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The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

Third Party Intervention Submission by
European Information Society Institute (EISi)

In re *Delfi AS v. Estonia*, App. no. 64569/09

INTRODUCTION

- This third-party intervention is submitted on behalf of the European Information Society Institute (EISi), an independent non-profit organization based in Slovakia which focuses on the overlap of technology, law & the information society. EISi promotes human rights in a digital society by conducting impact litigation before the courts. It also serves as a research center for high-technology law. Among other things, in the field of liability of intermediaries and freedom of expression, EISi regularly helps small providers balance freedom of expression of their users and their responsibility towards other human rights in daily practice.

- EISi 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 Rule of Court. This submission does not address the facts or merits of the applicant's case.

- In our submission, we address the following: (i) importance of the decision and task of the Court, (ii) practical impact of allowing the strict liability of intermediaries (non-editorial distributors of third party information) under Art. 10 of the Convention, and (iii) our suggested human right limits for the liability of intermediaries.

For the Intervener:

Martin Husovec, Legal Counsel

TASK OF THE COURT

(1) This case poses an important question of *human rights limits* related to the accountability of Internet intermediaries for speech of others. The task before the court is *not* to pick up one uniform model of regulation, but to *outlaw the extremes* of any regulation. The Court should strive to guarantee an effective remedy of injured parties on the one hand, and to preserve a fertile space for a public discussion needed in a democratic society on the other.

(2) In carrying out this task, we urge the court to resist in pronouncing the rule, which would mirror its *expectations* of a perfect or ideal societal discussion on the Internet. This can never be achieved. And any attempt to prove otherwise would only lead to a great sacrifice of a free discussion on the Internet, but without any tangible achievement. The Internet, unlike other media, is not subject to editorial control. This means that content that is carried around is not only positive or beneficial, but often also unsettling and unacceptable. It is much like the discussions that occur in a colloquial, off-line everyday, which are in the democratic societies not subjected to any editorial control that would be cultivating these expressions.

(3) This does not mean that we should watch without any action how human rights are disregarded on the Internet. On the contrary, and as the First Section decision of the Court rightly indicated, the State's positive obligations under Article 8 may involve the adoption of measures designed to secure respect for private life allowing an injured party to bring a claim not only against the authors of defamatory comments, but also against intermediaries (§ 91 of the judgment). Such *an effective remedy*, however, does *not* immediately require a full strict tort liability of an intermediary for speech of others. It can take form of claims for information, injunctive reliefs for removal, or even monetary compensations if carefully crafted.

(4) As we will argue in this submission, the full strict liability imposed by the Estonian courts, is not only in-compliant with the European Union law obligations[1], but also with the obligation to respect freedom of expression under Article 10 of the Convention[2]. In reviewing this case, we wish to invite the Court *to adopt the perspective of a small intermediary* and that not of a big corporation, *as a basis for its factual assumptions*. This is because of the following reasons. Firstly, it is a small and micro intermediaries such as hobbyists, amateurs, small businesses or unknown artists that dominate today's Internet. Any ruling of the Court, will be predominantly addressing their daily situations. Secondly, big intermediaries who have additional resources quite often exceed the exceptions of the law anyway because they have various business incentives to do that[3]. Hence, the Court does not need to worry that bigger intermediaries will be otherwise shielded from their social responsibility of moderating public debate. Thirdly, small intermediaries are often the first target of

1 Other third party interveners explain this point more in-depth.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms.

3 If an environment is predominated by offensive comments, many readers are discouraged from contributing with any meaningful discussion of the issues. Notoriously offensive comments of users also hurt a brand. For overall preview of the industry practicies – See WAN-IFRA, Online Comment Moderation: Emerging Best Practicies. 2013. Available online at http://www.wan-ifra.org/reports/

lawsuits, because they usually can not afford a litigation and easily exhaust their (often personal) finances and thus quickly give up[4].

(5) Last but not least, the Court should, in our view, focus mainly on the conflicts that arise in the context of *defamatory third party material*. The Court should *not be discouraged* to pronounce strong rules only due to the fact that other fields of law, do not necessarily pose concerns of similar magnitude regarding the freedom of expression. Different treatment for these cases can be addressed in the future case-law.

EFFECT OF STRICT LIABILITY

(6) In our work, we daily see small intermediaries struggling with striking the right balance between the freedom of expression of their users and rights of others. Small intermediaries lack legal departments, and mostly rely on their intuition of what is right. They take third party content down upon notice if they feel it is *unmistakably unlawful*. The real dilemma they face starts when it is not, because external information such as true facts or case-law is needed to clarify the unlawfulness. Many small intermediaries take the content down anyway, because they fear a legal action. Some of them *then* forward the demands to users, but many of them do not feel ready to make the content available again, even if their users explanation of the statements sounds plausible. And even if an intermediary such as a discussion forum provider decides to stand up for the user, this is not enough, because other intermediaries whose cooperation is essential to disseminate the content, such as domain name registrars, web-hosting companies or social networks, need to defend the user's speech as well. If anybody in the "Internet chain" does not stand up for speech, that will be enough to remove it from on-line circulation. Legitimate but uncomfortable speech on the Internet is therefore more fragile than it appears to be.

(7) The above situation happens despite the fact that a sufficient notice is often a prerequisite of any liability of the intermediary in many countries. Imposing a liability without any notice, which is what the Estonian court suggests, means for most of the small intermediaries either entire foreclosure of any public discussion or at least making it subject to a strong editorial control. In either case, very few intermediaries can expose themselves to the burden of risk, which strict liability entails. Therefore, *instead of cultivating* the public discussion, strict liability *removes discussion* from most of the small platforms.

(8) Over-compliance based on fear is only multiplied under the strict liability rule and more strongly leads to *collateral censorship*, which the Court repeatedly considered to outlaw as inadmissible in its case-law (*Yildirim v. Turkey*[5] [over-blocking of a website

4 An example of an attempt of this kind is a lawsuit against a local activist website „www.povazska-bystrica.otvorene.sk", which is reporting on local politics in a city of Povazska Bystrica in Slovakia. An NGO behind the website – Klub Strazov – was sued in this case by a local politician who disliked certain third party comments concerning one of the balanced articles. The plaintiff was trying to impose strict liability upon the operator of the website demanding 5000 euros as compensation as well as removal of the comments. The abusive nature of the lawsuit can also be infered from the fact that the plaintiff sued even without sending a prior notice to the operator.

5 Application Number 3111/10.

with legitimate content]; *Mouvement raelien Suiise v. Switzerland*[6] [baning an entire poster campaign because of the referred website with illegal content], *Ürper and Others v. Turkey*[7] [suspension of the entire newspaper]). In this case, the collateral censorship is more latent because it does not happen directly upon an act of State, but *indirectly* by imposing wrong incentives - in a form of high liability standards without sufficient safeguards - on private individuals acting as intermediaries. The Court should, in our view, pay equal attention to such less obvious instances of collateral censorship.

(9) It should be reminded that exactly these small platforms are often the driving forces behind public discussion, which is absent in the mainstream media, either because they are too uncomfortable for the editorial board of newspapers, who operate for profit, or because they are significant only for commercially unattractive small communities. In Slovakia, for instance, there are many local news websites that report on local "micro politics", which are completely absent in the mainstream media. Information on these services is often submitted directly by citizens and processed by non-profit websites run by local activists. These websites shed a light on petty corruption in society, environmental and religious dilemmas, or problems of minorities. In other words, issues concerning which, often no or even negative commercial interest exists.

(10) The benefits of *non-editorial decentralized speech* are not just limited to those stated above. They are also going to the heart of defending the very democratic system. Media decentralization enabled through the Internet also challenges mainstream media monopoly on the public debate as we know it from the last century. The effects of *media decentralization* are in many aspects reminiscent of *government (administrative) decentralization*, effects of which Alexis de Tocqueville[8] summarized as follows:

> "Decentralization has, not only an administrative value, but also a civic dimension, since *it increases the opportunities for citizens to take interest in public affairs; it makes them get accustomed to using freedom*. And from the accumulation of these local, active, persnickety freedoms, is born *the most efficient counterweight against the claims of the central government*, even if it were supported by an impersonal, collective will." [emphasis ours]

If one substitutes the central government for the mainstream media, a similar pattern can be seen.

(11) This decentralization of a public debate was made possible by very low construction costs for platforms that enable distribution of content. Aided by free software licensed solutions such as Media Goblin, Wordpress or Joomla[9], any citizen

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6 Application Number 16354/06.

7 Application Number 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07.

8 Tocqueville, A. *De la démocratie en Amérique*. Saunders and Otley,1835–1840.

9 MediaGoblin is a free software media publishing platform. It is somewhat of a decentralized alternative to Flickr, YouTube, or SoundCloud - *See* http://mediagoblin.org/; WordPress is a free and open source blogging tool and a content management system, which runs on a web hosting service. It is used by more than 22.0% of the top 10 million websites as of August 2013. - *See* http://w3techs.com/technologies/overview/content_management/all/; Joomla is a free and open-source content

today, with only limited technical skills and virtually no financing, can set up a 'media platform' and invite its fellow citizens to contribute. Because they do not need to ask for permission from anybody, or pay for promotion of their content, as cost-free services such as search engines and social networks deliver the content to their audience, the exposure and impact of decentralized speech is higher than ever[10]. Imposing strict liability for third party comments sweeps away all these advantages.

(12) In a similar way, even big media companies that redistribute decentralized speech can also provide certain types of services only without editorial control. These services can be offered *only* if the diligence of their operators is taken into account before any liability is imposed on them. Twitter, Facebook or VKontakte publish daily millions of short messages that originate from users. These services have the inherent value in capturing and spreading immediate reactions of people to the world around them - the characteristics that are incompatible with any editorial control. Because imposing strict liability on intermediaries means making all the services subject to editorial control, such legal rule leads to *sacrifice of the instant and rapid decentralized speech*.

(13) The immense value of a decentralized speech is best seen in the countries, where the (centralized) mainstream media are not sufficiently free, like in China. Scholar Ya-Wen Lei, in a book "Political Communication in China", notes in support of this[11]:

> ".. despite the competent authoritarian state, *a more decentralized media system enabled by technology has contributed to a more critical and politicized citizenry in China's cyberspace*. The Internet had made it possible for China's media system to undertake a new, albeit restricted and contingent role as communication institution of the society." [emphasis ours]

(14) In other words, decentralized speech enabled by non-editorial platforms also supplements and supports the 'watchdog role' that is traditionally associated with the mainstream media. It may even become a driving force behind public debate in situations in which mainstream media are failing, whether for political or market reasons, to perform its societal function. The fertile environment for public discussion outside of the centralized media therefore needs to be preserved. The 'watchdog role' of media has been strongly advanced by this Court in its case-law[12]. In our view, it should be extended to also cover platforms that take advantage of decentralized

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management framework for publishing web content. It is estimated to be the second most used content management system on the Internet after WordPress.

10 This is also recognized by big media companies themselves such as the New York Times, which in its recently leaked innovation report, lists mainly companies like Twitter, LinkedIn, Medium and others as the emerging competitors - See http://www.scribd.com/doc/224332847/NYT-Innovation-Report-2014

11 Tang, W., Iyengar, S. (Ed.) *Political Communication in China: Convergence or Divergence Between the Media and Political System?* Routledge, 2013.

12 Jersild v. Denmark, Application Number 15890/89; Bladet Tromso & Stensaas v. Norway, Application Number 21980/93; Dalban v. Romania, Application Number 28114/95; Bergens Tidende v. Norway, Application Number 26132/95; Thoma v. Luxembourg, Application Number 38432/97; Colombani & others v. France, Application Number 51279/99; Karakoç & others v. Turkey, Application Number 27692/95, 28138/95 and 28498/95; Cumpana & Mazare v. Romania, Application Number 33348/96; Grinberg v. Russia, Application Number 23472/03; Dammann v. Switzerland, Application Number 77551/01; Dupuis & others v. France, Application Number 1914/02; TASZ v. Hungary, Application Number 37374/05; Ürper & others v. Turkey, Application Number 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07; Youth Initiative for Human Rights v. Serbia, Application Number 48135/06; and other cases;

speech of individuals disseminated without an editorial control. After all, Art. 10 of the Convention already protects not only authorship, but also publication and dissemination of speech by third parties such as publishers, who provide "authors with a medium", and thus "participate in the exercise of the freedom of expression" (*Öztürk v. Turkey*)[13]. Any restriction on the dissemination of the information in the form of liability, also inevitably diminishes the value of initial authorship.

(15) Moreover, the Grand Chamber of this Court already held in *Jersild v. Denmark*[14] that "unless there are particularly strong reasons for doing so", punishment[15] for assisting in the dissemination of statements made by another person should not be accepted under Art. 10 of the Convention because such would seriously hamper any contribution to public debate. In the present case, the Estonian court imposed strict liability upon the person who assists in such dissemination.

(16) In our view, if strict liability is accepted as permissible under Art. 10 of the Convention, such would mean that national courts and legislators would be allowed to push against and eventually quench the less mainstream non-editorial public discussion by simply imposing high liability standards in the name of protecting rights of others or of public order. This can then be used by States to either directly prosecute individuals behind the platforms, or indirectly to manipulate the incentives of private individuals, thus discouraging non-editorial freedom of expression, which is more difficult to control. Allowing this would be especially worrying in States and during the periods, when the mainstream media are increasingly controlled by people with ties to the highest politics. In these cases, decentralized speech helps to counter-balance any non-democratic forces.

SUGGESTED HUMAN RIGHTS LIMITS

(17) In a democratic society, an effective remedy, and not a weapon of mass destruction, is needed to tackle a problem of enforcing rights of others. Imposing strict liability is such a weapon of mass destruction of non-editorial and decentralized speech. Effective remedy can be achieved by means of claims for information against intermediaries, claims for removal of content or carefully crafted tort liability rules. The margin of appreciation is broad enough for national jurisdictions.

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13 Öztürk v. Turkey, App. No 22479/93, notes in full that: "providing authors with a medium they participate in the exercise of the freedom of expression, just as they are vicariously subject to the "duties and responsibilities" which authors take on when they disseminate their opinions to the public"; a similar opinion is also presented by the Advocate General before the CJEU in *UPC Telekabel* C-314/12 who notes "So far as concerns the ISP, against which a measure under Article 8(3) of the directive is being adopted, a restriction of freedom of expression and information (Article 11 of the Charter) must first be examined. Although it is true that, in substance, the expressions of opinion and information in question are those of the ISP's customers, the ISP can nevertheless rely on that fundamental right by virtue of its function of publishing its customers' expressions of opinion and providing them with information."; *see* for a similar development in the US the case of Smith v. California, 361 U. S. 147 ("The free publication and dissemination of books obviously are within the constitutionally protected freedom of the press, and a retail bookseller plays a most significant role in the distribution of books.").

14 Application Number 15890/89.

15 The Court noted in this case: "In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."

(18) In our opinion, full tortious strict liability that forces intermediaries to total monitoring of millions of users and their sheer endless volume of speech, of which only an exiguous part is illegitimate, is exactly the type of extreme situation, which the Court should outlaw by its interpretation of Article 10 of the Convention. This can be achieved for instance by *moving the prohibition of a general monitoring obligation up to a human rights requirement of Article 10 as an abstract principle for all disseminators of non-editorial content*.

(19) The prohibition of a general monitoring obligation is an explicit rule foreseen in European Union law, namely Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive). Its Article 15 provides that "Member States shall not impose a general obligation on providers, when providing" certain types of services, "to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity". This rule, as we will demonstrate, is more than just a piece of secondary legislation – *it is a human rights standard*.

(20) Our support for this claim is twofold. First of all, some of the highest European courts already seem to intuitively come to this conclusion even in cases, where such an obligation is not prescribed by European law (Article 15 of the E-Commerce Directive). The German Federal Supreme Court (BGH) held few times that general monitoring obligation would be 'disproportionate' in the light of involved human rights such freedom of expression or freedom to conduct business even outside of its applicability.

(21) In 1976, the BGH decided an important case (*VUS*, VI ZR 23/72) involving an importer of Yugoslavian newspapers to Germany that included untrue libelous statements. The BGH concluded in this case that imposing a general monitoring obligation would be unreasonable, though maybe technically feasible. An importer, said the BGH, should be obliged to control only a certain specific texts of specified newspapers, which were brought to his attention, and does not need to control content of all the imported newspapers before the import. This consideration is based exclusively on the grounds of *proportionality*, without any reference to provisions of the 'ordinary law'.

(22) A similar assessment of proportionality re-appears in the newer case-law of the BGH, in cases where the German implementation of Article 15 of E-Commerce Directive does *not* apply, either because a provider was found to be an active hosting[16] service (*Kinderhochstühle im Internet II.*, I ZR 216/11)[17], or actually never fell under any of the safe harbors – *in casu*, the Google search suggestion tool (*Auto-compelete*, VI ZR 269/12). In both situations, the court rejected a general monitoring obligation

16 According to the case-law of the CJEU, other than passive hosting does not qualify for the hosting safe harbour of Article 14 of the E-Commerce Directive. As a consequence, also Article 15 does not apply to it.

17 Although BGH misleadingly refers to Article 15 of the E-Commerce Directive, it is clear from its wording that this provision does not apply to servies that are not covered by any of the safe habors, such as active hosting. BGH then also refers to § 139 of *L'Oréal v. eBay*, which states this more as a general principle (see 24 of this submission).

as it considered such an obligation to be *disproportionate*. In the latter case, the BGH expressed this fair balance as follows:

> Accordingly, the interests of the plaintiff on the protection of his personality rights on the one hand, must be weighed against the interests of the defendant in freedom of expression and freedom to conduct a business, protected under Article 2, 5(1) and 14 of the German Constitution, on the other. [..] The operator of a search engine is therefore basically not obliged to generally control beforehand its software-generated search suggestions in order to monitor eventual infringements. This would make the operation of a search engine with a quick user-serving suggestion tool if not completely impossible than at least unreasonably complicated[18].

(23) This approach is understandable. The freedom of expression under Article 10 of the Convention would be tangibly jeopardized if any distributor could be held liable for all the speech it disseminates, enables or communicates. Such freedom is useless if it cannot properly reach those to whom it is addressed. That is why, in our opinion, guaranteeing of an undisrupted channel for receiving information is as important as guaranteeing its initial creation. The above cases suggest a tendency to unify the prohibition of a general monitoring obligation into a common principle on the basis of the underlying conflicting human rights, such as freedom of expression.

(24) Secondly, also the Court of Justice of the European Union seems to understand general no-monitoring obligation not only as a part of the 'ordinary law' (i.e. secondary legislation), but directly as an obligation stemming from the EU Charter of Fundamental Rights. In 2011, the CJEU decided in *L'Oréal v. eBay* C-324/09 the following:

> Furthermore, *a general monitoring obligation would be incompatible* with Article 3 of Directive 2004/48, which states that the measures referred to by the directive *must be fair and proportionate* and must not be excessively costly. [emphasis ours]

This was further repeated in *Scarlet Extended* C-360/10, where the CJEU appers to start equating a general monitoring obligation *automatically* with a disproportionate interference with the *freedom to conduct business*:

> Accordingly, such an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.

Although both of the decisions were handed down in the context of services, where Article 15 of the E-Commerce Directive explicitly prohibits the imposition of such an

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18 In original: "Danach sind das Interesse der Kläger am Schutz ihrer Persönlichkeitsrechte einerseits und die durch Artt. 2, 5 Abs. 1 und 14 GG geschützten Interessen der Beklagten auf Meinungs- und wirtschaftliche Handlungsfreiheit andererseits abzuwägen. [..] Der Betreiber einer Suchmaschine ist danach grundsätzlich nicht verpflichtet, die durch eine Software generierten Suchergänzungsvorschläge generell vorab auf etwaige Rechtsverletzungen zu überprüfen. Dies würde den Betrieb einer Suchmaschine mit einer der schnellen Recherche der Nutzer dienenden Suchergänzungsfunktion wenn nicht gar unmöglich machen, so doch unzumutbar erschweren."

obligation, the CJEU did not only refer to this provision, but rather to the principle of proportionality, as a basis for its arguments. This indicates a deeper value of the rule.

(25) If the Court would postulate a similar prohibition of a general monitoring obligation as an indispensable requirement for all persons who distribute non-editorial content, human rights law would prevent national courts from imposing strict liability, and push them towards various negligence based standards requiring a notice to trigger any liability, thus still preserving enough room for effective remedy.

(26) This should not, however, be the last stop for the Court.

(27) Moreover, the Court should encourage, as many European courts did, intermediaries to give a fully respect to the freedom of expression of their users also *after the notice is filed*. This is only possible if the Court promotes a chance for users to reply to such allegations *before* their speech is taken down, and if *other than unmistakably unlawful speech will be subject to stricter requirements*, such as court interference, before any liability can be imposed on the intermediary.

(28) An example of such an approach can be again found in the jurisprudence of the BGH. In the *Blogger* case (VI 93/10), Google was sued for a content posted by a third party on one of the blogs hosted and operated by it. The BGH held that a careful balancing exercise between a right to private life and the freedom of expression needed to be carried out. As a result, the BGH required the following before any liability could be imposed:

> Taking of an action by a hosting provider is only prompted when the notice is so sufficiently specific that an infringement can easily be established based on the claims of the affected person, i.e. without any in-depth legal or factual review. [..] Regularly, the compliant of the affected person should be forwarded to a person who is responsible for the blog so he can react to it. If no reaction is received within a reasonable time limit, legitimacy of an objection should be presumed and the objected entry should be removed. Should the person responsible for the blog reply with a substantiated denial of the objections, so that legitimate doubts arise, the provider can basically hold and communicate this to the affected person, also requiring possible proof of the alleged infringement. Should the reaction or the necessary evidence not be delivered by the affected person, any further review is not needed. If from the reaction of the affected person or from the presented evidence, and taking into account an eventual reaction of the person responsible for the blog, an infringement of personality rights is proven, the objected entry should be removed[19].

19 In original: "Ein Tätigwerden des Hostproviders ist nur veranlasst, wenn der Hinweis so konkret gefasst ist, dass der Rechtsverstoß auf der Grundlage der Behauptungen des Betroffenen unschwer - das heißt ohne eingehende rechtliche und tatsächliche Überprüfung - bejaht werden kann. [..] Regelmäßig ist zunächst die Beanstandung des Betroffenen an den für den Blog Verantwortlichen zur Stellungnahme weiterzuleiten. Bleibt eine Stellungnahme innerhalb einer nach den Umständen angemessenen Frist aus, ist von der Berechtigung der Beanstandung auszugehen und der beanstandete Eintrag zu löschen. Stellt der für den Blog Verantwortliche die Berechtigung der Beanstandung substantiiert in Abrede und ergeben sich deshalb berechtigte Zweifel, ist der Provider grundsätzlich gehalten, dem Betroffenen dies mitzuteilen und gegebenenfalls Nachweise zu verlangen, aus denen sich die behauptete Rechtsverletzung ergibt. Bleibt eine Stellungnahme des Betroffenen aus oder legt er gegebenenfalls erforderliche Nachweise nicht vor, ist eine weitere Prüfung nicht veranlasst. Ergibt sich aus der Stellungnahme des Betroffenen oder den vorgelegten Belegen auch unter Berücksichtigung einer etwaigen Äußerung des für den Blog Verantwortlichen eine rechtswidrige Verletzung des Persönlichkeitsrechts, ist der beanstandete Eintrag zu löschen."

(29) Similar need for an appropriate defense was articulated also by the Advocate General in the above mentioned *L'Oréal v. eBay* case.

> Obviously freedom of expression and information does not permit the infringement of intellectual property rights. These latter rights are equally protected by the Charter, by its Article 17(2). Nevertheless, it entails that *the protection of trade mark proprietor's rights in the context of electronic commerce may not take forms that would infringe the rights of innocent users of an electronic marketplace or leave the alleged infringer without due possibilities of opposition and defence*. [emphasis ours]

(30) Last but not least, the principle of counter-reaction *before* the take-down has also been endorsed by the English High Court in *Tamiz v. Google* [2012 EWHC 449 (QB)], which tolerated Google's response time of several weeks.

(31) Giving the author of the objected content a possibility to defend its speech *before* it is taken down is an essential prerogative and sign of a right balance between an effective remedy and fertile environment for a freedom of expression. The importance of this principle has been highlighted by courts many times. Also this Court has not shied away from this principle, repeatedly holding that "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest" (*Ürper and Others v. Turkey; Yildirim v. Turkey, Observer and Guardian v. The United Kingdom*[20]). If the value of a non-editorial speech ought to be preserved, it is necessary that civil liability *not* be imposed in the form, which requires an *automatic* take down of information in period, when it is most relevant for a public debate. Even the possible reappearance of the information after some time can not be seen as a sufficient redress for this situation. The Court thus needs to encourage responsible treatment of alleged violation of rights of others, which does not always automatically lead to take-down of information upon a mere notice (allegation).

(32) To conclude,

> Where the law is uncertain, in the face of rapidly developing technology, it is important that judges should strive to achieve consistency in their decisions and that proper regard should be paid, in doing so, to the values enshrined in the European Convention on Human Rights and Fundamental Freedoms. In particular, one should guard against imposing legal liability in restraint of Article 10 where it is not necessary or proportionate so to do.[21]

CONCLUSIONS

The European Information Society Institute (EISi) suggests that the Court:

- **spells out, as an abstract principle, that any general monitoring obligation imposed upon disseminators of non-editorial third party defamatory content is incompatible with Article 10 of the Convention and**
- **promotes the guarantee of a content author's right to reply to any allegations before speech is taken down from on-line circulation, by requiring that no liability can be imposed before this moment.**

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20 Application Number 13585/88.

21 Words of the honorable Mr. Justice Eady taken from the decision of Tamiz v. Google [2012 EWHC 449 (QB)].