

Written Comments in the Case of

Delfi AS v. Estonia
Application No. 64569/09

A Submission to the European Court of Human Rights on behalf of

- *Media Legal Defence Initiative*
- *Media Law Resource Center*
- *American Society of News Editors*
- *Association of American Publishers*
- *Association of Dutch Publishers (Nederlands Uitgeversverbond)*
- *Association of European Journalists*
- *Condé Nast*
- *Persgroep Nederland*
- *Digital Media Law Project, Berkman Center for Internet & Society - Harvard University*
- *Dow Jones*
- *Dutch Association of Journalists (Nederlandse Vereniging van Journalisten)*
- *European Publishers Council*
- *Forbes Media*
- *Global Voices Advocacy*
- *Greenpeace International*
- *Guardian News and Media*
- *National Press Photographers Association*
- *News Corp*
- *Newspaper Association of America*
- *North Jersey Media Group*
- *NPR*
- *NRC Media*
- *Persvrijheidsfonds*
- *Raycom Media*
- *Reuters*
- *Sanoma Netherlands*
- *Telegraaf Media Groep*
- *World Association of Newspapers and News Publishers*

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For the Interveners:

Nani Jansen
Senior Legal Counsel
Media Legal Defence Initiative

IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application No. 64569/09 - Delfi AS v Estonia

WRITTEN COMMENTS OF MEDIA LEGAL DEFENCE INITIATIVE; MEDIA LAW RESOURCE CENTER; AMERICAN SOCIETY OF NEWS EDITORS; ASSOCIATION OF AMERICAN PUBLISHERS; ASSOCIATION OF DUTCH PUBLISHERS (NEDERLANDS UITGEVERSVORBOND); ASSOCIATION OF EUROPEAN JOURNALISTS; CONDÉ NAST; PERSGROEP NEDERLAND; DIGITAL MEDIA LAW PROJECT, BERKMAN CENTER FOR INTERNET & SOCIETY - HARVARD UNIVERSITY; DOW JONES; DUTCH ASSOCIATION OF JOURNALISTS (NEDERLANDSE VERENIGING VAN JOURNALISTEN); EUROPEAN PUBLISHERS COUNCIL; FORBES MEDIA; GLOBAL VOICES ADVOCACY; GREENPEACE INTERNATIONAL; GUARDIAN NEWS AND MEDIA; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; NEWS CORP; NEWSPAPER ASSOCIATION OF AMERICA; NORTH JERSEY MEDIA GROUP; NPR; NRC MEDIA; PERSVRIJHEIDSFONDS; RAYCOM MEDIA; REUTERS; SANOMA NETHERLANDS; TELEGRAAF MEDIA GROEP; WORLD ASSOCIATION OF NEWSPAPERS AND NEWS PUBLISHERS.

Pursuant to leave granted by the President of the Grand Chamber, the above named organisations (hereinafter referred to as the interveners) hereby submit written comments on comparative standards of liability for online media for comments left on their sites by third parties, as well as on emerging good practices as regards the moderation of online comments.¹

The interveners urge the Grand Chamber to take account of existing legal standards and best practices on intermediary liability as set out in this submission. As the first case on intermediary liability to be heard by the Grand Chamber, the Court's decision will be influential. Should the Court arrive at a standard that falls below the level of protection for freedom of expression under which many of the interveners operate, this would create a situation of legal uncertainty that would be detrimental to the free flow of information, opinions and ideas. Furthermore, the interveners urge the Grand Chamber to consider the examples of emerging best practices that are highlighted in this submission and point out that these have emerged in a regulatory environment where they have not been required to monitor user comments and where they have been exempted (either fully or conditionally) from liability.

I Introduction: online media and user comments – generating debate on topics of public interest

The vast majority of online media invite their readers to engage with the news by leaving comments. An October 2013 study by the World Association of Newspapers and News Publishers (WAN-IFRA),² covering 104 media outlets from 63 countries, found that only 7 did not allow reader comments.³

There are many reasons why online media engage with their readers in this way. Allowing comments enables readers to have their voice heard, adds a different dimension to the news and creates a community of readers around a news outlet. The WAN-IFRA study quotes UK-based *Reuters'* community editor as saying that, "[t]here is no better way to get a feeling about what people think about you ... Readers have to feel they can contribute to the public conversation."⁴ Comments are also a valuable resource for journalists, providing additional detail and insight from informed readers who can offer a wide range of opinions. This can broaden the publication's coverage, provide a different perspective and even inspire new stories. The community editor for Germany-based *Die Zeit* commented that user contributions also improve the quality of journalism: "[F]or every article there is at least one reader who

¹ The interveners would like to acknowledge Professor Lorna Woods, School of Law, University of Essex, for her drafting input, particularly as regards the section on European Union law.

² WAN-IFRA combines the World Association of Newspapers and the INCA-FIEJ Research Association (the latter itself bringing together the International Newspaper Colour Association and the International Federation of Newspaper Publishers).

³ WAN-IFRA, *Online comment moderation: emerging best practices*, October 2013, available for download at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, (hereinafter the "WAN-IFRA study"), p. 6.

⁴ WAN-IFRA study, p. 10

will ask the right questions and find something that the article doesn't answer but it should. Journalists are more on their toes when there are comments."⁵

The use of comments has significant value in fulfilling the free expression rights of the media's readership. Through the comments facility, readers can debate the news amongst themselves as well as with journalists. This transforms the media from a one-way flow of communication to a participatory form of speech which recognises the voice of the reader and allows different viewpoints to be aired.

The widespread use of comments in online media has led to a debate around liability for these comments. This is part of a wider debate around the liability of all "intermediaries". While in the early years of the Internet, intermediaries served a very technical function, the boundaries between access and content are now increasingly blurred and "intermediaries" include enhanced search services, online marketplaces, web 2.0 applications and social networking sites. From the users' perspective, all facilitate access to and use of content and are crucial to the realisation of the right to freedom of expression.

Because of their vital position in the chain of communication, intermediaries are also highly vulnerable to pressure.⁶ Governments and intergovernmental institutions, including the European Commission, have therefore recognised that all intermediaries require protection. Without protection, there is a risk that intermediaries may be incentivised to act as censors – to pre-empt risk of liability – or they may be discouraged from entering the market at all. The United Nations Special Rapporteur on Freedom of Expression has strongly criticised regulatory approaches that place strict liability on internet platforms. In his 2011 report,⁷ he was particularly critical of Turkey, where internet censorship has taken on draconian forms, and Thailand, where the managing editor of a website received a suspended prison sentence for user comments.⁸ He was also critical of the conviction in Italy of three Google executives for a video that had been uploaded by a user,⁹ and recommended that, "no one should be held liable for content on the Internet of which they are not the author".¹⁰

While the value of user comments to online media is widely recognised, and strict liability for intermediaries and other web platforms is clearly discouraged, it is true that not every comment offers an equally valuable insight – and some are offensive, insulting or otherwise inappropriate. There is therefore a clear challenge to online media in encouraging and highlighting those comments that provide a positive contribution to a debate whilst seeking to discourage comments that are abusive. The concomitant task for States is to ensure a regulatory framework that protects and promotes freedom of expression whilst also guarding other rights and interests.

Both are important tasks. If online media get the balance wrong, they risk losing the engagement of their readership who will not want to comment in an environment that is dominated by offensive or insulting voices. This has consequences in terms of journalism, reputation and ethics as well as economic consequences, and all of these provide powerful incentives to the media to 'get it right'. Equally, if States get the regulatory balance wrong, they violate the fundamental rights to freedom of expression and access to information of the media outlet *and* of its readers.

The following pages briefly summarise the regulatory frameworks for intermediary liability in the United States and in the European Union. Approaches in the EU and US are distinct, reflecting the different regulatory standards, but offer clear common denominators in (1) accepting the principle that some level of protection for intermediaries is vital, and (2) the absence of a requirement that intermediaries should monitor user content. In the US, lawmakers chose to exempt online media from liability for user

⁵ WAN-IFRA study, p. 10

⁶ Recital 59 Directive 29/2001 recognises this centrality in terms of intellectual property.

⁷ Frank La Rue, *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.

⁸ Case of Chiranuch Premchaiporn, Bangkok Court of Appeals, 8 November 2013.

⁹ In December 2012, this conviction was eventually overturned by the Milan Court of Appeals.

¹⁰ *Supra* note 7, p. 13

comments because the regime of liability that existed under the common law unfairly placed liability on online media who chose to moderate proactively. A full exemption was therefore granted to allow the media to develop a self-regulatory approach. However, the interveners highlight that even in the EU, a full exemption from liability is offered to online media and other intermediaries who act expeditiously to remove inappropriate content once properly notified. The final pages of this intervention highlight emerging good practice among online media.

II Comparative law on intermediary liability and regulation of user comments

(a) United States

The approach to intermediary liability taken by the US legislature and courts is informed by the consequences of imposing legal liability on online media who moderate user comments. An understanding of its history provides a crucial insight into the importance of allowing online media to self-regulate.

In 1997, the US Supreme Court in *Reno v. American Civil Liberties Union* described the Internet as a dramatic new marketplace of ideas, calling it the most participatory form of mass speech yet.¹¹ Under the First Amendment, the Internet was entitled to maximum protection and the Court cautioned lawmakers against imposing regulations that would unduly restrict speech on the new medium.

The law of intermediary liability in the United States is in the same spirit as the *Reno* decision. By statute and case law, intermediaries are given absolute protection against defamation and related claims over user-generated content.¹² Section 230 of the Communications Decency Act¹³ provides that 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. Any liability lies against the creator of the content.¹⁴ An important caveat to this is that the provider or ISP must not have contributed in a significant way to the content at issue.

In 1996, when Section 230 was enacted, the law regarding intermediary liability was unsettled. The common law distinguished between publishers and distributors and their respective responsibilities upon becoming aware of defamatory content.¹⁵ But this regime translated awkwardly to the online environment. Section 230 was a response to a 1995 decision, *Stratton Oakmont v. Prodigy*, that found that an intermediary could be legally responsible for the defamatory statement of a third-party user.¹⁶ This concerned an anonymous posting to an online 'bulletin board' that accused a brokerage firm of fraud. The identity of the poster was unknown and the brokerage firm sued the bulletin board, alleging it bore responsibility as the re-publisher of the libel. The Court found that Prodigy could be deemed to have published the libel because it screened postings for offensive and vulgar speech and was therefore deemed to exercise editorial control.

This decision was troubling. It made an intermediary potentially liable for the content of the millions of communications it transmitted and stored, and it also unfairly punished the intermediary for voluntarily moderating content on its sites. Section 230 was designed to eliminate both these concerns and to allow

¹¹ [Reno v. American Civil Liberties Union](#), 521 U.S. 858, 863 (1997).

¹² A separate body of law provides protection for intermediaries over intellectual property claims. The Digital Millennium Copyright Act 17 U.S.C. § 512 creates a notice and take down regime and related safe harbours. Given that legitimate copyright claims are rare in the context of user comments, the interveners will not discuss this.

¹³ 47 U.S.C. § 230. The statute does not apply to child pornography and other federal criminal statutes.

¹⁴ A claim can be filed against the intermediary to discover identifying details of the original publisher so that the claim can be made against the proper party. In such cases, courts typically require the claimant to make a prima facie showing demonstrating a likelihood of a valid claim and provide an opportunity for an anonymous commenter to respond. See [Dendrite Int'l, Inc. v. John Doe No. 3](#), 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

¹⁵ For an overview of the common law jurisprudence, see David Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, Loyola Law Review, Vol. 43, No. 2, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625820

¹⁶ *Stratton Oakmont v. Prodigy*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

online technologies to grow unfettered by potential liability for speech by their users. By enacting Section 230, US Congress chose not to impose on intermediaries the impossible task of screening user content for possible problems – even in response to specific notice. The Fourth Circuit in *Zeran* explained this policy as follows:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement — from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.¹⁷

The clear rules of Section 230 also removed the perverse common law disincentive to moderate user content, and instead encouraged intermediaries to self-regulate without fear of liability if that is done imperfectly. Thus, Section 230 provides protection for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”.

This clear approach has encouraged investment in the technology industry and has created a vibrant marketplace of ideas in online media. Technology industry observers credit Section 230 for fostering the environment for companies such as Facebook, Twitter, YouTube, TripAdvisor and others.¹⁸ Moreover, Section 230 has encouraged the development of hundreds of national and local media outlets that might not have been possible had US law required full publisher liability for intermediaries.

Since the enactment of Section 230, courts have applied its protections broadly. Intermediaries protected under the statute include all web enterprises and publishing platforms, and they are protected against defamation claims over user-generated content and other tort claims (excluding intellectual property claims) that seek to hold the intermediary responsible for another person's speech.¹⁹

(b) European Union

The intermediary liability regime in the European Union is contained in the E-Commerce Directive, enacted in 2000.²⁰ It provides a broad exemption from liability for intermediaries in regard of three activities: the “mere conduit” of content; “caching” of content; and “hosting”.²¹ The exemption is conditional upon the intermediary acting “expeditiously” to remove any material upon having actual or constructive knowledge of illegal activity/information. Crucially, the E-Commerce Directive also provides

¹⁷ *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

¹⁸ E.g. Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639, 650 (2014): “[T]he Communications Decency Act proved central to the rise of the new breed of Silicon Valley enterprise within the statute was a small fateful section, § 230, that would save many corporations—most of them not even dreamed of when the Act was passed—from potentially ruinous legal challenges.”

¹⁹ See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (applying Section 230 to privacy and image right claims against a dating website over a false profile created by a user); *Doe v. MySpace Inc.*, 528 F.3d 413 (5th Cir. 2008) (applying Section 230 to negligence claims over postings on a social networking site).

²⁰ Directive 2000/31/EC. Despite its name, the directive is wide in scope. Examples of services covered by the Directive include online information services (such as online newspapers), online selling of products and services (books, financial services and travel services), online advertising, professional services (lawyers, doctors, estate agents), entertainment services and basic intermediary services (access to the Internet and transmission and hosting of information).

²¹ The exemption applies to the service and not to categories of provider Case C-236/08 to C-238/08, *Google v. LVMH* (Adwords) [2010] ECR I-2417.

that intermediaries are not required to monitor users or content posted by them.²² This protection is vital as otherwise the exemption from liability could have been easily undermined and would have resulted in disproportionate obligations on intermediaries.²³

The European Court of Justice (ECJ) has issued a number of judgments clarified some of these terms and obligations. Its case law is guided by a number of principles: that the law must be interpreted to comply with fundamental principles, including the right to freedom of expression;²⁴ that exceptions and derogations from EU law should be interpreted narrowly;²⁵ and that directives should be interpreted in the light of their stated purpose.²⁶ Implementation by Member States both in law and in practice must be consistent with protection of fundamental rights guaranteed under EU law.²⁷

The right to freedom of expression has been a central consideration in all of the ECJ's decisions. For example, in its decision in the *Kabel Deutschland* case, the ECJ commented that, "it is appropriate to stress the importance of the fundamental freedom to receive information of which the recipients are end-users and which the Member States must guarantee".²⁸ This recognises that interference with one entity's communicative rights has an impact on the rights of others and requires that intermediaries are provided strong protection. The AG's reasoning in the *UPC Wien* case illustrates why intermediaries need to be protected as facilitators of the expression rights of others:

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.²⁹

The Court has generally concurred with this, holding that the freedom of information of internet users would be adversely affected by measures addressed to intermediaries.³⁰

Furthermore, the ECJ has repeatedly recognised the danger of requiring corporate entities to act as 'censors'. The determination of whether content is legal is problematic, especially bearing in mind the cross-border nature of internet publications and the fact that even in the EU, content may be legal in some Member States and not in others.³¹ This increases the risk of collateral censorship, and the Advocate General in *L'Oreal* therefore suggested that freedom of expression demands strong procedural rights for the provider of alleged illegal content as well as for the innocent user of the site in respect of take-down claims by third parties.³² In its decision in the *UPC Wien* case, the Court held that users whose content may be blocked or removed should have the chance to assert their rights.³³

The ECJ has clarified that the scope of the protection granted by the Directive is broad: web services such as online marketplaces,³⁴ search engines³⁵ and social networking sites³⁶ can benefit from the

²² E-Commerce Directive, Art. 15. See also Case C-70/10, *Scarlet Extended v. SABAM*, 24 November 2011.

²³ Commission Report, p. 14, see also Study on Liability of internet Intermediaries.

²⁴ Case C-275/06, *Promusicae v. Telefonica de Espana* [2008] ECR I-271, pars. 66-70.

²⁵ See AG in *L'Oreal* on the point that Arts. 12-14 are not exceptions, Case C-324/09, *L'Oreal v. eBay*, (Opinion) par. 136.

²⁶ *Adwords* judgment, par. 110. Sometimes determining the relevant recitals can be problematic, as the comments of the Advocate General in *L'Oreal* illustrate: see pars. 139-140.

²⁷ Case C-314/12, *UPC Telekabel Wien v Constantin Film Verleih, Wega Filmproduktionsgesellschaft*, judgment 27 March 2014, pars. 44-46.

²⁸ Case C-336/07 *Kabel Deutschland Vertrieb und Service GmbH & Co. KG v. Niedersächsische Landesmedienanstalt für privaten Rundfunk* [2008] ECR I- 889, par. 33.

²⁹ Case C-314/12, *UPC Wien*, Opinion, par. 82, and in reaching these conclusions cites *Öztürk v. Turkey*, no 22479/93, § 49, ECHR 1999-VI and with regard to collateral effect *Yildirim v. Turkey*, no. 3111/10, ECHR 2012.

³⁰ Case C-314/12, *UPC Wien*, pars. 47 and 55.

³¹ Case C-360/10, *SABAM v. Netlog*, par. 50.

³² *Supra* note 25, par. 158

³³ Case C-314/12 *UPC Wien*, par. 57.

³⁴ *L'Oreal*, Opinion, *supra* note 25, par. 158.

exemption. The key element is whether the operator stores content produced by third parties, but does not assist in its production or prefer some content over others.³⁷ National courts have held that the comments facility of online media falls within this.³⁸ The ECJ has stated that an intermediary would fall outside the hosting exemption if it, “has provided assistance which entails, in particular, optimising the presentation of the offers for sale ... or promoting those offers ... it must be considered not to have taken a neutral position between the customer-sellers concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of or control over the data relating to those offers for sale.”³⁹

The ECJ has also clarified that the level of knowledge required to defeat the exemption must be more than some general awareness of problematic content. The applicable test is whether the intermediary was “aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question”.⁴⁰ The key factor in this is clear awareness of the illegality of that content. The ECJ has recognised that “notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated”,⁴¹ a factor which will affect the assessment of the intermediary’s level of knowledge (as well as its speed in responding).

The requirement that content is removed “expeditiously” does not entail an immediate removal; there must be time for the intermediary to ascertain the content. Recital 46 of the Directive requires that, “the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level.” This clearly implies that consideration must be given to the claims of the originator of the content and that person’s freedom of expression. Too stringent an interpretation of ‘expeditiously’ might result in intermediaries taking down content automatically on receiving notice of it, which would potentially violate the originator’s right to freedom of expression.⁴² This is common in the interpretation of the law in all EU Member States. In *Tamiz v. Google*, which concerned defamatory comments on a blog, the English High Court held that the hosting defence could be applied although it had taken Google some weeks to act on the complaint.⁴³

The implementation of this regime by European governments shows that the rights of intermediaries as well as content creators must be given considerable weight. For example, the UK Parliament recently considered the issue of intermediary liability in the course of adopting a new Defamation Act. Under the English common law, websites were under great pressure to take down material whenever challenged and were deterred from moderating user content. That situation was deemed incompatible with core principles of free speech and Parliament decided to protect intermediaries by requiring claimants to follow a notice and takedown regime or sue an identified third party directly.⁴⁴

Germany’s Bundesgerichtshof considered the issue in 2011, in a case involving a blog hosted on Google’s ‘blogspot’ service. It held that the host provider is not required to proactively monitor articles and that it has to take action only if there is a notice of infringement that is sufficiently specific to

³⁵ Case C-131/12, *Google Spain*, Opinion, 25 June 2013, par. 95.

³⁶ Case C-360/10, *SABAM v. Netlog*, par. 48.

³⁷ Case C-360/10, *SABAM v. Netlog* 16 February 2012, par. 27.

³⁸ See, e.g., *Karim v. Newsquest Media Group, Ltd* [2009] EWHC 3205 (QB), 27 October 2009.

³⁹ Case C-324/09, *L’Oreal v. eBay*, [2011] ECR I-6011, par. 116.

⁴⁰ *Idem* at par. 120.

⁴¹ *Idem* at par. 122.

⁴² Commission Working Paper 2012, p. 38 and with regard to take down procedures, p. 41. See concerns expressed by Advocate General in Case C-314/12 at par. 89 in the context of an injunction to enforce IP rights under Directive 2001/29.

⁴³ [2012] EWHC 449 (QB), par. 61. The case was appealed to the Court of Appeal [2013] EWCA Civ 68 but that Court did not find it necessary to address the hosting defence.

⁴⁴ Defamation Act 2013 Section 5, <http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted/data.htm>. See also the UK Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill, February 2012, discussion at par. 77: <http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/Government%20Response%20CM%208295.pdf>.

establish a violation of law without any in-depth review of the law or of the relevant facts. The Court held that the aggrieved party's complaint must be forwarded to the person responsible for the blog, giving the blog author an opportunity to respond. If no response is received, the post should be deleted. However, if the complaint is disputed, the provider should request evidence substantiating the complaint. If no evidence is provided, no further review is necessary. If, however, the evidence shows that the complainant's rights were in fact infringed, the disputed post must be deleted.⁴⁵

It should be noted that in some Member States, notice-and-take-down procedures have resulted in excessive liability on intermediaries and the take-down of legitimate content. The UN Special Rapporteur has warned that the scheme of notice-and-take-down "is subject to abuse by both State and private actors".⁴⁶ The system has been criticised by the OSCE Representative on Freedom of the Media as well.⁴⁷ The European Commission launched a consultation on improving the mechanism in 2012, including to better protect the right to freedom of expression, the results of which have not yet been published.⁴⁸

As the following paragraphs will elaborate, the clear stipulation that intermediaries are not required to monitor content and the shield provided under US law (and the conditional exemption under EU law) have allowed online media to develop their own practices as regards the regulation of user comments.

III Emerging good practices in regulation of user generated content by online media

All online media outlets are well aware of the importance of moderation and most will ban comments that are offensive, insulting or otherwise inappropriate – primarily because it makes journalistic sense for them to do so. In the WAN-IFRA study, a spokesperson for *Die Zeit* commented: "The comments are associated with your brand. It's absolutely up to you as a news room to control what sort of comments you want to have. Sitting back and saying 'those comments are stupid but what can we do about it' is definitely not the way to go, I would say".⁴⁹ This is equally true for publications based in the United States. US-based news website *Gawker* commented, "it's the obligation of the news organisation to create an environment where the type of reader that they have feels comfortable having a conversation and discussion. We want to have conversations with our readers. Our moderation system is in no way meant to silence them, it's meant to create a safe environment where people can have intelligent conversation and can feel comfortable voicing strong opinions."⁵⁰

Over the last fifteen years, online media have been able to develop a set of practices around the moderation of user comments. Clear guiding principles that have emerged are:

- (1) most online media have 'community guidelines' on what they do and do not allow
- (2) most online media engage in post-publication moderation; they do not screen comments before they go up;
- (3) most online media do not monitor their sites for comments that violate the guidelines; and
- (4) most online media do not require registration under a user's real name.

The following paragraphs elaborate on these emerging principles and practices, primarily citing examples from the 2013 WAN-IFRA study.

⁴⁵ Bundesgerichtshof, 25 October 2011 (VI ZR 93/10, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=edd8ef57c04c7c24c308d8fc09cdab31&nr=58574&pos=10&anz=55>).

⁴⁶ UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, A/HRC/17/27, 16 May 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf.

⁴⁷ OSCE Representative on Freedom of the Media, *Freedom of Expression on the Internet*, 15 December 2011, <http://www.osce.org/fom/80723>.

⁴⁸ See http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm

⁴⁹ WAN-IFRA study, p. 8.

⁵⁰ WAN-IFRA study, p. 9.

The overwhelming majority of publications in the US and Europe do not screen or monitor comments before they are posted. While there is some proactive moderation, particularly around ‘flash point’ stories, this is done as a matter of self-regulation and, given that it’s not a universal practice, should by no means be taken as the norm. Most media regard pre-moderation as difficult, labour intensive and as delaying the all-important ‘conversation’ both between readers and between the media outlet and its readers.⁵¹ Importantly, the UK’s *Economist* flagged up that pre-publication moderation leads to greater legal liability: “[t]here are lots of reasons why we don’t want to read every comment before it appears, but one of them is the fact that we could then be held responsible for [it].”⁵²

Post-publication moderation works through a system whereby other readers flag up inappropriate comments. This prevents media from having to invest in what would be a small army of moderators to screen all comments, and encourages active and positive participation. Many online media rely on technology to refine this process, and many also run filtering software that recognises certain words or phrases as undesirable. For example, at the *Seattle Times*, all comments that are flagged up by users go into a queue for the moderators to look at – but if a comment gets several flags it will automatically be deleted pending screening. At *Der Standard*, in Austria, ‘intelligent’ software is used that learns from manual moderation on an ongoing basis. If the software is not sure, the comment will be passed on to a human being for consideration.⁵³

The WAN study found that on average, news outlets delete or block 9% of comments on their sites, mostly because they are considered ‘offensive’.⁵⁴ Other reasons why comments are deleted are that they were considered to be spam, hate speech, constituted a personal attack or used bad language. It should be noted that in deleting comments, media outlets often go beyond what the law may consider defamatory or hate speech. The editors of online media argue that by engaging in moderation they’re not engaging in censorship; instead, they are promoting an online environment for comment and debate on topics of public interest. Swedish outlet *Norran* commented that if readers “see that it’s the same people all the time commenting against each other ... they get sick and tired of it.”⁵⁵ The BBC’s editor for online content agreed: “From our point of view as a news organisation ... the priority is that there is a good editorially balanced debate” (it should be noted that as a publicly funded public service media, the BBC operates stricter commenting rules than other media).

Most online media in the WAN survey have community guidelines that indicate what is not acceptable – for example, comments that incite violence, hatred or that are obscene or racist. These guidelines are also used to provide constructive guidance to users on how to make a valuable contribution. Germany’s *Süddeutsche Zeitung*, for example, advises its readers to, “[k]eep a cool head. Even if a subject particularly excites you, we ask you to keep your posts free of generalizations and provocation, of hasty and irrelevant contributions, and specific disruptions to the debate.”⁵⁶

Many online media have mechanisms in place to block users who consistently break the rules, or to refer comments posted by these users for pre-publication moderation. Another option is not to delete comments but to hide them so they’re visible to users only. At *Buzzfeed*, the community editor can “hide comments and ban users if [the moderator recognises] their name and it’s an ongoing issue. The

⁵¹ WAN-IFRA study, p. 23-24.

⁵² WAN-IFRA study, p. 52.

⁵³ WAN-IFRA study, p. 33.

⁵⁴ WAN-IFRA study, p. 12.

⁵⁵ WAN-IFRA study, p. 12.

⁵⁶ “Welche Regeln gelten hier?” (What are the rules here?), <http://www.sueddeutsche.de/service/debattes-welche-regeln-gelten-hier-1.1359960>. Similarly, South Africa’s Mail and Guardian advises its readers: “When you have finished crafting your comment, read it again before posting it. Consider whether others will understand your arguments. Something that you meant to be satirical or humorous might not be clear to another reader. Also, take into consideration that your words will remain on the internet for a very, very long time, if not forever.” - “Something on your mind? Comments guidelines” <http://mg.co.za/page/comments-guidelines/>.

comment will still show up for them but not for everyone. They don't know ... [A]fter a while they'll figure out that it's not showing up because no-one is responding to them."⁵⁷ Canada's *Winnipeg Press* uses the same tactic and also blocks persistent offenders. Their accounts are reinstated only after they have done a quiz on the site's terms and conditions.⁵⁸

The majority of online media do not require users to disclose their real names. Out of 91 outlets surveyed in the WAN-IFRA study, 53 required registration but without disclosing their real name, while 18 did not require any registration at all. Only 20 required users to register under their real name, and many of these were in Latin America. Sites that allow users to register without registering their real name include leading European news outlets such as the BBC,⁵⁹ Reuters,⁶⁰ the Guardian⁶¹ and Spiegel,⁶² amongst others. The BBC's social media editor opined that "[t]here is quite a lot of value in allowing people to have anonymity." *Gawker* goes so far as to ensure absolute anonymity by allowing its users to log-in using an encryption key. The site's founder explained that, "we'll allow some disorder, if that's the price of freedom in one's personal life, in politics and the press".⁶³

In order to further encourage a high quality of debate and comment, many online media use rating mechanisms to make valuable comments more visible, usually by driving them up the page. The two most common ways that news organizations distinguish comments are through a 'thumbs up / thumbs down' click for individual comments, or by highlighting comments that are recommended by staff. The *New York Times* curates the comments that are thought to have provided the best contribution to a debate after a 24 hour period and highlights them as "NYT picks".⁶⁴ At Finland's *Helsingin Sanomat*, users can indicate not only if they agree or disagree but also whether they think that a particular point was 'well argued'. Comments that score more points are pushed up the page. At *SME Slovakia*, readers are encouraged to up the quality of their comments through a system that awards points and privileges for positive feedback on comments. Users with a lot of positive feedback on their comments can get promoted into the moderating team. This system of 'comments on the comments' drives valuable comments up the page, hiding those that are judged less valuable by the community of readers, and encourages readers to post thoughtful contributions rather than abusive or hateful one-liners.⁶⁵

IV Conclusions

User comments have become an integral part of online media. Whereas a traditional newspaper might devote one or two pages per issue to readers' letters, with a small sample of letters being selected for publication from the hundreds that they might receive, online media allow their readers to publish comments and remarks below most stories. Thousands of comments appear on news websites every day, providing space to readers to voice their opinions and spark debate on all manner of issues. This has turned the media from a space where the news is 'merely' reported to an online community where

⁵⁷ WAN-IFRA study, p. 38.

⁵⁸ See <http://www.winnipegfreepress.com/local/Winnipeg-Free-Press-Commenters-Quiz-193388041.html> (last visited 28 May 2014).

⁵⁹ See <https://ssl.bbc.co.uk/id/register?> (last visited 28 May 2014).

⁶⁰ See <https://commerce.uk.reuters.com/registration/pages/registration/begin.do?> (last visited 28 May 2014).

⁶¹ See <https://id.theguardian.com/register?> (last visited 28 May 2014).

⁶² See <https://www.spiegel.de/international/login/register.html?feature=forum> (last visited 28 May 2014).

⁶³ WAN-IFRA study, p. 32. Of course, the use of anonymous and pseudonymous writing in public discourse predates the Internet by centuries and was used by Shakespeare, Voltaire and Mark Twain, among many other esteemed writers. One of the most famous political examples is the publication of the Federalist Papers in the U.S. in 1787-88 by Alexander Hamilton, James Madison and John Jay. Writing under the pseudonym "Publius" they set out their theory for the constitutional governance of America. Anonymity ensured that readers would not prejudge their message simply because they did not like the authors – and anonymity remains an honourable tradition of advocacy and of dissent. Indeed, in the US courts have recently recognized that newspapers have an interest in "the vitality of [their] online forums" and so may "assert the First Amendment rights of the anonymous commentators." *Enterline v. Pocono Medical Center*, 751 F. Supp. 2d 782 (M.D. Penn., 2008).

⁶⁴ See <https://www.nytimes.com/content/help/site/usercontent/usercontent.html#usercontent-nytpicks>.

⁶⁵ WAN-IFRA study, p. 42.

the news is reported and discussed. The flow of traffic in online media is no longer one-way: users can have their say and engage both journalists and other users in conversation on important topics of the day. This has made an important contribution to the realisation of the right to freedom of expression for all.

The overview of comparative law and practice on the moderation of user comments in the preceding pages shows several commonalities. Crucially, EU and US law clearly hold that intermediaries – among which online media that allow user content must be placed – should not be required to monitor content which they host or to which they provide access. To do so would be undesirable for several reasons, including the chilling effect that this would have on both media and their users. As a matter of practice, only very few online media based in Europe or North America screen comments before they are allowed on the site.

Furthermore, the self-regulatory practices established by online media have been developed in a regulatory environment in which they are shielded from liability. In the US, legislators made a conscious choice to exempt intermediaries from liability precisely because making them liable discouraged any moderation at all. The expansive protection devised under Section 230 provides clear and predictable rules for intermediaries, granting them immunity from statements made by users. This lowered barriers of entry for thousands of online services that allow user-generated content, including news and information websites, and has promoted voluntary moderation of user content.

In the EU, exemption from liability is conditional on media acting expeditiously to remove illegal content once they have been properly notified – a condition that US-based media are not under. But even in the EU, courts have interpreted this by giving due weight to the free expression rights of both the intermediary and the content originator and have strongly cautioned against any approach that would lead to intermediaries being placed in the position of censor and the over-blocking and removal of content. This has benefited the free flow of information and self-regulation has driven much abusive comment from the pages of the mainstream media.

The interveners note that several countries, predominantly in Asia and the Middle East, operate a regime of strict liability for user content. This holds intermediaries liable for any unlawful user content regardless of knowledge or fault. As a result, media in these countries do generally screen comments prior to posting and there is far less debate among users. The interveners respectfully submit that punishing an intermediary regardless of knowledge or fault contravenes the freedom of expression rights of the media outlet and the audience; ignores the importance online speech plays in the functioning of democracy; and undercuts the good faith efforts intermediaries make to moderate user comments.

Whichever approach the Grand Chamber chooses, the interveners would urge it to take into account existing legal standards and self-regulatory practices in the EU and the US *and* to provide clear legal certainty regarding the question of liability. Uncertainty surrounding liability encourages intermediaries to remove content merely upon complaint even if such content was reviewed and deemed acceptable. Such uncertainty and burden on free expression would be removed by adopting expansive protection. But at a minimum intermediaries should have a safe harbour with clearly defined and industry appropriate rules pertaining to notice, time to remove and moderation of content subject to the rule.

ANNEX: BACKGROUND INFORMATION ABOUT THE INTERVENERS:

- **Media Legal Defence Initiative**

The Media Legal Defence Initiative is a non-governmental organisation that works in all regions of the world to provide legal support to journalists and media outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom. Under its strategic litigation programme, it has intervened or represented applicants in cases before the European Court of Human Rights, including in *Sanoma v. Netherlands*, *Von Hannover v. Germany*, *MGN v. United Kingdom* and other national and international courts on issues of media freedom.

- **Media Law Resource Center**

The Media Law Resource Center (“MLRC”) is a non-profit membership association for content providers in all media, and for their defence lawyers, providing a wide range of resources on media and content law and policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and freedom of expression issues. MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights. Today MLRC is supported by over one hundred and fifteen members, including leading publishers, broadcasters, and cable programmers, internet operations, media and professional trade associations, and media insurance professionals in America and around the world.

- **American Society of News Editors**

The American Society of News Editors (“ASNE”) represents media news editors. It focuses on leadership development and journalism-related issues. Founded in 1922 as a nonprofit professional organization, ASNE promotes fair, principled journalism, defends and protects free speech rights, and fights for freedom of information and open government. Leadership, innovation, diversity and inclusion in coverage and the journalism work force, youth journalism and the sharing of ideas are also key ASNE initiatives.

- **Association of American Publishers, Inc.**

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the US book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish electronic, hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the right to freedom of expression.

- **Association of Dutch Publishers (Nederlands Uitgeversverbond)**

The Association of Dutch Publishers (Nederlands Uitgeversverbond, “NUV”) is the trade association of publishers in the Netherlands and represents the collective interests of publishers of literature, entertainment & lifestyle, news and information products for education, trade and science (books, newspapers, magazines, radio, television and digital domains). The publishers joined in the NUV represent more than 90 percent of the Dutch publishing industry.

- **Association of European Journalists**

The Association of European Journalists (“AEJ”) is an independent professional association of journalists across Europe consisting of a network of about 20 national sections. It is recognised by the Council of Europe, the OSCE and UNESCO. The AEJ’s goals are to advance knowledge and debate on European affairs through journalism and the free flow of information and ideas. High priority is given to the AEJ’s

activities in support of media freedom and independence. The AEJ plays an active part in the Council of Europe's Steering Committee on Media and Information Society and the advisory Committee on the Protection of Journalism and the Safety of Journalists. The AEJ's special representative for media freedom, William Horsley, authored the OSCE's Safety of Journalists Guidebook, a guide to good practice for the participating states of the OSCE.

- **Condé Nast**

Condé Nast is a premier media company renowned for producing the highest quality content for the world's most influential audiences. Attracting 95 million consumers across its industry-leading print, digital and video brands, the company's portfolio includes some of the most iconic titles in media: Vogue, Vanity Fair, Glamour, Brides, Self, GQ, The New Yorker, Condé Nast Traveler, Details, Allure, Architectural Digest, Bon Appétit, Epicurious, Wired

- **Digital Media Law Project**

The Digital Media Law Project ("DMLP") is an unincorporated association hosted by the Berkman Center for Internet & Society at Harvard University. The DMLP is an academic research project that studies legal challenges to independent journalism and provides free legal tools and resources to the public. The DMLP frequently appears as an amicus curiae in cases where the application of law will have a significant effect on the use of digital media to inform the public.

- **Dow Jones Co.**

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with more than 1,800 journalists in more than fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

- **Dutch Association of Journalists (Nederlandse Vereniging van Journalisten)**

The Dutch Association of Journalists defends the interests of those who practice this profession: journalists, photographers, programmers, editors, magazine designers, webmasters, and educators. Its service is aimed at experienced journalists as well as at those who newly start in the profession, and includes freelancers as well as those employed in the media.

- **European Publishers Council**

The European Publishers Council is a high level group of Chairmen and CEOs of leading European media corporations. Members are the most senior representatives of European newspaper and magazine publishers. Their companies are involved in multimedia markets spanning newspaper, magazine, book, journal, internet, online database publishers, radio and TV broadcasting.

- **Forbes Media LLC**

Forbes Media LLC is the publisher of Forbes and other leading magazines, including Forbes Life and Forbes Asia, as well as an array of investment newsletters and the leading business website, Forbes.com. Forbes has been covering American and global business since 1917.

- **Global Voices Advocacy**

Global Voices Advocacy is a global network of bloggers and online activists dedicated to protecting freedom of expression and free access to information online. The network reports on threats to online speech, shares tactics for defending the work and words of netizens, and supports efforts to improve Internet policy and practice worldwide.

- **Greenpeace International**

Greenpeace International is the coordinating body of the worldwide Greenpeace organisation, which acts to change attitudes and behaviour, to protect and conserve the environment and to promote

peace. Greenpeace has been campaigning against environmental degradation since 1971, when a small boat of volunteers and journalists sailed into Amchitka, an island in the east of Alaska where the US Government was conducting underground nuclear tests. Today, the organisation includes 27 national and regional offices around the world, sustained by almost 3 million supporters. Greenpeace uses research, lobbying, and quiet diplomacy to pursue its goals, as well as public campaigns and high-profile, non-violent conflict to raise the level and quality of public debate. The internet has created important new possibilities for the public to contribute to Greenpeace campaigns, including by submitting user-generated content.

- **Guardian News and Media**

The Guardian News & Media Ltd. publishes theguardian.com and the Guardian and Observer newspapers. It is a unique news organisation whose journalism can be found across a range of different platforms. With a highly distinctive, open approach to publishing on the web, it now reaches a global audience of tens of millions. Edited by Alan Rusbridger, the Guardian is internationally recognised for the quality and independence of its reporting and its ground-breaking digital innovation. It is regularly voted best newspaper site in the world and was recently named newspaper of the year. Its collaboration with WikiLeaks, pursuit of the phone-hacking scandal and revelations about the surveillance programs carried out by the US National Security Agency have cemented its reputation for being at the heart of the biggest stories.

- **National Press Photographers Association**

The National Press Photographers Association (“NPPA”) is a non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

- **News Corporation**

News Corporation is a global, diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses across a range of media, including: news and information services, digital real estate services, book publishing, digital education, and sports programming and pay-TV distribution. Headquartered in New York, the activities of News Corp are conducted primarily in the United States, Australia, and the United Kingdom.

- **Newspaper Association of America**

The Newspaper Association of America (“NAA”) is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. All of NAA’s members operate digital services that include user-generated content.

- **North Jersey Media Group, Inc.**

North Jersey Media Group, Inc. is a family owned publishing company that provides news and marketing services. The Record and its sister publication, Herald News, are award-winning daily newspapers that reach nearly half a million readers a day with local, investigative and enterprise reporting.

- **NPR**

NPR, formerly National Public Radio, is a privately and publicly funded non-profit membership media organization that serves as a national syndicator to a network of 900 public radio stations in the United States.

- **NRC Media**

NRC is the publisher of NRC Handelsblad, a national, independent Dutch newspaper that prides itself on providing news and opinions from the Netherlands and abroad.

- **Persgroep Nederland**

Persgroep Nederland is a leading media organisation, active in the field of news, opinion, culture, inspiration, work and leisure. It publishes daily newspapers AD, de Volkskrant, Trouw and Het Parool in print and online. It also publishes several leading websites including NationaleVacaturebank.nl, Intermediair.nl, Tweakers.net and Autotrack.nl.

- **Persvrijheidsfonds**

The Dutch Press Freedom Fund (Persvrijheidsfonds) was established in 2007 by the Dutch Association of Journalists and the Society of Editors-in-chief. The Fund aims to initiate and support litigation that allows journalists to carry out their work in the fullest possible freedom.

- **Raycom Media, Inc.**

Raycom Media, Inc., an employee-owned company, is one of the United States' largest broadcasters and owns and/or provides services for 53 television stations in 37 communities in 18 states. Raycom stations cover 13.1% of U.S. television households and employ nearly 4,000 individuals in full and part-time positions. Each Raycom station operates multiple Web and mobile sites that include user-generated content.

- **Reuters Ltd.**

Reuters is the world's largest independent international news agency, reaching more than a billion people every day. Its coverage includes international politics, business, sports and entertainment. Reuters also publishes market data and intelligence to global business and finance consumers.

- **Sanoma Netherlands**

Sanoma Media Netherlands is the largest media company in the Netherlands. It has an extensive portfolio of magazines and websites, including AutoWeek, Donald Duck, delicious, Flow, Kieskeurig.nl, Libelle, Margriet, and NU.nl, and it is active in broadcasting as well.

- **Telegraaf Media Groep NV**

The Telegraaf Media Groep NV is a Dutch media and publishing company, mostly active on the newspapers and magazines market, but also on the Internet. It publishes the country's most widely read newspaper, de Telegraaf, in print and online.

- **World Association of Newspapers and News Publishers**

The World Association of Newspapers and News Publishers is the global organisation of the world's press, representing more than 18,000 publications, 15,000 online sites and over 3,000 companies in more than 120 countries. The organisation was created by the July 2009 merger of the World Association of Newspapers and IFRA, the research and service organisation for the news publishing industry. The two organisations have a 110-year history between them as the global representatives of the world's press.