

## EMERGING PATTERNS IN INTERNET FREEDOM OF EXPRESSION: COMPARATIVE RESEARCH FINDINGS IN ARGENTINA AND ABROAD<sup>1</sup>

### I. Introduction

This paper presents recent Argentine jurisprudence in cases where celebrity plaintiffs brought suit against the search engines Google and Yahoo for mainly violating their honor and privacy. It describes the facts of these cases, the arguments presented to the court and the reasoning judges have adopted in their decisions for injunctive relief. It presents two cases that bucked the trend and explains why the court found those cases to be exceptional. And it discusses a very recent decision on the merits, the first for this type of case. The paper then compares the emerging Argentine trend with decisions in other countries involving similar parties, especially a recent British ruling where the judge discussed at length in his decision the automated nature of search engines and found that liability cannot be assigned to them. Finally, the paper questions whether the Argentine approach is tenable given the mechanics of search engine technology and the competing trends abroad.

### II. Recent Argentine Jurisprudence

When CELE undertook this research in June 2009, we learned that there were over one hundred decisions from the past few years alone in Argentina granting preliminary injunctions against the search engines Google and Yahoo, all with similar fact patterns. One decision had just been issued refusing injunctive relief. The first case to be decided on the merits came down in July. In August, at least a couple of existing injunctive order were overturned.

#### a. The Facts Presented

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<sup>1</sup> This paper was written by Elizabeth Compa and Eduardo Bertoni based on the research done by Elizabeth Compa under the supervision and direction of Eduardo Bertoni. Bertoni is the Director of the Center for Studies on Freedom of Expression and Access to Information –CELE– at Palermo University School of Law. Compa is a JD student at Yale University School of Law and was an intern at CELE during the argentinena winter of 2009. CELE’s main objective is to create an academic environment to debate, study and research the content and limits of the rights of freedom of expression and access to information, with the purpose of contributing to give visibility to the importance of these rights in democratic societies, and to the problems that those exercising these rights have faced even under democratic governments. CELE initiates research projects that it considers necessary for this purpose, but also takes on projects per request of representatives of civil society, governments or inter-governmental organizations. CELE works together with academics, students and researchers from Argentina and other countries.

These cases all involve a plaintiff who is a celebrity or well-known public figure, whose name or image was being used without authorization, usually on websites with sexual or erotic content or offering sexual services. A Google or Yahoo search for the celebrity's name would yield results from these sites, and sometimes include thumbnail images in Google image search results.<sup>23</sup>

Third parties who are unaffiliated with Google and Yahoo operated the alleged offending websites. These operators were not named as parties to the lawsuits. Rather, plaintiffs brought suit against the search engines for facilitating access to the unauthorized content.

### **b. The Argument for Injunctions**

Judges repeatedly found that the plaintiff's honor, dignity, and privacy were being violated, and that the search engines exacerbated the damage by facilitating access to the offending sites. They profited from providing such access. In order to stop the harm being done to the plaintiff, therefore, the court ordered the search engines to sever the links to the offending content from their search results. In many instances, the court ordered them to sever links to any *similar* sites as well. In *María Isabel Macedo c/ Yahoo de Argentina SRL*, for instance, Judge Carlos Goggi explained (citing the lower court's order),<sup>4</sup> "in issuing an order 'to delete the name and image of the plaintiff Isabel Macedo from any type of link to sites with pornographic or sexual content, escorts, sale of sex, etc...' it is clear that 'etc' refers to sites of a similar nature to those already listed."<sup>5</sup> We will return to the court's view on the feasibility of such a sweeping mandate below.

The judges ignored, sometimes explicitly, the role of the third-party websites that publish the offending content. In the decision to uphold an injunction in *Valeria Raquel Mazza c/ Yahoo de Argentina*, for example, Judge Pablo Miguel Aguirre wrote,

"Independent of its lack of participation or control in the development of content created by third parties, what is certain is that the massive-scale diffusion of this content depends on [the defendants'] providing their technology to facilitate the search for such content; and it is precisely to avoid this indiscriminate propagation

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<sup>2</sup> See, e.g., *Sosa, María Agustina c/ Yahoo de Argentina SRL y otros s/ Medidas precautorias* (Expte. N° 60.124/2006), 8 Nov 2006; *Zámolo, Sofía K. c/ Yahoo de Argentina SRL y otro* (C. Nac. Civ. Y Com. Fed., sala 1a), 11 Nov 2006. These are just a sample of over a hundred decisions that all apply very similar arguments to very similar fact patterns. The cases cited throughout this paper – except those noted as being exceptional or unique – are also illustrative.

<sup>4</sup> "cuando ordena '...eliminar el nombre e imagen de la actora Isabel Macedo de cualquier tipo de enlace y vínculo con sitios de contenido pornográfico, sexual, escorts, acompañantes sexuales, venta de sexo, etc...', [resulta] evidente que 'etc' se refiere a sitios de similar naturaleza a los antes detallados." *Macedo, María Isabel c/ Yahoo de Argentina SRL s/ Medidas precautorias* (fs. 271/2, Buenos Aires), 10 July 2008.

<sup>5</sup> All translations in this paper are by the authors.

that the lower court's injunction was issued.”<sup>6</sup>

In *Jazmin de Grazia c/ Yahoo de Argentina* the court stated that it could not consider the role of third parties because they were not named in the suit. To do so would be procedurally improper.

“It is also not admissible – in the context of this case – to attempt to extend the effects of the injunction to third-party owners of the web pages... people responsible for and entities that administrate those pages, since this pretense would have to be established in its own right and corresponding questions addressed, but not in this proceeding, since to do otherwise would alter the ‘*thema decidendum*.’”<sup>7</sup>

Since the court argues that the search engines' infraction is in *facilitating* access, it sidesteps the potential argument that the outside websites are necessary parties to the lawsuits.

### c. Counter-Arguments

In court filings, Google and Yahoo made two types of counter-arguments: that it would be (1) hugely inconvenient to monitor unauthorized postings on third-party websites, and (2) technologically impossible to create filters to block offending content. With respect to the first, they said that at most, they could only sever links to specific sites that the celebrities themselves identified. The court rejected this argument by reasoning that it would be too onerous to require the celebrities to look out for and report specific websites they want to have blocked. Instead this responsibility lies with the search engines.

In the *Mazza* case, Judge Aguirre's reasoning illustrates this position. Google and Yahoo's request that the plaintiff provide them with the URLs to be severed

“is not, to my criteria, acceptable, because it demands of the plaintiff a burdensome daily task in order to then advise the defendants [about the websites]. By virtue of the technical means and the technology the defendants employ to carry out searches... they find themselves in the best position to find an adequate solution to execute the injunctive order.”<sup>8</sup>

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<sup>6</sup> “[I]ndependientemente de su falta de participación o control en la elaboración de productos generados por terceros, lo cierto es que su difusión masiva en gran medida depende del aporte de su tecnología destinada a facilitar la búsqueda de tales productos; y es precisamente a evitar esa propagación indiscriminada que se encuentra encaminada la cautelar decretada en autos.” *Mazza, Valeria Raquel c/ Yahoo de Argentina SRL s/ Medidas precautorias* (Juz. Nac. en lo Civil nº 50), 11 July 2008.

<sup>7</sup> “[T]ampoco resulta admisible – en el marco de este proceso – que se pretenda extender los efectos de la cautelar a los terceros dueños de las páginas web, a las entidades registrantes, a las personas responsables y a las entidades administradoras de dichas páginas, pues tal pretensión deberá ser planteada en su caso con la interposición de las demandas correspondientes, pero no en este juicio, pues en caso contrario se estaría alterando el ‘*thema decidendum*.’” *De Grazia, Jazmin c/ Yahoo de Argentina SRL y otro s/ Medidas cautelares* (Sala III, Buenos Aires), 5 Nov 2008.

<sup>8</sup> “Tal propuesta [de Yahoo y Google] no resulta a mi criterio aceptable, pues exige por parte de la actora un desagradable control diario para luego dar avisos a las demandadas. ... [E]n virtud de los medios técnicos y de la tecnología aplicada por las demandadas para desarrollar los buscadores por ella explotados a través de sus respectivos

With respect to the second counter-argument, the courts rejected claims of technical impossibility by saying essentially that the technology that created the search engines themselves could surely be crafted into a suitable filter. In the *Macedo* case, Judge Goggi scolded the search engines for making this counter-argument.

“This court finds it noteworthy that these companies, which publicly boast about their absolute mastery of information and the precision and speed of their searches, invoke the technical impossibility of carrying out the injunction and instead attempt to transfer... to the appellee [plaintiff] the task of putting a stop to the noxious effects on which this action is based.”<sup>9</sup>

We will return to the courts’ treatment of the question of technological impossibility below, in the context of decisions outside Argentina.

#### **d. Public Interest and Public Figure arguments playing a role**

To date there have been at far as we know two exceptions to the emerging pattern explained above. In June 2009, in *Servini de Cubría c/ Yahoo de Argentina y Otro*,<sup>10</sup> a judge ruled against plaintiff María Romilda Servini de Cubría on the grounds of freedom of expression. Servini de Cubría – herself a judge – sought to “block any information related to... as well as images of her, any time they do not have her authorization.”<sup>11</sup>

In rejecting the injunctive request the court cited the free expression tenet that, as a public servant, Servini de Cubría is subject to a higher level of public scrutiny.

“Turning to the plaintiff’s position as a judge, it is useful to note that the federal court has emphasized that ‘the exercise of free criticism of public officials on the grounds of government actions is an essential manifestation of freedom of the press’ and, likewise, that ‘public officials have voluntarily exposed themselves to a greater risk of suffering damage from defamatory news.’”<sup>12</sup>

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dominios, son quienes en mejor condición se encuentran para encontrar la adecuada solución para cumplir la cautelar ordenada y consentida.” *Mazza Valeria Raquel c/ Yahoo de Argentina SRL*.

<sup>9</sup> “[R]esulta llamativo a este Tribunal que las empresas accionadas, que públicamente se jactan de su pleno dominio de la información y de la precisión y velocidad de sus búsquedas, invoquen la imposibilidad técnica de cumplir las medidas dispuestas e intentan trasladar... a la reclamante la carga de hacer cesar los nocivos efectos sobre cuya base se acciona en autos.” *Macedo, María Isabel c/ Yahoo de Argentina SRL* (note iii above).

<sup>10</sup> *Servini de Cubría María Romilda c/ Yahoo de Argentina SRL y otro s/ Medidas cautelares* (Causa 7.183/08, Juzgado 4, Secretaría 7), 3 June 2009.

<sup>11</sup> “...bloquear cualquier tipo de información referida a la Dra. María Romilda Servini de Cubría, así como también imágenes respecto de su persona, siempre y cuando no contaran con autorización de la actora.” *Servini de Cubría María Romilda c/ Yahoo de Argentina SRL* (note vii above), paragraph 1.

<sup>12</sup> “[E]n atención al carácter de magistrada de la peticionaria, es útil señalar que la Corte Federal ha subrayado que ‘el ejercicio de la libre crítica de los funcionarios por razón de actos de gobierno es una manifestación esencial de la libertad de prensa’ y, asimismo, que ‘los funcionarios públicos se han expuesto voluntariamente a un mayor riesgo de sufrir perjuicio por noticias difamatorias.’” *Servini de Cubría María Romilda c/ Yahoo de Argentina SRL* (note vii above), paragraph 4.2, citing Fallos 269:189 and 310:508.

The logic of this rule regarding public officials does not, in the court's view, extend to other public figures who are not government officials.

However, in August, an appellate court did take this rule a step further, overturning a May 2008 injunction issued against Yahoo and Google on behalf of Diego Maradona. Here the court extended the public figure argument beyond the realm of strictly public officials to include well-known stars like Maradona (who is arguably the most famous living Argentine celebrity).<sup>13</sup> The judge wrote, "it is important to note that the images contained in the plaintiff's brief refer to themes that are tied to activity the plaintiffs carry out, and as such are of public interest, given the transcendence of the name of Diego Maradona..."<sup>14</sup>

In both of these cases, the court found it important (and in Maradona's case, decisive) that the cases did not deal specifically with sexual content. The court cited this fact in distinguishing *Servini de Cubría* from the actors and models for whom most injunctions have been granted. "Judge *Servini de Cubría*'s situation is not comparable to that of artists and models, whose situation called for a different response from this Court, with regards to images published on the Internet in which their names and images were being used on sites with sexual content."<sup>15</sup>

Similarly, in the *Maradona* opinion the court states that the images in question are "in no instance related to sites with sexual or pornographic content. It is clear, therefore, that the case at hand differs substantially from other decisions of this Court in which names and images were used

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<sup>13</sup> The "public official-public figure-public interest" arguments were used by the Inter-American Court of Human Rights in several cases. For example, in the "*Herrera Ulloa v. Costa Rica*" case – Judgment of July 2, 2004–, the Court said "A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate." –see para.129. In a recent decision (*Tristan Donoso v. Panama*, Judgment of January 27, 2009) the Court repeated that <sup>13</sup> "Value judgments concerning an individual's capacity to hold a public office and the way in which public officials perform their duties should enjoy greater protection in order to promote democratic debate. The Court has held that in democratic societies public officers are exposed to greater public scrutiny and criticism. This different threshold of protection is appropriate because such persons have voluntarily exposed themselves to more demanding scrutiny. Their activities go beyond the private domain and become part of the sphere of public debate. This threshold is not based on the position of the subject, but rather on the public interest of the activities that he performs." – see para. 115.

<sup>14</sup> "importa señalar que las imágenes contenidas en la documental adjuntada por la actora, se refieren a temas vinculados con la actividad desarrollada por los actores, y por lo tanto de interés público, dada la trascendencia del nombre de Diego Maradona..." *Maradona Diego Armando y otros c/ Yahoo de Argentina SRL y otro s/ Medidas cautelares* (Juz. 11 Sec. 21, Expte. N° 3.567/08, Reg. N° 133), 13 Aug 2009. For prior ruling, see *Maradona Diego Armando y otros c/ Yahoo de Argentina SRL y otro s/ Medidas cautelares* (Expte. N° 3.567/08, Reg. N° 133), 5 May 2008.

<sup>15</sup> "[L]a situación de la jueza *Servini de Cubría* no es equiparable a la de artistas y modelos, cuya situación mereció una respuesta diferente de esta Sala, ante imágenes publicadas en Internet en las que, inclusive, sus nombres e imágenes eran empleados en sitios de contenido sexual." *Servini de Cubría María Romilda c/ Yahoo de Argentina SRL* (note vii above), paragraph 4.2.

on sites with sexual content.”<sup>16</sup>

This distinction especially – the lack of sexual content – allows the court to attest that while these cases are exceptional, they do not contradict prior rulings.

#### **e. A Decision Granting Damages: The Virginia da Cunha Case**

In July 2009, the first ruling came down on the merits for this type of case. In *Virginia da Cunha c/ Yahoo de Argentina y Otro*,<sup>17</sup> federal civil court judge Virginia Simari employed arguments similar to those in the injunctive decisions about violations of the plaintiff’s honor and the search engines’ responsibility. Google and Yahoo’s responsibility, the judge argued, is based on their being facilitators of access to the offending content.

“Their business consists of a service that facilitates arrival at sites that would otherwise be very difficult to access, and furthermore, this facilitation forms the heart of one of their principal activities. Therefore, we are in a position to affirm that the search engine, in contributing to the access to the Internet sites, is in the best technical position to prevent the eventual harm, and this is the basis for the search engines’ responsibility for their activity of facilitating access to websites.”<sup>18</sup>

Judge Simari’s decision also relies on expert testimony alleging the feasibility of a court-mandated filter.

“On both search engines (Google and Yahoo) it is possible to create a search that prevents certain words from appearing in the search results. In fact, this procedure can be configured to prevent certain words from appearing in conjunction with other words in specific or general searches; it is therefore technically feasible to adapt the search to the information it is in a position to provide while avoiding certain words.”<sup>19</sup>

Below, we will return to the idea of the filter described here. Judge Simari found for the plaintiff and ordered Google and Yahoo to pay AR\$50,000 each to the plaintiff for moral harm

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<sup>16</sup> “en ningún caso relacionados con sitios de contenido sexual o pornográfico. Queda claro, entonces, que el caso sub examen difiere sustancialmente de otros fallados por esta Sala en donde sí los nombres e imágenes eran empleados en sitios de contenido sexual.” *Maradona Diego Armando c/ Yahoo de Argentina SRL*, 13 Aug 2009 (note x above).

<sup>17</sup> *Da Cunha Virginia c/ Yahoo de Argentina SRL y otro s/ Daños y perjuicios* (Juz. Nac. En lo Civil nº 75, Expte. Nº 99.620/06), 29 July 2009.

<sup>18</sup> “Su quehacer constituye un servicio que facilita la llegada a sitios que de otro modo serían de muy dificultoso acceso, y además, esa facilitación hace precisamente al núcleo de una de las actividades centrales que desarrollan. Así pues, nos hallamos en condiciones de afirmar que el buscador al contribuir al acceso a los sitios de internet se encuentra en las mejores condiciones técnicas para prevenir la eventual generación de daño y de allí surge el perfil de los buscadores como responsables de su actividad facilitadora del acceso a sitios.” *Da Cunha Virginia c/ Yahoo de Argentina SRL* (note xi above).

<sup>19</sup> “En los dos buscadores (Google y Yahoo) es posible realizar una búsqueda que evite que en los resultados aparezca determinada palabra. De hecho, ese procedimiento podría ser configurado a fin de evitar que cierta palabra aparezca vinculada con otras en determinados tipos de búsquedas o cualquier búsqueda; es pues técnicamente factible adecuar la búsqueda de la información que se está en condiciones de brindar, evitando determinadas palabras.” *Da Cunha Virginia c/ Yahoo de Argentina SRL* (note xi above).

(*daño moral*). At the time this paper is written, Google and Yahoo are expected to appeal the ruling.

### III. Recent British Jurisprudence

In granting injunctions in the vast majority of Argentine cases, judges have adopted a particular understanding about the technical nature of search engines. Similar cases abroad, especially in Europe, show these Argentine decisions to be outliers in the international arena. A recent British decision came to conclusions entirely in contrast to those of the Argentine courts in a case where a company sued Google for defamatory content on a third-party website. In the decision for *Metropolitan International Schools v. Google*,<sup>20</sup> Judge David Eady carefully explained the way search engines operate, placing particular emphasis on the fact that no human input or judgment is involved at any point – rather, the process is completely automated. Judge Eady wrote,

“It would be impossible for Google to search every page available on the web in real time and then deliver a result in a time frame acceptable to users. What happens is that Google compiles an index of pages from the web and it is this index which is examined during the search process. Although it is well known, it is necessary to emphasize that the index is compiled and updated purely automatically (i.e. with no human input). The process is generally referred to as ‘crawling’ or the ‘web crawl.’

“When a search is carried out, it will yield a list of pages which are determined (automatically) as being relevant to the query. The technology ranks the pages in order of ‘perceived’ relevance – again without human intervention. The search results that are displayed in response to any given query must depend on the successful delivery of crawling, indexing and ranking. Content on the Internet is constantly being crawled and re-crawled and the index updated.”<sup>21</sup>

Accordingly, the judge found that injunctive relief would actually be impossible from a technological standpoint. Any filter Google might set up to block offending content – as Judge Simari posited in the *Da Cunha* decision – would invariably also block untold numbers of websites whose content and services are perfectly legal. Further, to order Google to subjectively review search results and remove offending content (as some Argentine rulings do) would be highly unreasonable and unfeasible. Because the search engines employ no human input or judgment in carrying out their searches, they cannot be held responsible for third-party content. The judge described similar decisions in Switzerland, France, Spain and the Netherlands.

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<sup>20</sup> Between Metropolitan International Schools Limited (T/A Skillstrain and/or Train2Game) and (1) Designtechnica Corporation (T/A Digital Trends) (2) Google UK Limited (3) Google Inc (Case No HQ09X01852, [2009] EWHC 1765 (QB)), 16 July 2009.

<sup>21</sup> Metropolitan International Schools Limited v. Google Inc (note xiv above), paragraphs 11-12.

#### IV. Conclusion

The arguments presented in the British decision are central to contrast the Argentine cases. For example, compare Judge Eady's description of how Google functions, above, to Judge Aguirre's decision in the previously mentioned *Mazza* case:

“The defendants bear the quality of exploiters of their domains, which they created, designed and configured, and which, by way of their search engines, facilitate quick access to certain types of information contained on the Internet, generating links and ties that *necessarily require the existence of a database that stores and processes all of this information*, making it immaterial whether it the task is of a manual or mechanical character” (emphasis added).<sup>22</sup>

The database that, according to Judge Aguirre, must exist, is the index Judge Eady describes. But the manual versus mechanical difference that Judge Aguirre deems irrelevant is exactly the point on which Judge Eady eventually based his ruling: the lack of manual input means that Google is not the publisher of the offending content and therefore, at least under British law, cannot be held liable for it.<sup>23</sup> Another difference of the Argentine approach is that the injunctions refer to search results obtained through the [www.google.com.ar](http://www.google.com.ar) and [www.yahoo.com.ar](http://www.yahoo.com.ar) search engines, but because of the global scope of the internet the same results can be found through dozens of other Google and Yahoo portals (e.g. by putting another country's abbreviation at the end or leaving off a country designation altogether). This raises an important question of whether the injunctions are even affording relief to the plaintiffs.

These differences in the Argentine courts' reasoning diminish the soundness of the rulings to date. Given the emerging international consensus on these issues – in some European countries, legislation even protects search engines from this sort of lawsuit – and the incontestable technological realities on the mechanics of the search engines, it could be only a matter of time before the Argentine courts reverse the pattern that has emerged thus far.

Should a case in Argentina reach the Supreme Court, will it adhere to the arguments advanced by the lower courts, or instead overrule them? In the latter event, it will be interesting to see whether the court rules on the basis of the technology of search engines or furthers the argument in the *Servini de Cubría* and *Maradona* cases to argue that public figures of all kinds, including celebrities, voluntarily submit themselves to public scrutiny. The technological argument would

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<sup>22</sup> “En ese orden de cosas es de señalar que, las demandadas revisten la calidad de explotadoras de sus dominios, creados, diseñados y configurados por ellas, los que a través de sus motores de búsqueda, facilitan el rápido acceso a distinto tipo de información contenida en la Internet, generando vínculos y enlaces que necesariamente requieren de la existencia de una base datos que almacene y procese toda esa información, resultando indistinto que se trata de una tarea de carácter manual o mecánico.” *Mazza Valeria Raquel c/ Yahoo de Argentina SRL* (note iii above).

<sup>23</sup> *Metropolitan International Schools Limited v. Google Inc* (note xiv above), paragraphs 48-64.



still allow for a celebrity to claim that his or her privacy has been invaded or honor impugned. In this context, the court may find that the plaintiff could appropriately sue the operator of the offending website(s). On the other hand, if the court pursues the second argument – that celebrities, as public figures, invite more scrutiny and less privacy – it would bypass the question of whether the search engines are appropriate defendants, instead raising thought-provoking questions of what privacy rights a famous person actually has in Argentina in the Internet age.