections on news websites are better understood as newspapers appropriating the private discussion model that is native to the internet rather than the other way round.

The viability of online debate depends on hosting platforms being granted immunity from liability

11. Given their wide-ranging nature, it is perhaps inevitable that not all comments by Internet users necessarily involve a significant contribution to matters of public interest. Indeed, as Eady J noted in *Smith v ADVFN Plc and others* [2008] EWHC 1797 (QB) in an action in defamation concerning comments made on Internet forums and bulletin boards "*they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take"*. Similarly, Blair J noted in in the Court of Appeal for Ontario in Baglow v Smith (2012) ONCA 407, again concerning an action in defamation over comments made on the internet, that commentators "*engaging in the cut and thrust of political discourse in the internet blogosphere can be fervent, if not florid, in the expression of their views"* (para 1). In other words, a large number of online comments may well be unlawful, whether on the basis of defamation law, copyright law, or obscenity laws. The same is true, however, of conversations in cafes, restaurants or pubs and yet nobody would seriously suggest that the owner of a pub should be held liable for comments and opinions voiced by his customers.

12. In this way, it is clear that making websites responsible for comments made by users would force such websites to choose between two unpalatable options: either to take it upon themselves to police potentially hundreds of thousands of comments each day, or simply prevent users from posting comments on their website altogether. The former would impose an unacceptable burden on websites, whereas the latter would have a devastating effect upon the free and open exchange of ideas. Understood in this way, it becomes obvious that long-established principles governing defamation in the context of traditional print and broadcast media are plainly ill-suited to regulate the kind of debate and discussion that occurs on a daily basis between ordinary internet users.[6]

13. It is for this very reason that various international and comparative law standards have developed over the past two decades in order to shield intermediaries from liability in such cases, and protect freedom of expression online. We detail these standards in the following section.

II. INTERNATIONAL & COMPARATIVE LAW STANDARDS ON INTERMEDIARY LIABILITY

International standards

14. The question of intermediary liability was comprehensively addressed by the four special rapporteurs on freedom of expression in their 2011 Joint Declaration on Freedom of Expression and the Internet in which they recommended: [7]

(i) No one should be liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information;

(ii) Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online;

(iii) ISPs and other intermediaries should only be required to take down content following a court order, contrary to the practice of notice and takedown.

15. Similarly, the UN Special Rapporteur on freedom of expression stated in his landmark report on freedom of expression on the Internet that "*no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf*".[8]He further recommended that in order to avoid infringing the right to freedom of expression and the right to privacy, intermediaries should:[9]

> [O]nly implement restrictions to these rights **after judicial intervention**; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved. (Emphasis added)

The above standards reflect the unequivocal view that, as a matter of principle, intermediaries should not be held responsible for third-party content and should only be *required* to take down material by order of a court or other independent adjudicatory body.

The US approach

16. Both the US courts and Congress understood from a very early stage that Internet intermediaries should be shielded from liability for third-party content in order for technological innovation to fulfill its potential and free expression to flourish online. Under US law, liability for third-party generated content is governed by: (i) section 230 of the Communication Decency Act (CDA) 1996 which provides almost absolute immunity to Internet intermediaries for a variety of liability claims, including defamation; and (ii) the Digital Millennium Copyright Act (DMCA) 1998, which lays down a notice-and-takedown procedure in copyright infringement cases.[10]

17. In particular, section 230 of the CDA provides "*no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*" The rationale behind this policy was that Internet platforms should not be punished for their good faith efforts to address offensive content online.[11] The US Congress reasoned that to hold Internet platforms liable for third party comments would discourage them from at least trying to put in place self regulatory mechanisms to address potentially unlawful content online even though such mechanisms might not be entirely

successful.[12] In practice, therefore, Internet intermediaries are only required to remove content if ordered to do so by a court because the court has found that the content at issue was unlawful.

The European approach and the implementation of the E-Commerce Directive

Background and purpose

18. In the European Union ('EU'), the liability of Internet intermediaries is chiefly governed by the E-Commerce Directive ('ECD'). The Directive was intended to provide a 'light-touch' level of harmonization between the widely differing liability regimes applicable to Internet intermediaries within EU member states ('MS').[13] Indeed, as the European Commission noted in its proposal for a Directive on e-commerce, "*There is considerable legal uncertainty within Member States regarding the application of their existing liability regimes to providers of Information Society Services when they act as "intermediaries", i.e. when they transmit or host third party information (information provided by the users of the service).*" In practice, this legal uncertainty arose from the inconsistent application by MS courts of the general rules of negligence, secondary liability and publishers' liability to address the variety of claims that were mounted against intermediaries on the basis of defamation, copyright or obscenity laws.[14] Moreover, because of the considerable difficulties in applying these rules to new media, MS concomitantly sought to resolve the issue by adopting rules limiting the liability of online intermediaries creating even more uncertainty.[15] Ultimately, therefore, one of the key objectives of the Directive was to remove obstacles to the provision of online information society services across the EU by providing legal certainty in this area of law.[16]

19. The protection of freedom of expression was central to this objective as noted in Recital 9 ECD. At the same time, the Commission sought to ensure a high level of protection for consumers by lessening the risks of illegal activity online. The balance between these different interests and the allocation of liability between online service providers and online content providers was eventually resolved with the adoption of a 'safe harbor' or conditional liability regime of protection for intermediaries, which is reflected in Articles 12 to 14 ECD.[17]

20. It is important to bear in mind however that the Commission did not want the Directive to be too prescriptive given that "*electronic commerce [was] in the early stages of its development*". In particular, the Commission emphasized the need "*to avoid restricting that commerce by hasty and ill-adapted rules and the ability of parties to determine many of the issues themselves*". Accordingly, the Commission[18] – and later, the Directive[19] - encouraged the development by information society service providers of voluntary codes of conduct. It therefore echoed the concerns of the US Congress that Internet platforms should be encouraged - rather than penalized - to develop their own rules to deal with potentially unlawful content. [20]

The ECD scheme

21. As a result of the above considerations, Internet intermediaries have been granted different levels of immunity depending on the activity at issue under the E-Commerce Directive ('ECD'). Accordingly, Article 12 of the Directive provides almost complete immunity to intermediaries who merely provide technical access to the Internet such as telecommunications service providers or Internet service providers (ISPs). The same level of protection is accorded to providers of caching services under Article 13. By contrast, under Article 14 of the Directive, providers of hosting services (or 'hosts') may lose their immunity if they fail to act 'expeditiously' to remove or disable access to 'illegal' information upon obtaining 'actual knowledge' of the same. This effectively forms the basis of what is known as 'notice and takedown procedures' ('NTD'), which have been sharply criticized by several international human rights bodies, among

other things, for their chilling effect on freedom of expression: intermediaries tend to err on the side of caution and take down material which may be perfectly legitimate and lawful in order to avoid the risk of liability.[21]

22. In addition, Article 15 ECD prohibits MS from imposing a "*general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*". Article 15 therefore provides an important safeguard for Internet intermediaries since any monitoring requirement would immediately fix them with knowledge. It is also consistent with the overall approach of the ECD to illegal activity, which is reactive rather than preventative. Moreover, the prohibition under Article 15 constitutes a vital safeguard for the protection of freedom of expression online as it effectively prohibits Member States from requiring intermediaries to adopt filters as a means of preventing access to potentially unlawful content. Such filters are inherently incapable of distinguishing lawful from unlawful information online, so that there is always a risk that they may block access to perfectly lawful content.[22] Furthermore, the use of filters can be incredibly intrusive of individuals' private life, because they may involve "*a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent*".[23]

Implementation of the ECD and hosting activities

23. For the Directive to be effective, the Commission envisioned that it would apply to 'all information society services', i.e. "all services normally provided against remuneration, at a distance by electronic means and on the individual request of a service receiver".[24] This was effectively the definition already adopted in the Technical Standards and Regulations Directive 98/34/EC, which eventually made its way in the ECD.[25] Importantly, the Commission intended this broad definition to cover online newspapers.[26]

24. At the same time, the ECD did not define 'hosting services providers'. Rather, Article 14 referred to 'hosting' as the provision of a service "consisting in the storage of information provided by a recipient of the service". This provision subsequently became the subject of extensive litigation both at EU and national level in order to clarify the scope of the hosting protection. In the EU, the Court of Justice of the European Union ('CJEU') clarified the circumstances in which a commercial operator may qualify as a host in a series of cases pre-dating the domestic judgments in the *Delfi* case:

    - In *Google France, SARL and Google Inc. v. Louis Vuitton Malletier SA and Others* ('Google v LVMH'), the Court held that in order for an Internet service provider to be considered a host it must be "neutral", i.e. the service provider must not have played an "*active role so as to give it knowledge of, or control over, the data stored*."[27] The Court determined that Google was capable of being a host in relation to the content of advertisements submitted by users of its keyword advertising services.[28] The Court found that remuneration – and therefore the inherent existence of an economic interest in the relevant content - did not preclude hosting status.[29] In particular, the Court concluded that controlling the order of display of advertisements according to remuneration, setting payment terms, or providing general information to clients was no bar to hosting status.[30] Lastly, the Court stated that concordance between the keyword selected and the search term entered by an internet user was not sufficient to deem Google to be with knowledge or control over the data entered into its systems.[31]

    - In *L'Oreal v eBay*, the Court found that eBay was capable of being a host in relation to offers by sellers of goods on its online auction platform. By contrast, eBay was not acting as a host when it provided assistance to sellers by optimising the presentation of the offers for

sale in question or when promoting those offers.[32] In other words, in order to determine whether a commercial operator qualifies as host, it is necessary to look at the particular action the service provider is taking instead of the service provider's actions as a whole. Thus, acting non-neutrally in relation to some user content does not affect hosting protection for other user content, which has not been controlled.

25. The above criteria have been applied both by the CJEU and national courts to grant hosting protection to Internet intermediaries, including social networking sites,[33] blogging platforms,[34] chat rooms,[35] bulletin boards,[36] and video-sharing sites. [37] Protection has been granted despite those services providing features such as user guidelines and filters flagging 'forbidden' words for review under notice-and-takedown procedures.[38] Crucially, these platforms or websites all provide facilities for users to post comments online.

26. ARTICLE 19 submits that there is no material difference between the online platforms outlined above and online news sites for the purposes of user-generated comments. In particular, the technology and features used for online comments on websites are the same. Therefore, in our view, online news sites clearly fall within the hosting protection for the purposes of their online comment section. Moreover, as the above criteria make clear, the fact that online news sites may have an economic interest in the number of comments is no obstacle to benefiting from the protection of the Directive. Equally, there is nothing in Article 14 of the Directive or the case law of the CJEU to suggest that hosting protection depends on the ability of third parties to retain control over the information being posted. Such a contention would have the effect that search engines such as Google would never qualify for hosting protection. This would be plainly at odds with the purpose of the Directive and inconsistent with the emerging domestic case law on this point.[39]

The inconsistent approaches taken by national courts to the ECD

27. At the same time, it is apparent that the national courts of different EU member states have sometimes taken inconsistent approaches to the ECD, as detailed in a 2012 Commission Staff Working Document.[40] Among other things, this has been the result of the incorrect application by some domestic courts of their Press Laws or equivalent principles of editorial control.[41] In ARTICLE 19's view, however, the inconsistent approach of some domestic courts in this area does not make it any less reasonable for online news sites to rely on the Directive in order to protect them from liability for comments made by private users. Indeed, as the above examination of the CJEU's case law makes clear, the approach of the Estonian courts to the ECD is badly out of step with the consistent line of European jurisprudence on this point. ARTICLE 19 therefore submits that the approach taken by other national courts is to be preferred in this case.

28. In summary, while the E-Commerce Directive is deeply flawed in several respects,[42] it is clear from the context of international standards of intermediary liability as well as the comparative experience of other jurisdictions that it was meant to shield websites from liability for their users' comments, regardless of their own content. It is therefore incumbent upon the Court to ensure that the protection of Article 10 ECHR should, as a bare minimum, provide the same level of protection that the Community legislature intended under the Directive.

III. THE PROPER APPROACH TO THE LIABILITY OF ONLINE NEWS SITES FOR THIRD-PARTY COMMENTS

Immunity from liability for third-party content where the content itself has not been amended

29. ARTICLE 19 submits that while the normal liability rules should continue to apply to online news sites for the articles they publish, they should be considered as hosts – rather than publishers - for the purposes of the comment section on their website. In our view, this is consistent with the purpose of the ECD as interpreted by the CJEU and reflects best practice developed by associations of publishers such as GESTE (Groupement des Editeurs de Services en ligne) in this area.[43] Moreover, we submit that this approach is consistent with the Court's own findings in *Editorial Board of Pravoye Delo and Shtekel v Ukraine* that the Internet "*is an information and communication tool particularly distinct from the printed media*".[44] The Court found, "*the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.*"[45] As explained above, this is precisely why the ECD was developed as the traditional publishing liability rules were ill-suited to address the novel issues raised by the Internet (e.g. user generated comments).

30. We further submit that as hosts, online news sites should in principle be immune from liability for third-party content in circumstances where they have not been involved in directly modifying the content at issue. Moreover, as a matter of principle and in line with the international standards outlined above, they should only be required to remove content following a court order that the material at issue is unlawful. At the same time, ARTICLE 19 emphasises that the fact that an online news site should only be required to remove material following a court order does not prevent them from removing material in accordance with their Terms & Conditions or their house rules. Indeed, it is important to remember that it is always for each individual service provider to decide for himself or herself whether to allow readers or users of the site to post comments. The decision of a service provider to enable third party comments on their website merely reflects their willingness to engage in online conversation. While desirable, it is not an obligation and is not recognised as such under international law.

The existence of moderation systems should not be used to impose liability

31. ARTICLE 19 further submits that, as a general rule, it would be grossly unfair to hold online news media liable for comments posted by others on the basis that they *voluntarily* operate a moderation system. Moderation systems generally serve useful purposes, including by promoting respect between members of online communities. For example, post-moderation may be appropriate if anonymous Internet users start abusing each other online or the comments made are clearly racist. It is for this reason that several online newspapers recognised that they should provide a safe environment for their users and put in place self-regulatory moderation systems.[46] However, if service providers are fixed with knowledge simply on the ground that they operate such systems – rather than because they specifically intervened in the comments - this is likely to discourage them both from: (i) having a moderation system in place despite their other benefits; or (ii) even enabling comments in the first place, something which would undoubtedly diminish freedom of expression online more generally

32. Equally, ARTICLE 19 submits that online news sites should not be required to put in place moderation systems or forced to carry out general monitoring of content on their platforms in breach of their obligations under Article 15 ECD. In our view, any such requirements would

also be incompatible with Article 10 ECHR by putting intermediaries, i.e. private parties, in the position of 'policing' online speech and, in the case of filters, imposing a form of prior restraint on free expression. Moreover, we submit that just because online platforms have a number of technological tools at their disposal to remove users' comments does not mean that they have 'effective control' over them. Nor does it follow that they should use those tools (e.g. Internet filters) in circumstances where they would be highly detrimental to free speech.

Online news sites should not be held liable when complying with notice-and-takedown provisions

33. At the same time, ARTICLE 19 recognises that domestic courts in Europe are required to apply existing legislation, including notice-and-takedown provisions. To that extent, ARTICLE 19 submits that such provisions should be applied in a way that is maximally compatible with Article 10 of the Convention. In particular, we draw attention to the fact that, insofar as they qualify as hosts for the purposes of online comments, news sites are in principle *not required* to take down material upon notice. They only lose immunity from liability. In other words, they become more likely to be found liable for failure to act upon receipt of a complaint if legal action is taken against them.

34. This has two main consequences: *(i) a fortiori,* hosts should not be held liable when they take all reasonable steps to remove content upon notice, such as in the *Delfi* case; *(ii)* hosts should not automatically be held liable simply because they decided not to remove a comment upon notice. This is especially so given the lack of clarity surrounding the question of what 'actual knowledge' means under the ECD.[47] As a bare minimum, the courts should be slow to hold a host liable for refusing to remove a comment in circumstances where the removal request was generally unclear and in particular *(a)* failed to identify the location of the content at issue; or *(b)* failed to clearly identify the unlawful nature of the content at issue.[48] In this regard, it is worth remembering that the vast majority of online defamation claims are often too trivial, or not sufficiently serious, and the extent of publication is too minimal, to have caused any substantial damage to the reputation of the complainant.[49] Finally, we submit that intermediaries should not lose their protection as host when they remove content expeditiously and in any event within 24 hours. At the same time, we consider the term 'expeditiously' should be applied sufficiently flexibly to meet the circumstances of the host at issue.

IV. THE PROPER APPROACH TO THE HARMONIOUS INTERPRETATION BETWEEN THE CONVENTION AND EU LAW IN THIS AREA

35. ARTICLE 19 further submits that in cases involving EU law, it is incumbent upon the Court to pay close attention to the relevant framework and case law of the CJEU in interpreting the Convention to ensure consistency between the obligations imposed under EU and ECHR law. Failure to do so could put the parties in the impossible situation of having to be either in breach of their obligations under the Convention or in breach of their obligations under the EU Charter of Fundamental Rights. In addition, the Court should be careful not to set a lower standard of protection of free expression than that which has been established among EU member states by way of the Directive. To do so, ARTICLE 19 submits, would give rise to a breach of Article 53 of the Convention.[50]

36. ARTICLE 19 suggests that in circumstances where the national courts have manifestly erred in their interpretation of applicable rules of international or European law, the Court is not bound by the domestic courts' erroneous interpretation, especially where it would violate fundamental rights. In addition, it is well-established jurisprudence that the Court is "*the master of the*

characterization to be given in law to the facts of the case".[51] Moreover, as the ultimate arbiter of the proper interpretation of the Convention, it is the responsibility of the Court to make clear where the decisions of domestic courts are inconsistent with the requirements of the Convention.

CONCLUSION

37. With the advent of the Internet, the risk of liability is particularly high as millions of Internet users post comments online on a daily basis that others may consider to be defamatory or otherwise unlawful. Equally, service providers may be held liable for failing to remove illegal third-party material upon notice under notice-and-takedown regimes.

38. In ARTICLE 19's view, online news media should not be considered as publishers in respect of third-party comments on websites. Rather they should be considered as hosts who may only be held liable if they have specifically intervened in the content at issue. Equally, they should retain immunity from liability as hosts when they put a moderation system in place. A finding to the contrary would have a serious chilling effect on freedom of expression and would greatly undermine news publishers' business model at a time when the news industry is struggling to survive.

39. Similarly, insofar as notice-and-takedown provisions apply, we submit that as a minimum, hosts should not be held liable when they have expeditiously removed the allegedly unlawful content, which is the subject of the dispute. To hold otherwise would be both deeply unfair and would potentially lead to the complete shutdown of online comments which would undoubtedly diminish freedom of expression online.

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30 May 2014

[1] See also ARTICLE 19's submissions in *Jezior v Poland* (no. 31955/11), which raises the same issues in relation to bloggers: http://.article19.org/data/files/medialibrary/3670/Amicus-brief-Jezior-v-Poland-A19-submissions.pdf
[2] For a history of Usenet, see for instance, Godfrey v Demon Internet Limited, [1999] EWHC QB 244 (26 March 1999), at paras. 8 and 9; see also: http://www.newsdemon.com/history-of-usenet/beginning.php
[3] See UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, A/HRC/17/27, 16May 2011, available here: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf
[4] For a definition of Internet newsgroups and their common usage today, see: http://www.britannica.com/EBchecked/topic/1332816/newsgroup; one of the first Internet discussion forum of this kind was called Delphi and first appeared in the early 1980s: http://en.wikipedia.org/wiki/Delphi_(online_service)
[5] See Stevens J' Opinion in *Reno v American Civil Liberties Union*, 521 U.S. 844 (1997) quoting the District Court's judgment: http://www.law.cornell.edu/supremecourt/text/521/844#writing-USSC_CR_0521_0844_ZO
[6] ARTICLE 19 also refers to our brief in the *Jezior* case in which we set out what we believe to be the proper approach to online defamation; see also DLA Piper, *EU Study on the Legal Analysis of a Single Market for the Information Society*, Chapter 6 'Liability of Online Intermediaries', 2009, page 6, available upon request.
[7] See Joint Declaration on Freedom of Expression and the Internet, June 2011, available here: http://www.osce.org/fom/78309
[8] See UN Special Rapporteur on FOE report, cited above at n 3, para. 43.
[9] Ibid. para 47.
[10] ARTICLE 19 does not propose to detail the notice-and-takedown scheme under the DMCA since the vast majority of claims concerning third-party comments are defamation claims.
[11] This policy emerged as a result of the unsatisfactory outcome in two defamation cases: in *Stratton Oakmont, Inc. v. Prodigy Servs Co.*, a bulletin board was held liable as publisher of a libel on its platform despite its attempt at screening offensive comments; in *Cubby, Inc. v CompuServe, Inc.*, an internet platform was found not to be liable as it had taken no steps to remove offensive comments online. For a short history of section 230 CDA, see: https://www.eff.org/issues/cda230/legislative-history
[12] Ibid.
[13] See Commission proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, page 17, available at: http://www.edis.sk/ekes/ecomm_legalen.pdf
[14] See DLA Piper Study cited above at n 6, page 3
[15] Ibid. See for instance the example of France, page 4.
[16] See Recital 5 of the ECD.
[17] See also Recitals 40 to 49 ECD.
[18] See Commission proposal, cited above at n13, at page 17.
[19] See in particular Recitals 40 and 41 of the ECD and article 16 ECD (codes of conduct).
20 Self regulation in the context of the ECD has proved to be problematic in practice: see EDRI, *Human Rights and Privatised Law Enforcement,* February 2014, available at: http://edri.org/wp-content/uploads/2014/02/EDRi_HumanRights_and_PrivLaw_web.pdf
[21] See for instance, UN Special Rapporteur's report cited above at n 3 and OSCE report, Freedom of Expression and the Internet, July 2011, p. 30, available at http://www.osce.org/fom/80723.
[22] See Case C -70/10, *Scarlet Extended SA v SABAM*, 24 November 2011, paras 50-53 and Case C-360/10, *SABAM v Netlog*, 12 February 2012, paras 48-51.
[23] Ibid. It is also important to note that Recital 14 of the Directive provides that the Directive "*cannot prevent the anonymous use of open networks such as the Internet*".
[24] See Commission proposal, cited above at n13, page 2.
[25] See Article 2 and Recital 17 ECD.
[26] See Commission proposal, cited above at n13, page 15
[27] Cases C-236/08 to C-238/08 Google France & Google [2010] ECR I-2417.
[28] Ibid.
[29] Ibid. para. 116
[30] Ibid.
[31] Ibid. para. 117
[32] Case C-324/09 L'Oreal and others [2011] ECR I-06011, para. 123.
[33] *J19 and J20 v Facebook Ireland* [2013] NIQB 113
[34] See Spanish Supreme Court, *Royo v Google*, judgment 76/2013 of 13 February 2013; *Davison v Habeeb* [2011] EWHC 3031 at para. 56

[35] *Bunt v Tilley* [2007] 1 WLR 1243 at paras. 68, 76-77
[36] *Imran Karim v Newsquest Media Group Ltd* [2009] EWHC 3205 at paras. 3, 15, 17
[37] Italian Supreme Court, judgment 17 December 2013 concerning Google's video platform: http://merlin.obs.coe.int/iris/2014/4/article23.en.html
[38] See for instance the comment section on Amazon in *McGrath v Dawkins, Amazon and others* [2012] EWHC B3 (QB) at paras. 33, 42 and 48.
[39] See Judgment of Spanish Supreme Court, no. 144/2013, judgment 13 March 2013, p. 19 which held that Google qualified as an intermediary services for the purposes of Articles 12-14 ECD.
[40] Commission Staff Working Document SEC (2011) 1641 final, pages 24 – 30.
[41] In France, the courts' reliance on the notion of 'editor' in deciding whether interactive platforms should be considered as hosts has been criticized because of the lack of definition of 'editor': see Conseil superieur de la propriete litteraire et artistique, *Commission specialisee sur les prestataires de l'Internet*, Rapport, 15 Septembre 2008, p. 53 ff, available at http://ec.europa.eu/internal_market/e-commerce/docs/expert/20080915_report_en.pdf
[42] See ARTICLE 19's submissions in Jezior cited above at n1. Our submissions in this case highlight the lack of clarity of the provisions underlying notice-and-takedown procedures. In particular, it points to the serious chilling effect these procedures have on freedom of expression.
[43] See Conseil superieur de la propriete litteraire et artistique, *Commission specialisee sur les prestataires de l'Internet*, cited above at n40, p. 50
[44] Editorial Board of Pravoye Delo and Shtekel v Ukraine ,no 33014/05, 5 May 2011, at para 63
[45] Ibid.
[46] See the third-party intervention of MLDI and others in the present case.
[47] See Communication on e-commerce and other online services, SEC (2011) 1641 Final at page 32 ff, available at http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf
[48] For instance, in England and Wales, section 5 of the Defamation Act 2013 requires complainants to explain why the statement at issue is defamatory.
[49] For more details about proposed approach to defamation online, see our Jezior submissions cited above at n1.
[50] Article 53 provides that nothing in the Convention should be construed as limiting any of the human rights guaranteed under the national laws or international agreements entered into by High Contracting States.
[51] See Söderman v Sweden [GC], no.5786/08, para. 57, 12 November 2013; see also *Aksu v Turkey* [GC], nos. 4149/04 and 41029/04, para. 43, ECHR 2012.