

IN THE EUROPEAN COURT OF HUMAN RIGHTS

B E T W E E N :

ALEKSEY ANATOLYEVICH NAVALNYY

Applicant

- v -

THE RUSSIAN FEDERATION

Respondent

(1) ACCESS NOW

(2) ARTICLE 19

(3) ELECTRONIC FRONTIER FOUNDATION

(4) MASS MEDIA DEFENCE CENTRE

(5) MEDIA LAW RESOURCE CENTRE

(6) MEDIA LEGAL DEFENCE INITIATIVE

Third Party Interveners

JOINT WRITTEN COMMENTS OF THE
THIRD PARTY INTERVENERS

Introduction

1. The Third Party Interveners (“**the Interveners**”) submit these written comments pursuant to leave granted by the President of the Third Section under Rule 44 §3 of the Rules of the Court.¹
2. This case raises issues of considerable public importance with respect to the application of the right to freedom of expression and information protected by Article 10 of the Convention in the context of dissemination which occurs on the Internet on a day to day basis, and in particular the position of those who choose to post hyperlinked content, in this instance a link to a YouTube page. The Application is, on any view, likely to have an impact on a large number of journalists, academics, online activists, and others who use the Internet for the dissemination of information and ideas, as well as for their audiences throughout the Council of Europe member states.
3. *Summary of submissions.* By this intervention, the Interveners draw on their expertise as organizations working with international networks of media and information technology professionals to make the following three submissions to the Court:

¹ As set out in the letter dated 27 February 2017 from the Section Registrar, Mr. Stephen Phillips.

- (1) Given the ubiquitous operation of hyperlinking on the Internet, it is an impermissible interference with Article 10 for the use of hyperlinks to be capable of giving rise to liability in defamation;
- (2) Given the dynamic nature of the content on the Internet to which hyperlinks may provide access (but over which the poster of the hyperlink is unlikely to have control), attaching liability in defamation to the provision of hyperlinks risks a particularly pronounced chilling effect on freedom of expression in violation of Article 10; and
- (3) Defences that are available in law to the traditional media should also be made available to bloggers and online news sites – the formal designation of persons should be immaterial for the purposes of Article 10 rights in this context.

I: Hyperlinks and the Material Distinction between Authorship/Creation and Dissemination

4. The present case concerns the application of sanctions under the Russian law of defamation to the Applicant as a consequence of the Applicant's *dissemination* of existing online material, rather than the *creation* or *authorship* of new material. The materiality of this distinction is well-established in the case law of this Court. As is implied in the third question communicated to the parties in this Application, it is necessary, in any case concerning alleged defamation, to '*make a distinction between the applicant's own commentary and the contents of the video linked from his blog post.*' In this regard the position of this Court is clear, as summarized in *Godlevskiy v. Russia*:²

[A]n indiscriminate approach to the author's own speech and statements made by others is incompatible with the standards elaborated in the Court's case-law under Article 10 of the Convention. In a number of cases, the Court has held that a distinction needs to be made according to whether the statements emanate from the journalist or are a quotation of others, since punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.³

5. Maintaining this distinction is, in the Interveners' submission, crucial to ensuring that restrictions on freedom of expression go no further than what is necessary⁴ under the Convention, bearing in mind the essential function of journalism and

² *Godlevskiy v. Russia* [2008] ECHR 1169, [45].

³ See also: *Jersild v. Denmark* (1995) 19 EHRR 1; [1994] ECHR 33, [35] (Grand Chamber); *Thoma v. Luxembourg* (2003) 36 EHRR 21; [2001] ECHR 240, [62]; and *Flux v. Moldova (No 5)* [2008] ECHR 573, [24]-[26].

⁴ Restrictions to freedom of expression must be construed restrictively: see the Grand Chamber in *Animal Defenders International v. the United Kingdom*, [2013] ECHR 362, [100].

the public's right to receive information in a democratic society.⁵ If liability were to attach not only to statements made by journalists and commentators, but also to all existing statements made by others to which that journalist or commentator makes reference (by posting links online or otherwise), that would have a dramatic chilling effect on the use of hyperlinking. As this Court noted in *Thoma v. Luxembourg*,⁶ in the context of potential liability for the contents of quotations repeated in a journalist's work:⁷

'A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions, and ideas.'

6. If the law must be slow to attach defamation liability to a journalist for dissemination of a third party's opinions and comments - recognizing the public interest in the free dissemination of information and their right to receive information and ideas - then it is submitted that it must be particularly cautious before allowing liability in defamation to attach to the dissemination of those opinions by way of the inclusion of hyperlinks in online material. That is because, unlike conventional quotation in material published offline, in which the contents of the secondary material referred to will be excerpted and/or summarized for the reader of the primary article, hyperlinks operate merely as *optional* references for further investigation, which each reader of the content may or may not pursue. Accordingly, the link between the journalist or commentator disseminating the hyperlink and the contents of that link is even more tenuous than the link between a journalist directly quoting the views of another and the contents of that quotation.
7. Hyperlinking is essential to the free flow of information on the Internet. The system of hyperlinking has been explained by the English High Court in the following terms:⁸

'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.'

⁵ This is well-established in this Court's case law: see *Jersild v. Denmark*, 23 September 1994, Series A no. 298, [31]; and *Sunday Times v. United Kingdom*, [65].

⁶ *Thoma v. Luxembourg* (2003) 36 EHRR 21; [2001] ECHR 240.

⁷ *Id.*, [64].

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

8. Hyperlinks therefore play the role of a sophisticated and instant cross-referencing system, which allows readers to obtain a substantial amount of information relevant to a single publication (whether that additional information is in the form of supporting, challenging, or expanding upon the contents of the underlying publication). The role of hyperlinks has been described as *'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
9. Through providing swift access to a vast amount of online material, hyperlinking facilitates the free expression of information. The use of hyperlinks means that journalists and online commentators are not required to expend time in producing inherently partial description of content, and can instead present that content in full to their readership. Further, by the easy provision of primary sources via hyperlinking, the publication of information (and its consumption) is rendered more democratic, and the opportunity for the readership to investigate and assess the credibility of the information is presented.
10. The Interveners submit that the correct characterization of what occurs when a person posts a hyperlink is that adopted by a number of courts around the world which treat the actions of the party providing a hyperlink as merely *facilitating* the exploration of the readership by providing that readership with a choice as to whether or not to refer to the primary or alternative material.
 - 10.1. As the United States Court of Appeals for the Third Circuit stated in the case of *In Re Philadelphia Newspapers*, *'though a link and reference may bring readers' attention to the existence of an article, they do not republish the article'* and therefore do not create defamation liability under U.S. law.¹⁰ In a similar vein, the United States District Court for the Southern District of New York has noted that, *'[t]he hyperlink is the twenty-first century equivalent of the footnote.'*¹¹ The Court further explained, in rejecting the theory of defamation by hyperlinking, that: *'[P]rotecting defendants who hyperlink to their sources is good public policy, as it fosters the facile dissemination of knowledge on the Internet. It is true, of course, that shielding defendants who hyperlink to their sources makes it more difficult to redress defamation in cyberspace. But this is only so because Internet readers have far easier access to a commentator's sources. It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits.'*¹²

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

¹⁰ *In Re Philadelphia Newspapers LLC* (2012) 690 F.3d 161, at p. 174-75.

¹¹ *Sheldon G. Adelson v. David A. Harris, Marc R. Stanley, and National Jewish Democratic Council*, 12 Civ. 6052 (JPO) (S.D.N.Y. 30 September 2013), at p. 23, AFE-27.

¹² *Id.*, at p. 24-25, AFE-27.

- 10.2. The Supreme Court of Victoria was faced in the case of *Cripps v. Vakras*¹³ with the question of whether an article hyperlinking to a previous article could be treated as having adopted the contents of the previous article. The Court placed particular emphasis in its reasoning on the fact that the provision of hyperlinks does not demand of the readership that each of those hyperlinks will necessarily be pursued. Justice Kyrou noted that hyperlinks constitute ‘*no more than a choice that is offered to the reader to quickly and conveniently pursue further reading of separate publications.*’¹⁴
- 10.3. The German Federal Court has held that it is ‘*generally permitted to report on statements that illegally impair third parties’ rights of personality, despite the perpetuation or even amplification of the initial violation by means of the dissemination if there is a predominant interest in information and the disseminator does not annex the reported statements as his/her own.*’¹⁵ Further, ‘*in the interest of freedom of expression and freedom of press ... if hyperlinks only facilitate access to public sources that are accessible anyway, the obligation to scrutinize [the link’s destination] may not be subjected to all too strict requirements.*’¹⁶
- 10.4. The Supreme Court of Canada in *Crookes v. Newton* explained in a decision holding that hyperlinking does not amount to defamation, that unlike speaking or writing, referencing via hyperlink ‘*by itself, is content-neutral – it expresses no opinion, nor does it have any control over, the content to which it refers.*’¹⁷ The Supreme Court of Canada observed that ‘*[a] reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting control over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not ... These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition.*’¹⁸
11. Where a reader has the choice to pursue a hyperlink or not, one of the fundamental aspects of the traditional model of publication breaks down. It is well established as a principle of defamation law worldwide that liability cannot arise until publication of a defamatory statement takes place. Publication for the purposes of an action in defamation is, in turn, a two-stage process, involving not

¹³ *Cripps v. Vakras* [2014] VSC 110.

¹⁴ *Id.*, [26] (Kyrou J).

¹⁵ German Federal Court of Justice, I ZR 191/08 (14 October 2010), [26], AFE-20.

¹⁶ German Federal Court of Justice, I ZR 317/01 (1 April 2004), at p. 14, AFE-19.

¹⁷ *Crookes v. Newton*, [2011] 3 SCR 269, [30].

¹⁸ *Id.*, [26] and [27].

only the act of making the content available to others, but also the reception by the reader or audience of that content so that it is then known by them.¹⁹

12. The operation of hyperlinks therefore disrupts the direct relationship between the publisher and the readership on which the traditional law of defamation is based. Indeed, given the way in which hyperlinks operate, by *facilitating*, but not *mandating*, the dissemination of the contents of that link to the readership, it is not rational for the party providing those links to be held responsible for the content which the readership has of its own volition explored (albeit facilitated by the research of the party posting the link). The analogy with the role of a library catalogue, or an Internet search engine, is instructive. As the English High Court noted in *Metropolitan International Schools Ltd v. Design Technica Corp*, relying on the library analogy to determine that an Internet search engine ought not to be held responsible for the content of pages to which it provided links, '*it is hardly realistic to attribute responsibility for the content of those books [in a catalogue] to the compiler(s) of the catalogue.*'²⁰
13. Accordingly, the Interveners submit that attaching liability in defamation to the provision of hyperlinks (even to content that might be subsequently held to be defamatory) constitutes an impermissible interference with Article 10, while at the same time offending the theoretical foundations of defamation law itself. This submission, which this Court is invited to accept, is consistent with international standards.
 - 13.1. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that '*no-one should be held liable for content on the Internet of which they are not the author.*'²¹
 - 13.2. In their Joint Declaration, the Special Rapporteurs of the United Nations, the Organization for Security and Co-operation in Europe, and the Organization of American States have similarly stated that: '*[n]o one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content.*'²²

¹⁹ *Pullman v. Walter Hill & Co* [1891] 1 QB 524, at p. 527 ('What is the meaning of publication? The making known the defamatory matter after it has been written to some person other than the person of whom it was written').

²⁰ *Metropolitan International Schools Ltd v. Design Technica Corp* [2011] 1 WLR 1743 (QB), [52] (Eady J).

²¹ Frank La Rue, UN Special Rapporteur, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011), UN Doc. A/HRC/17/27 ('La Rue Report'), [43].

²² Joint Declaration of the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (21 December 2005), in OSCE, *Joint Declarations of the Representatives of Intergovernmental Bodies to Protect Free Media and Expression* (2013), at p.38, available at: <https://www.osce.org/fom/99558?download=true>. See also Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations*, Second Edition,

II: Dynamic Content and the Chilling Effect

14. The Court will be well aware that hyperlinked content can itself be changed by the person that has control of the webpage, after the hyperlink itself has been generated and shared. Imposing liability on someone who simply posts or shares a hyperlink for contents over which it has no control exposes persons exercising their freedom of expression online to potential sanctions which they have no effective means of avoiding, giving rise to a particularly serious chilling effect online.²³ That excessive impact, particularly bearing in mind the importance of hyperlinking to the contemporary use of the Internet, is incapable of justification under Article 10(2).

15. The function of the Internet in transforming the means and extent of publication and the exchange of information and ideas has been fundamental. As this Court has noted in *Ahmet Yildirim v. Turkey*, ‘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.’²⁴ The particular importance of the Internet as a medium capable of enhancing free access to information and the exchange of ideas without territorial or social restrictions has also been widely endorsed at the international level. The United Nations Special Rapporteur on Freedom of Opinion and Expression has observed that the Internet is now ‘one of the most powerful instruments for increasing ... access to information, and for facilitating active citizen participation in building democratic societies.’²⁵ In the light of that, the United Nations Human Rights Committee has urged all States in strong terms to ‘take all necessary steps to foster the independence of these new media and ensure access of individuals thereto.’²⁶

16. As set out above, hyperlinks are ubiquitous in the contemporary Internet, supporting the access of the readership to a wide range of material which would otherwise be unavailable to them without specialist resources and background knowledge. At one level, the use of hyperlinks resembles conventional referencing offline. But hyperlinks have distinct features which distinguish their use from the use of references in print materials. One such feature is that pages to which a publication may link are dynamic. That is to say, while the hyperlink itself may remain the same, the content of the web page to which that hyperlink

available at: <https://www.article19.org/data/files/medialibrary/38641/Revised-Defining-Defamation-Principles-2016.pdf>.

²³ See *Pihl v. Sweden*, Application No. 74742/14, [35], where, in the context of an Internet portal where third party comments are posted, this Court has recognized the chilling effect liability of the portal operator for such comments will have on freedom of expression. See also *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Application No. 22947/13, [86].

²⁴ *Ahmet Yildirim v. Turkey* [2012] ECHR 2074, [54].

²⁵ La Rue Report, [2].

²⁶ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of Opinion and Expression* (12 September 2011), UN Doc. CCPR/C/GC/34, [15].

gives a reader access is liable to change over time without the person who posted that hyperlink being made aware of the change. As a result, individuals who post hyperlinks have no control over the information to which their readership may have access through those hyperlinks, and thus no guarantee as to the content of the material linked to what they personally publish online. This aspect of hyperlinks has been noted by the Supreme Court of Canada in the *Crookes* case, in which the majority observed that:²⁷

‘Because the content of the [linked] article is often produced by someone other than the person who inserted the hyperlink in the primary article, the content on the other end of the link can be changed at any time by whoever controls the secondary page. Although the primary author controls whether there is a hyperlink and what article that word or phrase is linked to, inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked.’

17. Accordingly, while hyperlinks have clear public interest benefits and are an integral part of the structure of contemporary publishing on the Internet, by their nature, those hyperlinks leave the individual who inserts those links into a publication with no control over potential changes to the content to which the links provide access. If individuals are held liable for the contents of hyperlinked material, even though those publishers have no guarantee of control over that content, it will be inevitable that the willingness of publishers to make use of hyperlinks will effectively disappear, giving rise to a significant chilling effect and an unjustifiable interference with Article 10 rights. As the Supreme Court of Canada noted in the *Crookes* case:²⁸

‘The potential “chill” in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning.’

III: Uniform Availability of Defences

18. Finally, the Interveners note that, on the facts of the Application, the Russian domestic courts have held that defences commonly available in the Russian law of defamation to professional media organizations may not be available to the Applicant given that his publications were not made in the capacity of a professional journalist, but rather as an online commentator on current events and political affairs.

²⁷ *Crookes v. Newton* [2011] 3 SCR 269, [27] (Abella, Binnie, LeBel, Charron, Rothstein, and Cronwell JJ). See also: *Oriental Press Group Ltd v. Fevaworks Solutions Ltd* [2013] HKCFA 47 (Hong Kong Court of Final Appeal), [88] (Ribeiro PJ); and Case C-160/15 *GS Media BV v. Sanoma Media Netherlands BV and ors* ECLI:EU:C:2016:644, [46].

²⁸ *Crookes v. Newton*, [36] (Abella, Binnie, LeBel, Charron, Rothstein, and Cronwell JJ).

19. Without making specific submissions about the particular facts giving rise to the Application, the Interveners would like to respectfully draw the Court's attention to the position it has previously taken in cases such as *Braun v. Poland*²⁹ and *Magyar Helsinki Bizottsag v. Hungary*³⁰ to the effect that absence of formal designation of a person as a professional journalist ought to have no effect on the protection of that person's freedom of expression under Article 10 of the Convention.
20. A crucial function of Article 10 is to protect the dissemination and exchange of information and opinion relating to matters of public concern. That is a function in which a range of participants take part – not only journalists with certain professional affiliations or training, but also to academics, commentators, and politicians, as well as members of the general public who publish information. Further, international bodies have adopted a wide definition of “journalist”, covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as journalists.
- 20.1. As this Court noted in *Braun v. Poland*, ‘*the Convention offers a protection to all participants in debates on matters of legitimate public concern,*’³¹ regardless of profession.
- 20.2. The Council of Europe's Committee of Ministers has defined the term “journalist” as ‘*any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.*’³²
- 20.3. The UN Human Rights Committee has observed that journalism is a function ‘*shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of selfpublication in print, on the internet or elsewhere.*’³³
- 20.4. In the communicated case of *Toktakunov v. Kyrgyzstan*, the United Nations Human Rights Committee has taken the same approach in observing that protections intended to secure freedom of expression cannot sensibly, in the context of the contemporary diffusion of access to information on the Internet, be restricted to persons bearing some formal designation as media professionals.³⁴

²⁹ *Braun v. Poland* [2014] ECHR 1189.

³⁰ *Magyar Helsinki Bizottsag v. Hungary* [2016] ECHR 975 (Grand Chamber).

³¹ *Braun v. Poland* [2014] ECHR 1189, [47].

³² *Recommendation No. R (2000)7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information*, adopted 8 March 2000.

³³ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of Opinion and Expression* (12 September 2011), UN Doc. CCPR/C/GC/34, [44].

³⁴ *Toktakunov v. Kyrgyzstan* (28 March 2011), UN Doc. CCPR/C/101/D/1470/2006, [6.3] and [7.4].

21. Accordingly, the Interveners submit that any approach adopted by domestic courts which renders certain defences available only to certain persons (for example, media professionals) exercising their freedom of expression, but not to other persons similarly engaged in debate on matters of public concern (for instance, non-professional commentators, such as academics, politicians, and civil society activists), is inconsistent with the long-observed principle that protection of freedom of expression is available to all, consistent with its designation as a human right, rather than a privilege of a particular professional class. The Interveners respectfully invite the Court to take this opportunity to reaffirm its commitment to this principle.

**CAN YEGINSU
ANTHONY JONES
4 New Square Chambers**

London, 18 April 2017