

**EMERGING PATTERNS IN INTERNET FREEDOM OF EXPRESSION:  
COMPARATIVE RESEARCH FINDINGS IN ARGENTINA AND ABROAD**

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**I. Introduction**

This paper outlines recent Argentine case law addressing liability on the Internet for third-party generated content, focusing particularly on a number of preliminary injunctions ordering search engine companies to block access to allegedly offending websites. These preliminary injunctions have been issued in cases in which celebrity plaintiffs have brought suit against Google and Yahoo for violating their honor and privacy. The paper begins by setting these cases in an international context, with a comparison of the emerging Argentine trend with related decisions in other countries, including a recent British ruling that discusses at length the automated nature of search engines and found that liability cannot be assigned to them.

The paper will also deal briefly with the role of “public interest” and “public figure” considerations in selected cases in Argentina. Finally, a decision by a Court in the province of Mendoza is examined in which a preliminary injunction was issued

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<sup>1</sup> The original version of this paper was written by Eduardo Bertoni with Elizabeth Compa, based on her research under the supervision and direction of Prof. Bertoni. This updated version –prepared for discussion at a workshop held in Buenos Aires on October 19<sup>th</sup>, 2010- was written and researched with the collaboration of Sara Rafsky and Andrea de la Fuente. 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 Argentinean winter of 2009. Rafsky, a current CELE intern, is a Georgetown University graduate and was a Fulbright scholar in Colombia last year. De la Fuente is a lawyer and researcher at CELE. More information about CELE at [www.palermo.edu/cele](http://www.palermo.edu/cele).

against Facebook prohibiting the creation of certain groups on this social networking site.

We will describe the facts of these cases, the arguments presented, and the reasoning judges have used in reaching their decisions. Additionally, we examine two cases which defied the emerging trend and a recent overruling of a decision on the merits. Finally, the paper questions whether the Argentine approach is tenable given the mechanics of search engine technology and the prevailing trends abroad.

## II. Recent British Jurisprudence

When CELE first undertook this research in June 2009, we learned that there were over one hundred decisions from the past few years in Argentina granting preliminary injunctions against Google and Yahoo. By granting preliminary injunctions in the vast majority of these cases, Argentine judges have showed a particular understanding about the technical nature of search engines. In the *Virginia da Cunha c/ Yahoo de Argentina y Otro*<sup>2</sup> case, for example, the trial court ruled that filtering damaging content was a viable option. These cases will be discussed in more depth later on.

Similar cases abroad, especially in Europe, show these Argentine decisions to be outliers in the international arena. The conclusions of a recent British decision were entirely in contrast to those of an Argentine decision 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>3</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

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

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>4</sup>

Based on this, the judge found that injunctive relief would actually be impossible from a technological standpoint. Any filter that Google might set up to block offending content would invariably also block untold numbers of websites whose content and services are perfectly legal, the judge reasoned. Furthermore, to compel Google to review search results according to subjective criteria and remove offending content (as some Argentine rulings order) would be highly unreasonable and unfeasible. Because the search engines employ no human input or judgment in carrying out their searches, the decision concluded, they cannot be held responsible for third-party content. The judge described similar decisions in Switzerland, France, Spain and the Netherlands.<sup>5</sup>

International legislation has also mostly supported the idea that search engines should not be held liable for third-party content, such as the United States’s Communications Decency Act,<sup>6</sup> the “safe harbor” provision of the US Digital Millennium Copyright Act,<sup>7</sup> the European Union’s Electronic Commerce Directive,<sup>8</sup>

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<sup>4</sup> Metropolitan International Schools Limited v. Google Inc (note iii above), paragraphs 11-12.

<sup>5</sup> In September, a Spanish court ruled that YouTube could not be held liable for videos posted on its site that violated copyright laws, as long as the site removed the illegal content when properly notified. YouTube, which is owned by Google, argued that the site was a “host,” similar to ISPs, and thus was protected from liability by EU regulations (note 8 below). Eric Pfanner, “YouTube Can’t Be Liable on Copyright, Spain Rules,” *The New York Times*, September 23, 2010.

<sup>6</sup> “Protection for “Good Samaritan” blocking and screening of offensive material (1) Treatment of publisher or speaker: 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. (2) Civil liability: No provider or user of an interactive computer service shall be held liable on account of - (A) 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; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).” Communications Decency Act of 1996 Pub. L. 104-104, title V, 8 February, 1996, 110 Stat. 133, Section 230 (c), [http://www.law.cornell.edu/uscode/html/uscode47/uscode47\\_usc\\_sec\\_47\\_00000230----000-.html](http://www.law.cornell.edu/uscode/html/uscode47/uscode47_usc_sec_47_00000230----000-.html)

<sup>7</sup> “A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—(1)(A) does not have actual knowledge that the material or activity is infringing; (B) in the

and Chile's recent Intellectual Property Act.<sup>9</sup> Most of Latin America, however, is still lacking legislation to regulate search engine liability. In that vacuum, particularly in Argentina, it has been left to the courts to decide.

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absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link," Digital Millennium Copyright Act Pub. L. 105-304, 28 October, 1998, 112 Stat. 2860, Section 512 (3) (d),

[http://www.law.cornell.edu/uscode/html/uscode17/uscode17\\_00000512----000-.html](http://www.law.cornell.edu/uscode/html/uscode17/uscode17_00000512----000-.html)

<sup>8</sup>“The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; 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 Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.” European Union Electronic Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, arts. 42-48, see at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>

<sup>9</sup>“The service providers who at the request of a user store, or through third party intermediaries, data in their network or system, or conduct search services, links and/or refer to a site through search tools, including hyperlinks and directories, will not be considered responsible for the data stored or referred to provided that the server: a) Has no effective knowledge of the illicit character of the information of the data; b) Does not receive any direct economic benefit attributed to the offending content, in the case that they have the right and capacity to control said activity; c) Publicly designs a representative to receive the judicial notifications that are referred to in the final subsection, in a form that determines the regulations, and d) Removes or incapacitates in an expedited manner the access to the stored information according to the provision set forth in the following subsection. It will be understood that the service providers have

### III. Recent Argentine Jurisprudence

In Argentina, more than one hundred cases regarding Internet liability have been filed. This paper focuses on and examines some of the most important decisions and trends that have emerged from these cases, many of which are still being argued. One decision has been issued refusing the injunctive relief sought. The first case to be decided on the merits came down in July 2009. The following month, at least two injunctive orders were overturned. Most recently, in August 2010, the decision on the merits was overturned on appeal.

#### a. The Facts Presented

The first set of 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>10</sup>

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the effective knowledge when a competent justice tribunal, according to the procedure established in article 85Q, has ordered the removal of the data or the blocking of access to them and the service providers, being legally notified of said resolution, does not comply in a expedited manner.” (“Los prestadores de servicios que a petición de un usuario almacenan, por sí o por intermedio de terceros, datos en su red o sistema, o que efectúan servicios de búsqueda, vinculación y/o referencia a un sitio en línea mediante herramientas de búsqueda de información, incluidos los hipervínculos y directorios, no serán considerados responsables de los datos almacenados o referidos a condición que el prestador: a) No tenga conocimiento efectivo del carácter ilícito de los datos; b) No reciba un beneficio económico directamente atribuible a la actividad infractora, en los casos en que tenga el derecho y la capacidad para controlar dicha actividad; c) Designe públicamente un representante para recibir las notificaciones judiciales a que se refiere el inciso final, de la forma que determine el reglamento, y d) Retire o inhabilite en forma expedita el acceso al material almacenado de conformidad a lo dispuesto en el inciso siguiente. Se entenderá que el prestador de servicios tiene un conocimiento efectivo cuando un tribunal de justicia competente, conforme al procedimiento establecido en el artículo 85 Q, haya ordenado el retiro de los datos o el bloqueo del acceso a ellos y el prestador de servicios, estando notificado legalmente de dicha resolución, no cumpla de manera expedita con ella.”) Ley 20435, Modifica la ley N° 17.336 sobre propiedad intelectual, May 4, 2010, Article 85, *see* <http://www.leychile.cl/Navegar/?idNorma=1012827&idVersion=2010-05-04&idParte>

<sup>10</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, Sofia 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.

The alleged offending websites were operated by third parties unaffiliated with Google and Yahoo. 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.

The final case is a recent ruling against Facebook that deliberated whether the social networking site could be held responsible for a group on its site created by minors that promoted truancy.

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

In most of these injunctions, the decisions focused on violations of privacy and causing moral harm. 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 and 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 example, Judge Carlos Goggi explained (citing the lower court's order),<sup>11</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>12</sup> We will return to the court's view on the feasibility of such a sweeping mandate below.

Unlike the British judge, the Argentine 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

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<sup>11</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>12</sup> All translations in this paper are by the authors.

avoid this indiscriminate propagation that the lower court's injunction was issued.”<sup>13</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>14</sup>

Since the court argues that the search engines' infraction is in *facilitating* access, it sidesteps the problem of the potential liability of third-parties that have created the content.

### **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, the court ruled, 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

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<sup>13</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>14</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.

“...[It] 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>15</sup>

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 contrast to the British ruling, Judge Goggi scolded the search engines in the *Macedo* case 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>16</sup>

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

The *Macedo* decision was not the only one to address the appropriateness and feasibility of filtering search engine results. 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’s decision in part relied on expert testimony alleging the viability 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

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<sup>15</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 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. (footnote xiii)

<sup>16</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* (footnote xi).

<sup>17</sup> *Da Cunha Virginia c/ Yahoo de Argentina SRL y otro* (footnote ii).



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>18</sup>

This reasoning stands in contrast to the British decision, in which the judge posited that filtering the search results might unintentionally block legitimate content. In fact, according to a recent *New York Times* blog posting, people with the same name as the Argentine plaintiffs in some of the cases that were granted injunctions found they were being blocked in search engine results as well.<sup>19</sup>

The judge also employed arguments similar to those in the other injunctive decisions about violations of the plaintiff’s honor and the search engine’s culpability for causing moral harm. She argued that Google and Yahoo’s responsibility was 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>20</sup>

The judge found for the plaintiff and ordered Google and Yahoo to pay AR\$ 50,000 each to the plaintiff for moral harm (*daño moral*).

In August, the decision in the Da Cunha case was overruled.<sup>21</sup> In the 2-1 majority vote, the Appellate Court mostly sidestepped the issue of technological feasibility and addressed instead the question of responsibility. In the decision, the Court applied article 1109 of Argentina’s Civil Code, which states that to be held responsible for damages, “fault” must be found on the part of the defendant.

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<sup>18</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* (footnote ii).

<sup>19</sup> “No Safe Harbors in Argentina,” *The New York Times*, 20 August, 2010, <http://bits.blogs.nytimes.com/2010/08/20/no-safe-harbors-in-argentina/>

<sup>20</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* (footnote ii).

<sup>21</sup> *D.C.V. v. Yahoo de Argentina SRL y otro s/ Daños y Perjuicios*, Cámara Nacional de Apelaciones en lo Comercial, Sala D. Expte. N° 99.620/2006. *Da Cunha Virginia c/ Yahoo de Argentina SRL y otros* (footnote ii).

The judges concluded that the search engines could not be assigned fault in this case. To reach this conclusion regarding “fault”, the Court considered that:

“(…) the contents and information that can be accessed through the services offered by the defendants have not been, I insist, created, edited, or “uploaded” by them, but by third parties that in the majority of cases – and so it was held by the information technology expert -remain anonymous”.<sup>22</sup>

Moreover, the Court seemed to place the burden of identifying the webpages with allegedly offensive content on the plaintiffs:

"Before receiving any demand from the affected person seeking to block the content that is considered damaging and available on the Internet through the search engines defendants, they cannot themselves be attributed or assigned any fault for the content in question."<sup>23</sup>

The Court did express, however, the belief that “fault” could be found – and therefore search engines could be held liable for illegal content- if they were informed of its existence and failed to take appropriate remedial measures to remove it.

“If when faced with an illicit situation and having been made aware of it through the proper mechanisms, [the search engines] did not carry out the proper and necessary conduct to cease the harmful activities, well, in that moment it could be configured as fault on their part and be susceptible to being viewed in terms of the articles 512, 902, and 1109 of the Civil Code.”<sup>24</sup>

Despite the implications this finding holds for future litigation, the Court did not further elaborate on how or when the search engines could be considered having been made aware nor on what exactly constitutes “proper [advisory] mechanisms.” On this issue, the dissenting judge disagreed and argued that indeed the defendants had been made aware and had been negligent in removing the content. For this reason, he found

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<sup>22</sup> “... los contenidos e información a los cuales se puede acceder a través de los servicios proporcionados por las demandadas no han sido, insisto, creados o editados o “colgados” por ellas, sino por terceros, que en la mayoría de los casos, y así lo señaló el perito informático, permanecen en el anonimato”. <sup>22</sup> D.C.V. v. Yahoo de Argentina SRL y otro s/ Daños y Perjuicios”, Cámara Nacional de Apelaciones en lo Comercial, Sala D. Expte. N° 99.620/2006. Da Cunha Virginia c/ Yahoo de Argentina SRL (footnote ii).

<sup>23</sup> “[C]on anterioridad a cualquier reclamo del afectado solicitando el bloqueo del contenido que considera agravante y disponible en Internet a través de los buscadores demandados, no puede a los mismos serle atribuida o adjudicada con culpa alguna por los contenidos cuestionados.” <sup>23</sup> D.C.V. v. Yahoo de Argentina SRL y otro s/ Daños y Perjuicios”, Cámara Nacional de Apelaciones en lo Comercial, Sala D. Expte. N° 99.620/2006. Da Cunha Virginia c/ Yahoo de Argentina SRL (footnote ii).

<sup>24</sup> “... Frente a una situación ilícita, y advertidas a través de los mecanismos pertinentes, no realicen la conducta atinente y necesaria para obtener la cesación de las actividades nocivas, pues, recién en ese momento, se configuraría una falta propia susceptible de ser apreciada en los términos de los arts. 512, 902, 1109 y cc. Del Código de fondo.” D.C.V. v. Yahoo de Argentina SRL y otro s/ Daños y Perjuicios”, Cámara Nacional de Apelaciones en lo Comercial, Sala D. Expte. N° 99.620/2006.

the search engines could and should be considered responsible, and voted to uphold the decision.

**e. Public Interest and Public Figure arguments playing a role**

As shown in the cases above, the issue of search engines' responsibility and "fault" for third-party content has not yet been conclusively resolved in Argentine jurisprudence. To date there have been, as far as we know, two other exceptions to the emerging pattern of injunctions explained above. These cases have concerned the conflict between a public figure's right to privacy and public interest. In June 2009, in *Servini de Cubría c/ Yahoo de Argentina y Otro*,<sup>25</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>26</sup>

In rejecting the injunctive request the court cited the freedom of 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>27</sup>

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

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<sup>25</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>26</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 (footnote xxv), paragraph 1.

<sup>27</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 (footnote xxv), paragraph 4.2, citing Fallos 269:189 and 310:508.

most famous living Argentine celebrity).<sup>28</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>29</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>30</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 on sites with sexual content.”<sup>31</sup>

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<sup>28</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>28</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>29</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>30</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* (footnote xxv), paragraph 4.2.

<sup>31</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 (footnote xxix above).

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. Nonetheless, these cases do not provide any guidelines for who should be considered a public figure, and in what cases the public interest overrides a public figure’s right to privacy. While the *Servini de Cubría* case emphasized the unique role of public servants and public officials, no clear principles have been established as to why, for example, Maradona’s rights should be differentiated from those of the models, other than a perhaps arbitrary calibration of the extent of his fame.

#### **f. Beyond Search Engines: damaging content and Facebook**

In May, another ruling was delivered regarding fault and damaging online content, but this time against Facebook, rather than against search engines. The case, *Protectora Asociación Civil de Defensa del Consumidor c/ Facebook Inc. P/Sumario*,<sup>32</sup> concerned groups created on the social networking site by minors that promoted school truancy. After considering the potential conflict between freedom of expression and the right to privacy, Judge Alfredo Dantiacq Sánchez in Mendoza ruled in favor of the plaintiff, a consumers’ rights association, and issued a preliminary injunction in the case ordering:

“...The immediate cessation of groups created or to be created by minors, regarding content in the Province of Mendoza or received and/or directed towards minors located there, with the objective of promoting school truancy...the prohibition extends to other possible ends where minors promote objectives that could cause them or others harm in their actions.”<sup>33</sup>

Judge Sánchez thereby set up a broad definition of what could be interpreted as liable content, partly using the official policy of Facebook itself concerning minors as justification for his reasoning.<sup>34</sup> The injunction only covers groups and content created

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<sup>32</sup> *Protectora Asociación Civil de Defensa del Consumidor c/ Facebook Inc. P/Sumario*, (Segundo Juzgado en lo Civil, Comercial y Minas, Expte. Nø. 152.628), 11 May, 2010.

<sup>33</sup> “...[E]l cese inmediato de los grupos creados o a crearse por menores de edad, respecto de los contenidos que sean vistos en la Provincia de Mendoza o recibidos y/o dirigidos a menores que se encuentran en ésta, con el objeto de promover la falta al ciclo escolar... como también hacer extensivo a posibles otros objetos donde los menores de edad promuevan objetivos que puedan causarse daño ellos o a terceros con su accionar.” *Protectora Asociación Civil de Defensa del Consumidor c/ Facebook Inc. P/Sumario* (footnote xxxii)

<sup>34</sup> “We reserve the right to apply special methods of protection to minors (such as providing them with content appropriate for their age) and apply capacity restrictions for adults who share with and contact minors, recognizing that this may entail a more limited experience for minors on Facebook.” (“Nos reservamos el derecho de aplicar métodos de protección especial para menores (como proporcionarles un

in Mendoza. As in the search engine cases, it remains to be seen whether compliance with injunctions of this kind is technically or logistically feasible. Despite the sweeping nature of the decision, only time will tell whether monitoring on this scale succeeds in practice.

#### IV. Conclusion

As shown in this paper, Argentine jurisprudence has differed greatly from international case law regarding internet liability. The arguments presented in the previously discussed British decision in particular stand in contrast to the rulings in the Argentine cases. For example, compare Judge Eady's description of how Google functions in the *Metropolitan International Schools* case to Judge Aguirre's decision in the *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>35</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>36</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

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contenido adecuado a su edad) y aplicar restricciones a la capacidad que tienen los adultos para compartir y conectarse a menores, reconociendo que esto puede suponer para los menores una experiencia más limitada en Facebook.”) <http://facebook.com/policy/php>

<sup>35</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* (footnote xiii).

<sup>36</sup> *Metropolitan International Schools Limited v. Google Inc* (footnote iii), paragraphs 48-64.

leaving off a country designation altogether). This raises the 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 both jurisprudence and legislation, as well as the incontestable technological realities of the mechanics of search engines, it could be only a matter of time before the Argentine courts reverse the existing pattern, such as in the recent Da Cunha appeal.

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 Cubria* and *Maradona* cases to argue that public figures of all kinds, including celebrities, voluntarily submit themselves to public scrutiny. The technological argument would 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.

Many of the issues raised by the jurisprudence studied in this paper could be definitively resolved by comprehensive legislation. As Pedro Less Andrade, Latin American policy counsel for Google, writes in *Americas Quarterly*:

“...[M]easured regulation that works with the actors (civil society, content providers and service providers) in the fast changing world of Web 2.0 could provide a more consistent, modern and flexible model...Regulation that is well balanced and consistent with successful international regulatory trends elsewhere while remaining applicable to the Latin American legal tradition will serve as a powerful tool for justice in the resolution of ICT-related matters that present technical complexities.”<sup>37</sup>

The lack of legislation in the region not only creates uncertainty in the legal realm, but also, he argues, stifles innovation:

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<sup>37</sup> Pedro Less Andrade, “Who’s Liable for User-Generated Content?,” *Americas Quarterly*, Winter 2009, Volume 3, Number 1, pp. 73 and 75.

“If such a regulatory framework could provide legal security for the activities of the different main players – like different Internet intermediaries (ISPs, 2.0 platforms, social networks, search engines) – it would permit better planning and more sustained investment in the region...Regulatory gaps over the potential liability of Internet service providers for user-generated content and security for online commerce explains in part the failure of the region to generate start-up enterprises in the world of Web 2.0 and Social Web.”<sup>38</sup>

Carlos Petre, a Secretary of an Argentinean Court of Appeals, also highlights the problematic nature of leaving the fate of internet liability, and perhaps future internet developments, up to the judicial realm:

“It may be that the Legislative Body is the branch in better condition to study in depth, debate and regulate this subject; it is very difficult for an injunction enacted in an urgent manner in accord with the specific procedural systems for injunction to best resolve these conflicts. But for now it is the only one.”<sup>39</sup>

Much of the international legislation discussed earlier was debated and passed a decade ago - when Google was in its infancy and before Facebook even existed - and does not take into account many of the technological developments and subsequent issues that have occurred in the years following. Argentina and Brazil, among other countries, are currently considering various internet legislative bills. As Andrade notes, Latin America has the unique opportunity to study earlier legislation and learn from its mistakes. The nature of those mistakes and the content of future legislation is an issue we would like to leave as an open question.

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<sup>38</sup> Andrade, pp. 73 and 74.

<sup>39</sup> Carlos Petre, “Medidas Cautelares y Tecnología: Su aplicación en los casos en que se demanda a los ‘motores de búsqueda’ de *Internet* por responsabilidad,” paper presented at a close workshop in Buenos Aires, 2010. “Puede que sea el Poder Legislativo el que esté en mejores condiciones para profundizar, debatir y regular sobre esta materia; difícilmente un pronunciamiento cautelar, dictado con carácter urgente de acuerdo con las normas procesales que rigen nuestro sistema precautorio y sin un marco legal específico de fondo, sea la mejora forma para resolver los conflictos. Por ahora es la única.”p. 16