

Liability of Internet Service Providers (ISPs) and the exercise of freedom of expression in Latin America

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Introduction

The advent of new forms of mass communication through technology has posed regulatory obstacles and challenges. Perhaps one of the most sensitive and problematic issues from the standpoint of the associated economic models and conflict with other constitutional rights, especially the right to freedom of expression, relates to the mechanisms for establishing liability. As is well-known, the use of digital networks has shifted the discussion regarding the multiple aspects of civil liability to a new setting, with the attendant difficulties that this brings.

When it comes to the online environment, technological infrastructure does not seem to pose, at least a priori, any regulatory obstacles for the exercise of freedom of expression. Initially, with the proliferation of *bulletin boards systems*, and later with the emergence of mailing lists and the widespread use of email, communications became essentially decentralized and were developed through communication protocols enabling such exchanges. But it was with the technical possibilities which enabled the exchange of intangibles via digital networks and in recent years with the boom of the so-called social networks, that the regulatory importance of this infrastructure for the exercise of rights became increasingly evident. Somehow, a shared feature of these communicative acts is the need for technological infrastructure. This infrastructure, in turn, is operated by Internet services providers, which not only administer but also have power to control the flow of data across their networks.

Hence the importance, from a regulatory perspective, of establishing firm criteria to ensure that net neutrality is maintained and, in this case in particular, the importance and the need to establish a system that will provide for the responsibility of those who are technically capable of controlling any uses which depart from those permitted by law. For this and other reasons, it seems that the measures taken by authorities with respect to these providers are not just desirable but also necessary to prevent any lawless actions or breaches in the course of communications taking place through this crucial infrastructure. Notably, no clear criteria have been established at the international level. In this respect, several methods have been proposed in the continent to put communications under the oversight (at least in part) of such institutions, which are still discussed with varying degree of social awareness and participation.

This paper will try to address such proposals in light of the fundamental rights recognized in regional instruments and the potential consequences of such legal intervention for the development of the freedoms and rights which are exercised through media that use digital networks, and for the protection of the interests of the affected parties. The article will try to reach conclusions regarding how best to enforce the liability of communication intermediaries - where reasonable-, and which mechanism may be used to oversee the balance between the interests at stake, taking comparative experiences into account.

Should technical facilitators be liable for communicative acts which constitute criminal offences or infringements? When is interference with user communications justified? In cases

where such questions have been answered by statutes or by the courts, has an optimal answer been delivered which is not detrimental to the users who communicate via Internet or the economic actors responsible for the service? These are just some of the questions which should be answered with regard to the liability of Internet intermediaries.

I. Country study

Mixed normative realities in Latin America have forced us to narrow the scope of our study. Therefore, we have focused on countries which have achieved a certain degree of development in these areas, especially those with recent legal initiatives. The following sections will concentrate on the commonalities and differences among Argentina, Brazil, Chile and Colombia.

I.A. Regulation of Internet providers

Acts of communication through Internet, regardless of content, pass through a complex technological infrastructure, consisting of very different physical and logical elements, each controlled by an operator. The participation of these operators is subject to the regulations of each relevant territory, whether the rules concerning general communications services or the specific rules governing the provision of Internet-related services. In the same way, there are regulatory differences regarding compliance with the national rules governing business combinations and their share of the market.

The relevance of such distinctions lies in that each method of operation could in theory give rise to a different form of liability, depending on how the content or communicative act manifest themselves in each of the stages of Internet communication. To the extent that each operator has control over one of these stages and, as a result, has the technical capacity to allow the circulation of allegedly criminal content or content which infringes the rights of third parties, then the intermediary will facilitate communication. Logically, this intermediary will also have the necessary technical capacity to prevent the circulation of such communication.

In this respect, we can distinguish Internet services based on their functional character¹:

a) An *access provider*, which connects an end user's computer to the Internet, using cables or wireless technology, or also facilitating the equipment to access the Internet;

b) A *transit provider*, which allows interaction between a computer and the access provider, and the *hosting providers*, and its function is merely the transmission of data (*mere conduit*);

c) A *hosting provider* has one or several computers with available space or “servers”, with access to transit providers, which may be used for its own purposes or for use by third

¹ This classification of services has been established by the authors based on the language of Directive 2000/31/CE of the European Parliament and of the Council, as well as the directive analyzed by Maturana, Cristian, in “Responsabilidad de los Proveedores de Acceso y Contenido en Internet,” in *Revista Chilena de Derecho Informático*, No. 1, 2002. Facultad de Derecho, Universidad de Chile. Santiago.

parties, who make content available from other computers connected to access and transit providers. A hosting provider will offer technologies to feature content on the web, to send, receive and administer emails, store files, etc. A distinction may be established between *caching*, where the purpose of hosting is to facilitate the functioning of the network through automatic, intermediate and transient storage of information, and *hosting*, that is, commercial or other storage that is permanent or more than merely provisional.

d) The term *content provider* refers to those who use the above infrastructure to make available to end users the most diverse information, including web pages, services, email, connection between different end users and as many other possibilities as the mind can conceive, by delivering content created by the provider itself or by intermediaries or third parties. Also, within content provision services we may distinguish Internet search and linking services from other providers, considering the special way in which they interact with other online content, which has afforded them special treatment in the jurisprudence of the courts and in recently proposed legal reforms.

The organizational and economic differences between these operators (that is, whether the operational and financial capacity of one or several of these components of the structure of Internet communication is concentrated or not) will not be relevant for the purpose of this article. Nevertheless, the practice observed in the continent indicates that the different providers interact with users as access and transit service providers, and as telecommunications providers which also offer Internet access, while Internet content is managed and made available by different content providers who may or may not own the servers hosting such content.

This latter distinction between service providers associated with the connection, and service providers associated with content delivery is particularly relevant for the analysis of liability: hosting and content providers have a potentially global reach; on the contrary, those who provide services or connectivity to end users within a certain territory will usually be subject to the legal and geographical restrictions of such territory. So, although a web page may be available all over the world, connection providers will vary depending on the computer used to access the website. A logical consequence of this is that access and connection service providers must abide by the laws of the territory in which they operate, whereas hosting and content providers will be subject to the rules of any territory where their content is accessible. To make the analysis of this matter more easily interpretable, we will use the term **connection providers** to refer to those providing access, connection and infrastructure services enabling Internet access and the transmission of data, the term **hosting providers** to refer to those which give others the possibility of sharing content in the web, and the term **content providers** to refer to those who make different services or content available to the generality of users, irrespective of whether these are provided by them or not.

Of course, each country has its own rules for service delivery between the end user and the Internet access provider.² Our analysis will not focus on this aspect, but rather on the

² The relationship between a person contracting an Internet connection and the entity which provides the service is strictly a customer or service relationship. In this way, obligations concerning the provision of the service are regulated by each country -such as in Brazil, in the Código de Defesa do Consumidor (Lei N° 8.078/90)- or the

liability of Internet access providers as intermediaries with respect to the communication acts of their users. The general question in this regard is which are the liability rules applicable to access and connection providers, as well as to content providers. If all of them are intermediaries between a sender and the actual or potential recipients of an act of communication or expression, which are then the liability rules applicable to such communication? Similarly, when the service offered by a content provider enables other parties, such as clients or users, to publish content or communicate information, the provider may also be held liable for the consequences of those acts.

At the regional level, these questions receive a general negative answer. Broadly speaking, there are no national regulations affecting directly and specifically Internet connection providers; with few exceptions, content providers are not subject to special regulations either.

However, some considerations should be made in this regard. We should note first that just because there is no specific regulation of the liability of Internet service providers (or content providers) it does not follow that they may not be held liable under civil law, but rather that such responsibility shall be governed by the general rules of liability and, therefore, proving said liability will be more challenging. Secondly, although there are few specific regulations regarding the civil liability of Internet service providers and content providers at the regional level, this absence of regulation is becoming a thing of the past. International treaties dealing largely with free trade and economic cooperation have been adopted, forcing countries to introduce legal reforms on this matter; laws have been passed recently in Chile³; and several reform proposals are underway in Argentina⁴, Brazil⁵ and Colombia⁶, discussed further below.

II. Determination of legal liability of Internet service providers

To refer to the legal consequences of improper conduct, a distinction is often made between criminal and civil liability. Criminal liability deals with the imposition of legal penalties for conduct which is prohibited by society and classified as a crime. On the other hand, when we speak of civil liability we refer, in a general way, to the system which recognizes a person's obligation to compensate any harm to another's person or property resulting from their actions or omissions. Both types of liability may coexist: those who engage in criminal acts will not only face the sanctions set out in the law, which will curtail their rights and freedoms, but

service is regarded as another telecommunications service, as with the Chilean General Telecommunications Law (Ley General de Telecomunicaciones, No. 18.168 of 1981).

³ Law No. 20.435 amending the Intellectual Property Law, of May 5, 2010.

⁴ Proyecto N° de Expediente 8793-D-2010, Trámite Parlamentario número 208 (February 22, 2011), sobre Régimen para Proveedores del Servicio de Internet.

⁵ The Brazilian legal reform process that sought to amend the liability standards applicable to Internet service providers was initiated as part of the copyright law reform, in particular the *Lei de Direitos Autorais* No. 9.610 of 1998. Fluctuations, controversies and shifts in government strategy have prevented active participation by the civil society and have cast doubt on the success of the process. Nevertheless, several draft bills are already under debate. For a full timeline, see Paranaguá, Pedro, "Brazil's Copyright Reform: Are We All Josef K.?" in *Intellectual Property Watch*. Available at <<http://www.ip-watch.org/weblog/2011/05/12/brazil%E2%80%99s-copyright-reform-are-we-all-josef-k/>> [last accessed on June 25, 2011].

⁶ Bill No. 241 of 2011, regulating liability for infringement of copyright and other related rights on the Internet.

must also provide a monetary compensation to redress the harm suffered by those affected by their wrongful acts.

A fundamental consequence of this distinction between civil and criminal liability lies in the possibility to claim one or the other. The imposition of criminal liability is necessarily subject to the existence of a penalty stipulated in the law prior to the harmful event. Such law must be in full force and must be rigorously and unequivocally enforced both with respect to the reprehensible conduct and the corresponding sanction (*nullum crimen, nulla poena sine lege praevia, scripta, stricta et certa*). As we have noted earlier, civil liability, in turn, results from the enforcement of generally accepted principles which provide for the compensation of any damage caused or from a preexisting duty not to cause harm (*alterum non laedere*). Additionally, criminal liability allows only for the sanction to be imposed directly upon the offender, as perpetrator, accomplice or accessory. Meanwhile, civil liability may be established by proving that someone other than the offender is responsible.

Without going into the details of national legislation or the doctrinal distinctions of each national legal culture, a rough distinction⁷ can be made in the area of civil law between *negligent liability* or *fault-based liability*, in which a person is held liable for harm caused to others if it is demonstrated that his or her conduct was negligent or intentional, and *strict liability*, which makes a person responsible for the damage caused by a certain activity, regardless of the degree of diligence employed. A distinction is also made between liability for one's own acts, liability for the acts of others and products liability, each with variations depending on the national context. In some of these cases, there are regulations which hold Internet connection providers or content providers liable, but this is not so in many others cases.

The grounds for Internet providers' liability shall be subject to the enforcement of rules which are applicable to them as content intermediaries. This is so because the unlawfulness may result from the communicative acts performed by individuals or businesses as originators of content. In this regard, the following acts have been recognized as criminal offences committed via the Internet: “*a*) the dissemination of bomb-making instructions, terrorist activities, drug production and trafficking, and political activism, which threaten national and global security; *b*) the promotion of child pornography (pedophilia) and sexual services, in order to protect minors; *c*) the transmission of messages that incite hatred and racial or religious discrimination, which degrade human dignity; *d*) the stealing and destruction of data by ‘hackers’, and which constitute a threat to information security and confidentiality; *e*) the crimes related to software ‘piracy’, which infringe intellectual property; *f*) the unauthorized collection, processing and transmission of personal data, which requires the legal protection of privacy; *g*) sending defamatory or libelous messages which injure the honor and dignity of a person; etc.”⁸

In recent years, there has been an international attempt to develop a legal formula to impose liability for the dissemination of information that is sensitive, secret, confidential or that may compromise the security of a State or its troops abroad. However, this has been a

⁷ For a comprehensive analysis of civil liability, especially tort liability, in the continental civil law tradition, see BARROS, Enrique, *Tratado de Responsabilidad Extracontractual*. Santiago, Editorial Jurídica de Chile, 2006.

⁸ See Jijena, Renato, *Contenidos de Internet: Censura o Libertad de Expresión*. Available at: <<http://www.mass.co.cl/acui/leyes-jijena2.html>> [Date of last access: June 25, 2011].

concomitant of the controversy surrounding the WikiLeaks case.⁹ A resolution by the courts is still pending and special statutes on the subject are yet to be passed.

II.A. Liability and child pornography

From a criminal law standpoint, the most frequent cases of Internet liability have involved the preparation and dissemination of pornographic material affecting minors. Several reforms throughout the region have sought to reflect that the use of technology is just another means to commit crimes, and these rules have been applied in countries like Argentina,¹⁰ Brazil,¹¹ Chile,¹² Colombia,¹³ Costa Rica,¹⁴ El Salvador,¹⁵ Nicaragua,¹⁶ Paraguay,¹⁷ Uruguay¹⁸ and Venezuela.¹⁹ For the purpose of this article, what matters most is not the recognition of those crimes under the law but the ensuing obligations for Internet service providers (as well as connection and content providers). As a result, in addition to penalties being imposed on those directly responsible for the dissemination or distribution of pornographic material depicting minors in an explicit or implied manner (depending on the legislation), Brazil and Colombia establish an obligation to remove the material.

In Brazil, Article 241-A²⁰ of the Children's Charter punishes with fines and imprisonment from three to six years anyone who offers, sells, transmits, distributes or disseminates pornographic material involving minors, through any means, including computer and telematic systems. The same punishment (paragraph 1) shall apply to those who provide the means or services necessary to store such material (part I), or who by any means facilitate computer access to the material (part II). Under the second paragraph, such behaviors are

⁹ For a summary of the case and its implications for the web, see UNESCO, *Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet*, p. 13, France, 2011.

¹⁰ Criminal Code, Article 128.

¹¹ Estatuto da Criança e do Adolescente, Articles 241-A (on transmission and distribution, inter alia), 241-B (on acquisition, including storage), et seq., introduced by Law 11.829 of 2008.

¹² Criminal Code, articles 374 bis and 374 ter, introduced by Law 19.927 of 2004.

¹³ Criminal Code, articles 218 (Pornography involving children under 18) and 219-A (Use or facilitation of the media to advertise sexual intercourse with children under 18) and Law No. 679 of 2001 on child abuse and pornography in the Internet, article 7.

¹⁴ Criminal Code, articles 173 (preparation) and 174 (distribution and dissemination).

¹⁵ Criminal Code, article 173.

¹⁶ Law No. 641, New Criminal Code of 2007 (Nuevo Código Penal de 2007), article 175.

¹⁷ Criminal Code, article 140.

¹⁸ Law No. 17.815 of 2003, articles 2 and 3.

¹⁹ *Ley Especial contra Delitos Informáticos* of 2001, article 24.

²⁰ Art. 241-A. *Oferecer, trocar, disponibilizar, transmitir, distribuir, publicar ou divulgar por qualquer meio, inclusive por meio de sistema de informática ou telemático, fotografia, vídeo ou outro registro que contenha cena de sexo explícito ou pornográfica envolvendo criança ou adolescente:*

Pena – reclusão, de 3 (três) a 6 (seis) anos, e multa.

§ 1o Nas mesmas penas incorre quem:

I – assegura os meios ou serviços para o armazenamento das fotografias, cenas ou imagens de que trata o caput deste artigo;

II – assegura, por qualquer meio, o acesso por rede de computadores às fotografias, cenas ou imagens de que trata o caput deste artigo.

§ 2o As condutas tipificadas nos incisos I e II do § 1o deste artigo são puníveis quando o responsável legal pela prestação do serviço, oficialmente notificado, deixa de desabilitar o acesso ao conteúdo ilícito de que trata o caput deste artigo.

punishable when the person legally responsible for the service has been officially notified but fails to disable access to the illicit material featuring child pornography. In other words, once those responsible for the storage and transmission become aware of the existence of the material, they will be subject to criminal sanctions, even if they were not involved in its preparation or publication.

In addition, the state of R o de Janeiro has imposed additional obligations on Internet service providers. A law from 2003²¹ requires “Internet access providers” (referring to *hosting* providers) from that state to submit quarterly reports to the Municipal Council for Children's Rights informing the pages hosted by them and naming those responsible for such pages.²² Providers are also expected to report and to encourage users to report inappropriate content, and may be subject to fines that increase significantly with each repeat offence.

The Colombian case is slightly different. Apart from prohibiting the dissemination of pornographic content featuring children under 18 in the Colombian Criminal Code (Article 218), Law No. 679 of 2001, amended by Law No. 1336 of 2009, sets out additional obligations regarding child pornography.²³ Under Article 7 of said law, service providers, content providers and users of information networks are banned from storing written, graphic and audiovisual material involving sexual activity with minors, in addition to being banned from publishing pornographic material when “there is a basis” to suspect that the individuals involved are minors. There is a further prohibition that seems to go far beyond the obligation to refrain from producing, storing and disseminating child pornography: the law prohibits (Article 7, No. 3) the hosting of “links to websites which contain or distribute pornographic material concerning minors.” As a result, a search engine could be subject to sanctions for merely displaying among the results a site where this type of material is provided, and this would require an excessive degree of control of all links. For example, we could imagine a situation in which a link is provided to a site containing videos, ignoring the full extent of the material that has been published in such link. Then, the linker would be exposed to liability for linking a website which offers child pornography.

²¹ Law No. 3.644, of September 17, 2003, Rio de Janeiro.

²² Art. 1^o *Os provedores de acesso   internet estabelecidos no Munic pio do Rio de Janeiro, fornecer o a cada tr s meses, rela o completa das p ginas home pages que hospedam ao Conselho Municipal dos Direitos da Crian a e do Adolescente-CMDCA, bem como a dos respectivos respons veis por sua elabora o.*

Par grafo  nico. A elabora o, remessa e an lise da rela o a que se refere o art 1^o desta Lei, t m por objetivos prec puos:

I - identificar as home pages que estejam veiculando materiais sobre pedofilia;

II - coibir a pr tica da pedofilia na internet;

III - facilitar e viabilizar a puni o dos respons veis por sua elabora o.

²³ Article 7. *Prohibitions. Providers, servers, administrators or users of global networks of information shall not:*

- 1. Host in their own website images, text, documents or audiovisual files involving direct or indirect sexual activity with minors.*

- 2. Host in their website pornographic material, especially images or videos, when there is basis to suspect that the individuals who were photographed or filmed are minors.*

- 3. Host in their website links o sites which display or distribute pornographic material involving minors.*

Article 8 of the same law²⁴, in turn, establishes a general obligation to report criminal acts against minors, to combat the dissemination of child pornography, to refrain from using networks to publish illegal material involving minors and, in particular, to implement “technical blocking mechanisms which users can apply to protect themselves and their children from illegal, offensive or undesirable content concerning minors.”

Article 10 of the same law provides that the above duties may be enforced through administrative sanctions.²⁵ The Ministry of Communications may punish those responsible with fines of up to 100 statutory minimum wages and the cancellation or suspension of the electronic page. The Ministry may also require Internet service providers to report on the control mechanisms or filters used to block pages featuring child pornography, and may force them to include mandatory clauses in web portal contracts providing for the ban and blocking of pages with child pornography. The law requires providers to grant access to judicial and police authorities so that they can track an IP number when the law is infringed. The relevance of such measures, absent a court ruling or proceeding, will necessarily overlook considerations of proportionality, privacy and due process in favor of combating child pornography.

I.B. Liability and threats to the honor, dignity and private life of individuals

An aspect that deserves consideration is the imposition of harsher penalties for insulting or libelous acts or other forms of defamation or offenses when the communication is made in writing, with publicity or via the press or other mass media. The practice of the courts in many countries has been to punish these crimes pursuant to the general principles for establishing

²⁴ Article 8. *Duties. Without prejudice to the obligation imposed by the law on all Colombian residents, the providers, administrators and users of global networks shall:*

1. *Report to competent authorities all criminal acts against minors that come to their attention, including the dissemination of pornographic material involving minors.*

2. *Employ all the technical means available to combat the dissemination of pornographic material involving minors.*

3. *Refrain from using global information networks to disseminate illegal material concerning minors.*

4. *Establish technical blocking mechanisms which users can apply to protect themselves and their children from illegal, offensive or undesirable content concerning minors.*

²⁵ Article 10. *Administrative sanctions. The Ministry of Communications will act on the reports and will sanction responsible providers, servers, administrators and users within the Colombian territory with:*

1. *Fines of up to 100 statutory minimum wages.*

2. *The cancellation or suspension of the electronic page.*

The imposition of the above sanctions will be made in accordance with the procedure established in the Contentious Administrative Code (Código Contencioso Administrativo), and taking into account the principles of due process as well as considerations of adequacy, proportionality and recidivism.

Additional paragraph. The Ministry of Communications shall have power to require Internet service providers to furnish, within a time period determined by said Ministry, any information that it deems necessary concerning the enforcement of Law No. 679, as amended. In particular, the Ministry shall be entitled to:

1. *Require Internet service providers to disclose, in the manner and within the period specified, the mechanisms or filters that they use to block pages with child pornography.*

2. *Require Internet service providers to include mandatory clauses in web portal contracts providing for the ban and blocking of pages with child pornography.*

Internet service providers shall grant access to judicial and police authorities to their networks so that they can track an IP number when the law is infringed.

Failure to comply with these provisions will result in the enforcement of the administrative sanctions established in article 10 of Law No. 679 of 2001, with its criteria and formalities.

direct and personal criminal liability, irrespective of whether the message was transmitted over the Internet, to the extent that technological tools enable the prosecution of individuals even when the defamatory statement was made anonymously.

From the viewpoint of legal analysis, the imposition of criminal liability for such crimes not to the person who expresses the offenses but instead to those who disseminate them, deserves closer attention. We are referring to such circumstances in which the intermediary is subject to criminal sanctions for facilitating or disseminating content of this nature. This is the case in Colombia²⁶ and, less extensively, in Argentina²⁷, where the dissemination or publication of defamatory statements may also give rise to liability. Nevertheless, in these cases the enforcement of the principles of criminal liability, in particular the requirement of *criminal intent*, tends to exclude the applicability of the sanctions when the providers have no influence over the content disseminated by them and, therefore, it is not possible to prove an intent to offend or cause discredit.

This has not prevented the criminal and civil prosecution of Internet service providers and content providers in cases of statements perceived as harmful to a person's honor.

A popular example is the string of actions brought by prominent public figures in Argentina in an attempt to recover damages from search engines. In particular, such actions sought the adoption of precautionary measures to suspend, block or remove any link retrieved by search engines (usually Google and Yahoo!) between the name or image of the claimant and the web pages containing sexual or defamatory material.²⁸ Although little progress has been made towards a final judgment in these cases²⁹, the courts have granted provisional measures. For example, the search of “Yesica Toscanini” in the Argentine version of the Yahoo! search engine³⁰ yields, together with the number of results found, an explanation that none of these results can be displayed due to a court order to that effect.

Notwithstanding the proliferation of such cases in Argentina, and that in many of them precautionary measures were granted, one of the most recent cases (still pending) evidenced sharp differences of opinion between the courts of first and second instance and has established a set of criteria for the future determination of liability of service providers, in particular Internet search and linking services. In 2006, singer Virginia da Cunha sued Google Inc. and Yahoo! Argentina for damages. Da Cunha alleged that by returning her name and likeness among results

²⁶ Criminal Code of Colombia, Article 222. *Indirect defamation. The sanctions established in the previous articles shall apply to those who publish or reproduce defamatory statements made by others, or who reproduce the statements in an impersonal manner, using expressions such as "it is said", "reportedly" or other similar phrases.*

²⁷ Criminal Code of Argentina, Article 113. *Anyone who publishes or reproduces, by any means, defamatory statements made by others shall be punishable as responsible himself provided that the claim is not correctly attributed to the corresponding source. Expressions referring to matters of public interest or which are not assertive shall not constitute calumny.*

²⁸ For a detailed account of the status of the discussion concerning the liability of search engines in Argentina, see Tomeo, Fernando and Abieri, Roberto, “Responsabilidad de los buscadores de Internet”, in *Revista de Responsabilidad Civil y Seguros*, Year 11 (2009), No. 12, pp. 66-70. La Ley, Argentina.

²⁹ Until mid-2010, judgments had been rendered in only 2 of more than 130 cases. *Cfr.* Sreeharsha, Vinod, “Google and Yahoo Win Appeal in Argentine Case,” *The New York Times*, August 20, 2010, p. B4.

³⁰ Available at: <<http://ar.yahoo.com>>.

for sex related searches, the search engines had damaged her image, and that “her fundamental rights to honor, name, image and intimacy had been violated by associating her with Internet sites with sexual, erotic or pornographic content, and by using her likeness for unauthorized commercial purposes.”³¹ The court of first instance ruled in favor of the artist and ordered the defendants to pay 100.000 Argentine pesos plus interest as compensation for pain and suffering. The court applied the general rules of civil liability set forth in the Argentine Civil Code, in the absence of special rules on the subject. In its conclusions of law, the court notes that search engines have control over the search system, and are responsible for the content featured in web pages. In addition, the court recognizes the importance of search engines and considers that, because of this, their responsibility over displayed results is enhanced rather than diminished, as the growth of the Internet cannot be accomplished at the expense of the fundamental rights of individuals.³² The court found that fundamental rights had been violated and awarded damages in the amount indicated above as compensation for pain and suffering.

In August 2010, however, Chamber D of the Federal Appeals Court for Civil Matters (Cámara Nacional de Apelaciones en lo Civil), a court of second instance of the Argentine civil justice system, reversed the decision with two votes in favor and one vote against reversal.³³ Patricia Barbieri, in her concurrent opinion, cited various legal and doctrinal sources, including the domestic rules which recognize the Internet as a means to exercise the fundamental right to freedom of expression, established in the constitution.³⁴ Barbieri also makes a point concerning the rules of liability: in the absence of a results-based system of strict or objective liability, then the basic elements of tort liability, including negligence or fault, must be proved.³⁵ Only after a complaint has been filed it would be appropriate to accuse search engines of negligence (if they fail to respond satisfactorily to such complaint), instead of expecting them to implement some sort of prior censorship mechanism over contents beyond their control.³⁶ Ana María R. Brilla de

³¹ “Da Cunha Virginia c/ Yahoo de Argentina S.R.L. y otro”. Juzgado Nacional de Primera Instancia en lo Civil N° 75, Buenos Aires, July 29, 2009.

³² Id.

³³ Cámara Nacional de Apelaciones en lo Civil, sala D, Expte. N° 99.620/2006 “D. C. V. c/ Yahoo de Argentina SRL y otros/ Daños y Perjuicios” Recurso N° 541.482. Juzgado N° 75.

³⁴ Opinion of Barbieri: “Decree 1279/97 is applicable and provides that the Internet service falls within the constitutional guarantee of freedom of expression and is subject to the same treatment as other media. This means that the provisions of articles 14, 32 and 42 of the Argentine Constitution which recognize freedom of expression and prohibit prior censorship are applicable to Internet services. In addition, Law No. 26.032/05 provides that the search, reception and dissemination of ideas and information via Internet services fall within the constitutional guarantee of freedom of expression.”

³⁵ Opinion of Barbieri: “From this point of view, the mere fact that the information or material in the web and retrieved by search engines is incorrect and offensive to the honor, likeness or privacy of a person, without more, cannot entitle them to claim compensation for any damage caused. Once the abuse or unlawfulness has been demonstrated, those seeking to receive compensation will have to prove the fault or negligence of the search engine under the general system of liability for one's own acts established in article 1109 and which follows the principle “alterum non laedere.” That is, the verification of the damage suffered will not suffice to establish an obligation to compensate; the claimant will need to demonstrate the imputability of the conduct on the basis of fault or negligence.”

³⁶ Opinion of Barbieri: “But it is clear to me that even if civil liability is established, it may only be asserted against the respondents to the extent that, having been warned of an unlawful situation, they fail to take measures to put an end to the harmful activities, as only then there would be a misconduct that could be assessed pursuant to the terms of articles 512, 902, 1109 and following sections of the Code. In sum, before a claimant requests that the allegedly offensive content be removed from the web, search engines may not be held liable for such content.”

Serrat rendered the second majority vote. She concurred with the arguments presented by Barbieri and further noted that search engines function as mere data collectors and, therefore, there can be no intent to offend by the respondent.³⁷ The dissent refuses to accept prior censorship as a means to prevent any damage caused but nevertheless indicates that the respondents could implement filters, and notes that the fact that the offensive links are still retrieved by the search engines is simply inexcusable.³⁸ The case is currently pending before the Argentine Supreme Court.

Several years before, in a landmark decision which sought to address this issue despite the absence of specific laws on the subject, the superior courts of Chile made an attempt to set a precedent for defamation cases involving online content. The decision has been extensively commented in legal literature³⁹ for its innovative approach and for being one of the few occasions in which the courts of Chile have had the opportunity to consider matters of this nature. In *Fuentes con Entel*,⁴⁰ the claimant filed a complaint against Internet provider Entel concerning an advertisement for sexual services which was featured in mid-1999 in the advertisement section of the same Internet provider. The person seemingly offering the services was the claimant's daughter, then aged 17, who received countless telephone calls of an “obscene, insulting, rude and corrupt” nature which forced the family to suspend the service. In the claimant's opinion, the constitutional right to honor of the minor had been violated. The

³⁷ Opinion of Brilla de Serrat: “These are not transmissions which are harmful to personal rights, including images, via operators of written, oral or TV media, but rather auxiliary activities aimed at facilitating access by service users to the sites in the “web”. This is not a transmission of personal data that could jeopardize the right to privacy of all human beings, although we do understand the stress suffered by the claimant –a former singer turned model and actress-, upon realizing that she was being associated with web pages featuring sexual activity, prostitution and pornography, although she was in no way accused of or depicted as being involved personally in such practices.”

³⁸ Opinion of Diego C. Sánchez: “The evidence presented, admitted by my colleagues (section 477 and following articles of the Procedural Code), shows that Google Inc. and Yahoo! became aware that through their search engines it was possible to access content from third-party websites retrieved in their searches and featuring the likeness and/or associating the name of the actress with erotic, pornographic, sexual or other texts which are considered illicit, and that the respondents are capable of implementing filters to prevent the indexing of sites or images associating certain words with said content. It is nevertheless inadmissible that the precautionary measures (case file No. 63314/06, which I have before me) were granted on August 23, 2006 (pursuant to page 64, containing notarial certificate issued by notary public Arias from 27-06-06) and that notice was given immediately to the defendant, on September 7 of that year (pages 147/9) and early in 2010 (pages 2139/40, which are now part of this main case file), more than three years after the precautionary measure was ordered, Google continues to retrieve links which associate the name of the claimant with websites containing sexual and pornographic material. (...) The defendants' misconduct in failing to comply in due time with the precautionary measures ordered by the court, requiring the defendants to block or remove illegal material which infringes the fundamental rights of the claimant is both relevant and inexcusable.”

³⁹ See, among others, Lipszyc, Delia, “Responsabilidad de los Proveedores de Servicios en Línea por las Infracciones del Derecho de Autor y Derechos Conexos en el Entorno Digital: Análisis de la Jurisprudencia Internacional”, in XI Curso Académico Regional OMPI/SGAE Sobre Derecho de Autor y Derechos Conexos para Países de América Latina, OMPI, 2005; Piñeiro, Lorena, “Responsabilidad de los ISPs por Violación a la Propiedad Intelectual: Estados Unidos, Europa y Chile.” In *Revista Chilena de Derecho Informático*, No. 5, 2004, Universidad de Chile; Carrasco, Humberto, “Algunos Aspectos de la Responsabilidad de los Proveedores de Servicios y Contenidos de Internet.” In *AR: Revista de Derecho Informático*, No. 26, September 2000.

⁴⁰ Corte de Apelaciones de Concepción [Concepción Court of Appeal], decision in *Recurso de protección*, Orlando Fuentes Siade con Empresa Nacional de Telecomunicaciones Entel S.A., rol 243-19-99, ruling of December 6, 1999.

company declined any responsibility, as the advertisement had been placed by a user from the city of Concepción through Entel's free platform, but the content was exclusively the responsibility of the users who published content in the platform.

In *Fuentes con Entel*, the court dismissed the claimant's argument and established that the constitutional action was brought belatedly. The court nevertheless addresses other aspects of the case, including the absence of special laws on the subject, and identifies three types of Internet service providers: access providers, storage providers and content providers. The court indicates that all such providers must participate for a crime to be committed, and classifies Entel as an access and storage provider, and the external company GrupoWeb as a content provider. Citing professor Santiago Schuster,⁴¹ the ruling concludes that liability lies directly with the user who provides online content when such content is illegal or harmful, and that liability may also extend to content which is introduced directly by the end users of the Internet service when the provider has created a database with the contributions made by its clients through the different fora available to subscribers and has failed to take necessary action to identify the users who post such messages and to establish any potential liability in case of third party damage. In accordance with the opinion of the author, the Court recognizes a duty of control by Entel, and provides that Entel should take any necessary measures to put an end to the damage caused to third parties. The liability of hosting providers becomes "evident" when they fail to put an end to crimes committed through their services and which are known or should be known to them, as this behavior (of fault or negligence) makes them responsible for, or complicit in the crime. This does not respond to the question about the cost of this oversight, or about whether the company should conduct such control as a provider of access or as a storage provider, considering that a different company provided the content.

The ambiguity of the case was not resolved subsequently at a later stage of the conflict. After the action for relief was dismissed, instead of a direct constitutional remedy, the aggrieved party sought to assert her rights by filing an ordinary civil action to establish the tort liability of Entel, the Internet access provider, together with the person who posted the advertisement in which the victim was portrayed as a sex worker. The action was brought against Mrs. Yáñez Vargas for providing her Internet password to another person without regard for his or her malicious or negligent acts and the harm caused to the claimants by the advertisement; and against Entel for failing to fulfill its duty to ensure that its network is not used to offend the honor or the mental integrity of the affected party, even though it was capable of deleting the advertisements. The trial court dismissed the claim.

The Appeals Court of Concepción ruled against the appellant,⁴² but had a new opportunity to re-assess some of the aspects that had been already considered several years before. In its decision in *Fuentes con Entel II*, the Court of Concepción confirmed that the applicable laws would be those of tort liability and that the imputability of the conduct should be based on the fault or negligence of the offender. This time, the Court established that the

⁴¹ Schuster, Santiago, *Responsabilidad Legal en las Redes Digitales*. Conference at the Law School of the University of Chile (Universidad de Chile), Santiago, 1999.

⁴² Appeals Court of Concepción (Corte de Apelaciones de Concepción), decision on appeals, case *Paulina Fuentes Almendra y otro con ENTEL S.A.; Carmen Gloria Yáñez Vargas*, rol 1223-2003, judgment of December 21, 2007.

defendant had not acted with fault in allowing another person to use an Internet password (in the opinion of the Court, “Not as many passwords as family members are usually contracted”), whereas the person who posted the illicit content - one of her daughters- was legally of age and was responsible for her actions.

As for the Internet access provider, this time the Court expressly stated that the provider “is not obliged to control the inclusion of content in the web and, in fact, it is expected to respect the free circulation of the information through the web”. The provider has not breached any duty of care, as it “was not aware” of the offense in question and it removed the advertisement only a few hours after receiving the request. In this respect, although the Court upholds traditional liability standards, it is worth considering some the Court's comments, which may even run contrary to the previous decision: the Internet access provider is not obliged to control the inclusion of content in the web, but it does have an obligation to respect the free flow of information through the Internet. The Court does not define such principle, but defends it against the acts of Internet providers.

It is unclear from the above case-law solutions whether there is a single formula for imposing liability. In fact, it seems reasonable that an access and connection provider which does not offer any storage capacity or content should be free from liability for the content posted by end users and for their acts of communication (in spite of the opinion rendered by the Court of Concepción in its first decision on *Fuentes con Entel*). However, when such content or acts of communication are hosted and made available to all other users of the web using the physical and technical structure of the hosting and content providers, the situation is not so clear. Oversight of standards of conduct and diligence, in this respect, should be accompanied by enhanced doctrinal and dogmatic refinement, if not by the implementation of new legal conditions. These measures need not be intended to establish the civil liability of Internet service providers on the understanding that, in theory, they are economically stronger than other users and potential respondents⁴³; but with the aim of elucidating the real extent of their involvement (and hence, their liability) with respect to potentially illicit acts which may affect the rights of third parties.

II.C. Liability of Internet providers for the infringement of intellectual property rights

We have seen and examined cases in which controversies between content providers (and content searchers) concerning the provision of Internet services and threats to honor were taken to court, but this is not the area where the liability of Internet service providers has been discussed most thoroughly. It is not the tension between freedom of expression and the image and honor of individuals,⁴⁴ but rather the infringement of the property rights of authors via

⁴³ “The tendency to make Internet service providers (hereinafter, ISPs) liable for the wrongful acts of their users over the Internet can be easily explained. On the one hand, any offense (of any kind, whether civil, criminal or administrative) on the Internet is materialized through their services (access or storage services, search engines or routers); Internet would not exist without ISPs. On the other hand, ISPs are easily locatable and usually have greater solvency than offenders to compensate any damage caused.” XALABARDER, R., *op.cit.*

⁴⁴ Bertoni, Eduardo, *Libertad de Expresión en el Estado de Derecho*. Buenos Aires, Editores del Puerto, 2008.

online exchanges⁴⁵ that over the last years has prompted discussions about the possibility of regulating the liability of Internet service providers, leaving aside other forms of web crime, such as those noted earlier in this article.

II.C.I. Foreign influence: discussion of international treaties and foreign laws

As has been noted, the liability of communication intermediaries for the acts of third parties has been widely discussed by theorists, in some cases by legal authors and, particularly in our region, in the case law of the courts. But aside from certain cases of public relevance (because of the actors involved, or the impact they may have on future regulation), it is largely based on international instruments that the general copyright system has tried to push the agenda for amending the local copyright laws.

This is not an isolated strategy though. When considered in perspective, it becomes clear that a shift or change in emphasis has occurred in copyright legislation at the international level. The issue was initially dealt with in specific treaties concerning copyright and related rights, but following the increased economic relevance of the computer industry during the late 20th century, a significant trend emerged at the international level concerning the treatment of copyright issues and, in general, the development of new technologies. This trend results from an important paradigm shift in international regulations, and since the 1970s and 1980s the direction of international copyright regulations veered towards the agenda of commerce under the WTO. Examples of the above are the signing of the Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS) in 1994 and the WIPO Internet Treaties in 1996.

Partly as a result of the criticism received by developing countries from the WIPO, and also due to the commercial significance of piracy related losses, during the first half of the 1990s a further shift took place which is relevant to the focus of this article: the measures aimed at coping with piracy and the emergence of new copyright protection mechanisms -especially on line- prompted the inclusion of these issues in bilateral instruments, always as part of the trade agenda. Therefore, especially in Latin America, the so-called Free Trade Agreements became a new way in which international rules, led in this case by the United States, sought to influence local regulations, this time with the aid of potential trade sanctions in the event of non-compliance. Such treaties were entered into with Chile (2003), Peru (2007) and Central American countries (2003-2006). The United States is now in advanced negotiations with Panama and Colombia.

Such free trade treaties contain full chapters dedicated to the *enforcement* of copyright and related rights, and set out not only police and judicial procedures but also other aspects concerning technological protection measures (TPM) and the limitation of liability of Internet service providers, discussed further below, based on the criteria established by the Digital Millennium Copyright Act (DMCA) of 1998.

⁴⁵ Xalabarder, Raquel, "La responsabilidad de los prestadores de servicios en Internet (ISP) por infracciones de propiedad intelectual cometidas por sus usuarios". In *Revista de Internet, Derecho y Política*, No. 2, 2006. Available at: <<http://www.uoc.edu/idp/2/dt/esp/xalabarder.pdf>> [last accessed: June 25, 2011]

The controversial DMCA of 1998 is the federal law that implements and makes operational the WIPO Internet Treaties. Among the aspects regulated by such legislation are the criminalization of several acts aimed at circumventing technological protection measures, increased penalties for online copyright infringements and the creation of a model known as “Safe Harbor”. This model creates an exemption from or a limitation of liability in cases where the provider complies in good faith with certain standards established by the law.⁴⁶ It is through this model that the activities that will be part of this safe harbor are designed: when ISPs act as conduits for such communications, the capture of information, the hosting of content created by users and the provision of tools for finding information on the web that is associated with the content browsers. Therefore, for purposes of informing the service provider, the DMCA only requires that a private notice be sent by the affected party to the provider in order to trigger the legal mechanism under the safe harbor conditions.

The existence of free trade agreements does not mean that efforts at the regional or supra-regional level by countries with consolidated economies have stalled. On the contrary, there are at least two experiences that we think are worth noting in light of the special importance they attach to the liability of intermediaries in the event of potential infringements by third parties. Clearly, these instruments are not exclusively related to such matters. As will be discussed further below, in the case of the TPP, enforcement and civil liability aspects are just parts of more extensive regulatory projects to establish a free trade area for countries in the Pacific.

The Trans-Pacific Partnership Agreement (known as TPP) originated from an agreement signed by Brunei, Chile, New Zealand and Singapore in 2005, which created a free trade zone among those nations providing for the elimination of duties to facilitate trade processes in the Asia-Pacific region. Since 2010, and especially due to the willingness expressed by the United States, Australia, Peru, Vietnam and Malaysia to adhere to this agreement, negotiations have been advanced to extend the reach of the initial agreement. Such expansion refers largely to matters concerning the international flow of goods and products, and judicial and administrative measures to deal with informal exchanges. On the other hand, as we have noted, the TPP is part of a new strategy at the international level to transfer the discussion concerning the judicial measures that should be taken at the domestic level from the international mechanisms of the United Nations, such as the WIPO, to a multilateral debate. This has also received great criticism, as there are serious obstacles in establishing improved conditions that do not merely include criteria aimed at overprotecting copyright but also provide for international measures which facilitate access or somehow favor the rights of citizens, especially in the online environment.

As for its content, the TPP is similar to the long-negotiated and controversial Anti-Counterfeiting Trade Agreement (ACTA)⁴⁷ in that it responds to the same practice of the US Government to use international multilateral agreements to establish rules that are increasingly protective of the rights of copyright owners, including measures concerning patents and

⁴⁶ See [online]: <http://www.law.cornell.edu/uscode/17/usc_sec_17_00000512----000-.html>. [Editor's note: accessed on 11/5/11.]

⁴⁷ The treaty was signed during a ceremony in Tokyo, Japan, on October 1, 2011. The treaty was signed by Australia, Canada, South Korea, the United States, Japan, New Zealand and Singapore. The European Union, Mexico and Switzerland attended the ceremony but did not sign the treaty.

geographical indications, among others. It is also a result of the secrecy surrounding the international negotiations of the document, despite the fact that more than five negotiation sessions were held.

With regard to intermediary liability, in particular Internet service providers, the TPP goes a step further than the last versions of the ACTA⁴⁸ and ⁴⁹. In fact, article 16 and the final article in the most recent draft that has been leaked indicate that a special treatment is accorded to enforcement measures in the digital arena. As we will see below, the rules of the TPP go beyond those of the TRIPS and provide for the international implementation of criteria far more restrictive than the rules of the DMCA. So much so, in fact, that think tanks, professors and activists have pursued vigorous campaigns to make the negotiation process more transparent and, eventually, intervene in such process to try to balance the regulatory approaches, keeping in mind not only criminalization and enforcement, but also taking into account the rights and interests of citizens.

Article 16 entitled “Special measures relating to enforcement in the digital environment” provides for a broad application of direct enforcement rules established in the treaty and in other national laws regarding copyright and related rights. Article 16.3, first part, reads:

3. For the purpose of providing enforcement procedures that permit effective action against any act of copyright infringement covered by this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies that constitute a deterrent to further infringements, each Party shall provide, consistent with the framework set out in this Article:

(a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials[...]⁵⁰

The interesting point is that subsection (a) of article 16.3 expressly requires the signatory countries to take measures that will provide legal incentives for service providers to cooperate with copyright owners in the storage and transmission of copyrighted materials. Given the nature of the instrument, it fails to specify what those measures or incentives might be, and this

⁴⁸ The final version of the ACTA, in fact, dismisses the US proposal regarding the liability of service providers and includes only broad references to this topic:

Article 23.5. Each Party shall adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for the offences referred to in Article 2.14. Subject to the legal principles of the Party, the liability of legal persons may be criminal or non-criminal. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.

⁴⁹ As noted before, the text resulting from the negotiations has been kept confidential, but several civil society organizations have leaked the content of non-official versions. See [online]: <<http://keionline.org/node/1091>>. [Editor's note: accessed on 11/5/11.]

⁵⁰

3. For the purpose of providing enforcement procedures that permit effective action against any act of copyright infringement covered by this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies that constitute a deterrent to further infringements, each Party shall provide, consistent with the framework set out in this Article:

(a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials[...]

poses at least two problems. First, an instruction of this sort does not clarify the procedural strategy to implement the measure in question, which would allow for cooperation among private parties, even without resort to a jurisdictional filter, and this is of utmost importance for measures which may potentially affect the exercise of basic rights online. Second, these measures are associated with certain practices that are currently lawful and which have been implemented in some European countries, through a private system (in the case of France and the HADOPI law), or a pseudo-administrative system (in Spain), and which include the suspension of the Internet connection to users who allegedly make unauthorized file exchanges.

Subsection (b) of article 16.3 refers explicitly to the liability of Internet service providers and sets out rules related to transmitting, routing, or providing connections for material; caching carried out through automatic processes; storage or linking, using language similar to that of the Chilean law, as will be discussed further below. In addition, article 16.3.b.xi provides that

(xi) Each Party shall establish an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.⁵¹

Apart from the fact that the language of this article extends beyond the usual content of Free Trade Agreements as well as, to some extent, the provisions of the DMCA, this rule gives national authorities wide discretionary powers to set out procedures —administrative or judicial— for Internet service providers to disclose information regarding a potential infringer to a copyright owner. As can be observed, this provision allows for judicial and administrative notice and take-down procedures under which a person who has given effective notification pursuant to the provision is entitled to receive relevant information concerning users. In any case, protective measures should be included to guarantee the right to privacy and the right to protection of personal data. This is especially important considering the vast array of different rules applicable to the liability of intermediaries and the specificities of the regional laws governing the protection of privacy and personal data and which, in many countries in the region, do not meet the standards accepted internationally by most European nations.

II.C.II. The regulation of Internet service provider liability in Chile

In this country, the Intellectual Property Law was amended to comply with international treaties, in particular the Chapter on Intellectual Property Rights of the United States-Chile Free Trade Agreement.⁵² Under this treaty, the parties undertook to provide legal incentives for cooperation between service providers and copyright owners, in addition to limiting the liability of the former.⁵³ Such limitations referred to the exemption from civil liability and the judicial measures regarding certain technical functions, namely:

⁵¹

(xi) Each Party shall establish an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

⁵² United States-Chile Free Trade Agreement (in force since January 1, 2004), Chapter Seventeen: Intellectual Property Rights.

⁵³ Chile-US FTA, ch. 17 (a).

- (i) transmitting, routing, or providing connections for material without modification of its content;
- (ii) caching carried out through an automatic process;
- (iii) storage at the direction of a user of material residing on a system or network controlled or operated by or for the provider, including e-mails and attachments stored in the provider's server, and web pages residing on the provider's server; and
- (iv) referring or linking users to an online location by using information location tools, including hyperlinks and directories.⁵⁴

These limitations shall apply only where the provider does not initiate the transmission, or select the material or its recipients, and some additional formal conditions apply to the implementation of the system in question. That is, the system is intended for those who do not provide content directly but who act as intermediaries.

Since the adoption of the Treaty, a procedure for notice and take down of content has been established for removing and blocking content in storage, search and linking services, making it compulsory for both parties to establish this procedure by law and to provide for the "effective notification" of the infringing material to the service provider.⁵⁵ This system was already compulsory in the United States under the notice and take down procedure of the DMCA. The only issues to be negotiated are the aspects of the law that would be enforceable in Chile, effective notification being the one where greater innovation may be expected in the Chilean law, compared to international law now in existence or being debated.

In mid-2010, Chile implemented the most important reform to the Law of Intellectual Property in forty years,⁵⁶ as part of a mandatory legal reform process required by the FTA to introduce several sensitive changes to substantive aspects of the law, such as the exceptions and limitations to copyright and the settlement of disputes related to tariffs imposed by collective rights management societies (*sociedades de gestión colectiva*).⁵⁷ Although not all aspects regulated by the FTA were implemented through this law (for instance, technological protection measures were left out this time), a full chapter was added to the Chilean copyright law in order to implement the obligation to limit the liability of Internet service providers.

The chapter devoted to "Limitation of liability of Internet service providers" of the Chilean Intellectual Property Law grants such exemptions from liability and replicates almost identically the definition of providers in the FTA. Three general conditions are established for service providers to benefit from such exoneration, from which only search, linking and referencing services are excluded. Such conditions are:

⁵⁴ Chile-US FTA, ch. 17 (b).

⁵⁵ Chile-US FTA, ch. 17 (f).

⁵⁶ Law No. 20435 of May 5, 2010, amending Law No. 17336 on Intellectual Property.

⁵⁷ In Chile, membership in a collective rights management society is voluntary. Nevertheless, the performance of such societies, consistent with that of monopolistic institutions, has come under the scrutiny of economic authorities for possible abuse of a dominant position.

- a) having established general and public terms, under which service providers may terminate contracts with content providers which have been classified as repeat infringers of this copyright law by a court of law;⁵⁸
- b) not to interfere with technological measures for protecting and administering the rights of copyrighted works which are widely recognized and lawfully used;
- c) not being involved in the creation or selection of the material or its recipients.⁵⁹

In addition to these general conditions, there are specific conditions which vary depending on the service provided by each search engine. The law focuses first on mere access, connection and routing service providers and exempts them from liability to the extent that they refrain from interfering with the content in question.⁶⁰

Secondly, the law imposes conditions for suppliers of temporary and automatic storage.⁶¹ In this case, the conditions require suppliers to refrain from interfering with the technological processes established by source providers and the technology that enables the interaction with these providers. The obligation to refrain from modifying the content is also reiterated. Finally, it is established that such providers shall not be liable if they prevent access to material that has also been removed by the source provider after being notified of this duty pursuant to the law. This is the first reference to the concept of notification or actual knowledge.

⁵⁸ It is striking that a provider *should* establish this unilateral power to terminate the agreement in case of infringement, rather than by a court of law or as a result of a procedure established by law, considering that these results are highly restrictive of the right to use the communications technology offered by Internet. In this respect, Internet service providers undertake a responsibility that has already been established in jurisdictions such as France (with the HADOPI Law): that repeat infringements of copyright should result in disconnection of users.

⁵⁹ See Law No. 17336, article 85 O.

⁶⁰ See Law No. 17336, article 85 M:

Suppliers of data transmission, routing or connection services shall not be responsible for the data transmitted provided that the supplier:

- a) does not modify or select the content of the transmission. The technological handling of the material that is necessary to effect the transmission through the net, such as packet division, shall not be considered a modification of content;
- b) does not initiate the transmission, and
- c) does not select the recipients of the information.

This limitation of liability comprises the automatic storage or the automatic and temporary copying of transmitted data which are necessary to carry out the transmission, provided that the automatic storage or copying is not accessible to the general public and is not stored for longer than is reasonably necessary for purposes of communication.

⁶¹ See Law No. 17336, article 85 N:

Service providers that store data temporarily through an automatic storage process shall not be liable for the stored data, on condition that the supplier:

- a) respects the conditions for access by users and the rules applicable to the updating of the stored material established by the source site provider, unless such rules are used by said provider to prevent or unreasonably hamper the temporary storage referred to in this article;
- b) refrains from interfering with compatible and standardized technology used in the source site to obtain information regarding the online use of stored material, when such use is in conformity with the law and is consistent with generally accepted industry standards;
- c) does not modify the content upon transmission to other users; and
- d) expeditiously removes or disables access to material that has been removed or disabled in the source site, upon receipt of a notice in accordance with the procedure under article 85 Q.

This reference is more relevant with respect to the third group of Internet providers identified by the Chilean law: providers of storage for users and search, linking and reference services. That is, service providers enabling access to content made available by third parties, in particular the group of Internet service providers who are most exposed to civil liability, assuming that, as opposed to simple connection providers or automatic and temporary providers, they are better equipped to know the content made available by them. As such, this is the sort of service that usually receives more notifications, especially in the United States of America, to set in motion notice and take-down procedures.

The requirements for such providers to be exempt from liability under the Chilean copyright law are: that the provider does not have “actual knowledge” of the illegal nature of the content; that the provider does not get a financial gain directly attributable to the infringing activity and that the provider can and must control it; that the provider has appointed a representative for notification purposes; and finally, that the provider expeditiously removes or disables access to the infringing content.⁶² All such conditions have already been incorporated into the foreign laws previously mentioned.

However, the feature that makes the Chilean law stand out in the international context is the definition of “actual knowledge” established for suppliers of content that is provided by third parties. To establish that there is “actual knowledge” and that hence the service provider is liable, unlike the systems that provide for extrajudicial notification of infringing material, two requirements must be satisfied: first, there must be a judicial order by a competent court requiring that the content be removed or that access be disabled; and second, upon notice of such judicial order, the service provider must have failed to comply with it “expeditiously.”⁶³

Therefore, there can be no actual knowledge without a court order to remove or disable access to the material which has not been satisfied by the provider. Such court decision, which may or may not be issued in the course of an existing judicial procedure (that is, it may be requested at a pre-judicial stage before an action is brought to establish the liability of the infringer, in order to preemptively safeguard the rights of the offended party), should weigh other interests which may be endangered by the order (efficacy, technical feasibility, potential

⁶² See Law No. 17336, article 85 Ñ, first subparagraph:

Service providers who, at the request of a user, by themselves or through others, store data in their network or system or provide search, linking and reference services to an online website by using information location tools, including hyperlinks and directories, shall not be liable for the data stored or referred, on condition that the provider:

- a) does not have actual knowledge of the illegal nature of the data;
- b) does not get a financial gain directly attributable to the infringing activity, in cases where the provider has the right and ability to control such activity;
- c) publicly appoints a representative for receiving the judicial notifications referred to in the final subsection, in the manner prescribed by the regulations; and
- d) expeditiously removes or disables access to material stored in accordance with the provisions of the following subsection.

⁶³ See Law No. 17336, article 85 Ñ, second subsection: “The service provider shall be understood to have actual knowledge when a competent court, pursuant to the procedure set forth in article 85 Q, has ordered that the data should be removed or that access should be disabled, and the service provider has been legally notified of such order and nevertheless fails to comply with it expeditiously.”

harm to the aggrieved party, possibility of adopting other measures which are less restrictive) and may only:

- with regard to connection, transmission and routing suppliers, provide for “reasonable measures” to prevent access to infringing content without blocking other lawful content;
- with regard to (temporary or other) storage suppliers, provide for the removal or blocking of illicit content or the cancellation of services to repeat infringers.⁶⁴

Anyone who operates the notice and take-down system with malicious intent or who makes a knowing material misrepresentation as part of this procedure shall also be liable for any harm caused.⁶⁵ Such measures could even be taken *ex parte*, provided that the requesting party furnishes a security and that serious reasons exist. The procedure is of a “brief and summary” nature, it is conducted before a civil judge and the infringed rights should be carefully individualized, as well as the owner of the rights, the infringing content, the type of infringement and its location in the network. However, this procedure allows the possibility of objection, and the provider may request that the measure be invalidated.⁶⁶ Certainly, during the

⁶⁴ See Law No. 17336, article 85 R:

In cases where the general requirements of article 85 O and the requirements of article 85 M regarding transmission, routing or supply of information have been met, the court may only order such pre-judicial or judicial measures as may be reasonable to disable access to an infringing content that should be clearly identified by the requesting party, and under no circumstances should other licit content be blocked, pursuant to the provisions of subsection 2 of the above article.

In cases where the general requirements of article 85 O and the special requirements of articles 85 N and 85 Ñ regarding the functions described in those articles have been met, the court may only issue the following pre-judicial or judicial orders:

- a) removing or disabling access to the infringing material which should be clearly identified by the requesting party pursuant to the provisions of article 85 Q;
- b) cancelling the specific accounts of repeat infringers, which should be clearly identified by the requesting party pursuant to the provisions of the second subsection of article 85 Q, when the account holder is using the system or network to infringe copyright or related rights.

All such measures should be issued with due regard for the burden to the service providers, users and subscribers, the potential harm to the copyright owner or the holder of related rights, the technical feasibility and effectiveness of the measure, and whether less burdensome enforcement methods are available to ensure respect of the right whose protection is sought.

These measures shall be ordered following notice to the service provider pursuant to the provisions of subsections three, four and five of article 85 Q, with the exception of judicial orders aimed at ensuring the preservation of evidence or other judicial decisions that are not expected to have a meaningful impact on the operation of the provider's system or network.

⁶⁵ See Law No. 17336, article 85 T: “Anyone who knowingly provides false information regarding alleged infringements of the rights protected under this law shall indemnify any interested party for any damage caused, on condition that such damage results from actions taken by the network service provider based on said information. The provisions of article 197 of the Criminal Code shall apply.”

⁶⁶ See Law No. 17336, article 85 Q:

For right infringements recognized under this law which are committed through networks or systems controlled or operated by or for service providers, the owners of such rights or their representatives may request the measures set out in article 85 R at the pre-litigation or the judicial stage. When such measures are requested at the pre-litigation stage, and provided that serious reasons exist, they may be granted without notifying the service provider; however, the requesting party shall furnish a security in advance, to the satisfaction of the court. Such request will be heard by the civil judge with jurisdiction in the service provider's domicile, notwithstanding any criminal actions that may be brought.

same procedure the court may take further measures to identify the infringing party in order to establish their direct liability.⁶⁷ This judicialization of the procedure prior to removing or disabling access to content distinguishes this particular law from other related laws.

There is no prohibition in Chilean law against controlling or monitoring content. Instead, in accordance with rules such as the E-Commerce Directive of the European Parliament, all providers under the law are excused from this duty.⁶⁸ This is consistent with a more general obligation to refrain from interfering with content, which is not established with regard to the intellectual property rights which may be affected by Internet traffic but rather with the net neutrality obligations arising from the Chilean law⁶⁹.

A particular aspect, that we consider of no practical value except for deterrence purposes, is the obligation of providers to inform their users, who have allegedly committed an infringement, of any notices of presumed infringement, including full details of the representative of the infringed party, the infringing content, the rights which were violated, the manner of infringement, the location in the network and other details, within five days after the complaint is received.⁷⁰

In addition to meeting the requirements under subsections 1, 2 and 3 of article 254 of the Code of Civil Procedure, the request should clearly indicate:

- a) the rights which have been allegedly infringed, noting precisely the owner of such rights and the type of infringement;
- b) the infringing material, and
- c) the location of the infringing material in the networks or systems of the relevant service provider.

Once the above have been fulfilled, the court will order the removal or blocking of the infringing content without delay. Such decision will be notified through a judicial summons to the relevant service provider and through the court docket to the requesting party.

The affected content provider may, without prejudice to any other rights they may invoke, request the court that issued the order to cancel the measure that removed or restricted access to the material. To do so, the provider shall submit a request that must comply with the requirements noted in subsection 2, and shall submit additional reference information supporting the request. This will be deemed to constitute express submission to the jurisdiction of the court hearing the matter.

This procedure shall be of a brief and summary nature, any appeals shall be granted without a stay of execution, and the superior court will hear the matter.

⁶⁷ See Law No. 17336, article 85 S: “The competent court, at the request of the right owners who have initiated the proceeding set forth in the previous article may direct the service provider to furnish any necessary information to identify the alleged infringer. The data so received shall be managed pursuant to the provisions of Law No. 19628 concerning the protection of privacy.”

⁶⁸ See Law No. 17336, article 85 P:

The service providers referred to in the above articles, for the purposes of the present law, shall have no duty to oversee the data transmitted, stored or referenced, nor the obligation to conduct active searches of facts or circumstances indicating illicit activities.

The provisions of the above subsection shall be without prejudice to any actions by the ordinary courts of justice to investigate, identify and prosecute crimes or practices constituting an abusive exercise of copyright or related rights recognized under this law.

⁶⁹ See Law No. 20453, of August 26, 2010, enshrining the principle of net neutrality for consumers and Internet users.

⁷⁰ See Law No. 17336, article 85 U:

Notwithstanding all prior provisions under this chapter, Internet service providers shall communicate users in writing about notifications received from right holders regarding alleged infringements, on condition that the following requirements are met with respect to the notice:

After the adoption of the Chilean law, it remains unknown how this special law operates, as it does not preclude the application of the general rules of civil liability. In other words, although the Chilean law purports to solve the issue of liability discussed in this article, it paves the way for Internet service providers to bring a civil action under the ordinary rules of civil liability. Indeed, it is precisely this question that is addressed first in the respective chapter of the Intellectual Property Law.⁷¹ It seems logical that, regardless of how damaging these rules appear to be for service providers, they do not preclude any criminal liability which may be subsequently claimed.

II.C.III. Intellectual property liability: the Taringa! case

In mid-2011, the brothers Hernán and Matías Botbol were formally charged in the courts of the city of Buenos Aires, in the Argentine Republic, with infringement of intellectual property committed through the website that they administer and represent, known as Taringa!. In this highly visited website, registered users can post content —mostly text and images—, discuss and “share” copyrighted material. The website provides numerous links through which users can download copyrighted material, and this fact was reported by a group of Argentine publishing houses that own copyright on several literary works.

Although the judicial case is about establishing the criminal liability of the Botbol brothers, and this escapes the focus of our analysis, the judicial procedure raised a series of questions which have been the subject of heated discussion in Argentina. The 6th Chamber of the National Court of Criminal and Correctional Appeals (Sala VI de la Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Argentina),⁷² upheld the prosecution of the Botbol brothers as “necessary participants” in the illicit activities, and for “being effectively aware” of such

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- a) notice of the alleged infraction is received by electronic or other written means from the right holder or their representative;
 - b) the right holder or their representative is domiciled or resides in Chile and shall be sufficiently authorized to receive service of process on behalf of the right holder;
 - a) the rights which have been allegedly infringed are identified, clearly indicating the owner of such rights and the manner of infringement;
 - d) the infringing material is identified, as well as its location in the networks or systems of the service provider who has received the notice of infringement, through its URL or equivalent means, and
 - e) it includes information enabling the service provider to identify the user who has made available the allegedly infringing content.

Internet service providers, following receipt of a communication pursuant to the above subsection, shall inform this to the alleged infringing user and shall furnish said user with all evidence provided by the right holder or their representative within five business days after the receipt of the communication.

⁷¹ See Law No. 17336, article 85 L:

Without prejudice to the applicable general civil liability rules, in the event of third party infringements of the rights protected under this law caused through systems or networks operated or controlled by natural or legal persons providing some of the services described in the above articles, such service providers shall not be required to provide monetary relief for the damage caused, provided that the conditions for the limitation of liability set out in the following articles are met, depending on the nature of the service. In these cases, service providers may only be subject to the pre-litigation or judicial measures described in article 85 R.

[Authors' note: added emphasis.]

⁷² Decision on appeals (Sentencia sobre recurso de apelación), Causa N.º 41.181 *Www.taringa.net y otros s/procesamiento*, Sala VI de la Cámara Nacional de Apelaciones en lo Criminal y Correccional.

activities, giving rise to criminal prosecution.⁷³ Even though at the time the ruling was rendered the website received tens of millions of visits monthly and more than 20,000 new messages from the community with links to other sites, the Appeals Court was clear about the involvement of the website administrators, by noting that the website facilitated the “dissemination and reproduction of material without the consent of the right holders.” Nevertheless, the degree of participation in such crimes was not established. The Court is even more resolute in that the administrators were “clearly aware” of the fact that the messages contained links to copyrighted material. However, reviewing all daily posts; examining if they include links to download material; analyzing if the works are copyrighted and if the posting was made without authorization (possibly by someone other than the person providing the link) or in violation of exclusive rights seems a daunting task, considering that more than 20,000 messages are received on a daily basis. The idea that an administrator *knows or should know* about the content uploaded to the site or which is linked from it, considering the case of Taringa!, requires us to be extremely careful about assertions of liability that fail to take into account specific circumstances.

The decision eventually rendered in the Taringa! case,⁷⁴ although it is a criminal case, will undoubtedly impact on the determination of civil liability in cases involving similar sites, and even search engines that automatically provide links to other websites or content. In particular if responsibility is examined pursuant to the strict rules and principles of criminal liability, but it is nevertheless extended to situations such as those described in the prosecution of the owners of Taringa!

III.C.IV. Pending draft bills

II.C.IV.a. COLOMBIA. As was the case in Chile, over the last years Colombia has focused on negotiating and signing a FTA with the United States of America, with very similar terms concerning the protection of intellectual property and the liability of Internet service providers.⁷⁵ Even before the treaty came into full force, there was some controversy over the last months about a bill to amend the copyright law of that country that establishes new liability rules for Internet service providers.

This bill,⁷⁶ which has come to be known (especially among its detractors) as the “Lleras Law,”⁷⁷ defines the Internet service providers it regulates,⁷⁸ the civil and criminal liability

⁷³ In the decision upholding the prosecution, the court held that: “It should be noted that even though the crime is actually committed by those who upload the work to the website and download it, both parties meet at the website www.taringa.net, and those responsible for such site should be at least necessary participants in the scheme and are clearly aware of its unlawfulness. Therefore, the agreement invoked to release themselves from liability [the website's terms of use] cannot be taken into account by this court.”

⁷⁴ The criminal prosecution of the owners was subsequently confirmed by the same chamber, on October 25, 2011.

⁷⁵ U.S. – Colombia Trade Promotion Agreement (not yet ratified), chapter 16.

⁷⁶ Bill No. 241 of 2011, regulating liability for infringement of copyright and other related rights on the Internet.

⁷⁷ The name “Lleras Law” has been used informally, after the Colombian Interior and Justice Minister, Germán Vargas Lleras, who submitted the bill to the National Congress on April 4, 2011.

⁷⁸ Bill No. 241, see article 1:

Internet service providers. For the purposes of the present law, Internet service providers shall be those persons providing one or several of the following services:

- a) transmitting, routing, or providing connections for material without modification of its content;
- b) storing data temporarily through an automatic process (caching);

regime⁷⁹ applicable⁸⁰ and the absence of an oversight obligation in a manner much similar to that of the Chilean law.⁸¹

As regards exemption from liability, it classifies providers similarly to the Chilean law, and distinguishes the grounds for exemption from liability based on whether they are access, connection or routing providers,⁸² and ⁸³ caching providers⁸⁴ or providers of storage at the request

c) storing data at the direction of a user of material residing on a system or network controlled or operated by or for the service provider; and

d) referring or linking users to an online site using information search tools, including hyperlinks and directories.

⁷⁹ See article 2:

Liability rules. Internet service providers, content providers and users shall be liable for the use of content, pursuant to the general rules of civil, criminal and administrative liability.

The information used by computer systems or networks shall be protected by the laws regulating copyright and other related rights provided that the conditions for such protection are met.

This article may nevertheless be amended, as agreed by the First Committee of the Senate of Colombia (Comisión Primera del Senado de Colombia) at a debate held on June 14, 2011, and during which the general terms of the bill were approved and referred to the Senate Plenary.

⁸⁰ See article 4:

Exoneration of liability of Internet service providers. Without prejudice to the applicable general civil liability rules, in the event of third party infringements of copyright and other related rights caused through systems or networks operated or controlled by natural or legal persons providing some of the services described in the above articles, such service providers shall not be required to provide monetary relief for the damage caused, provided that the conditions for the limitation of liability set out in the following articles are met, depending on the nature of the service.

In these cases, Internet service providers may only be subject to the pre-litigation or judicial measures described in articles 13, 14, and 16 of this Law.

⁸¹ See article 3:

Absence of a general oversight obligation. The Internet service providers referred to in the above articles, for the purposes of the present law, shall have no duty to oversee the data transmitted, stored or referenced, nor the obligation to conduct active searches for facts or circumstances indicating illicit activities.

The above shall be without prejudice to the power of competent authorities to require Internet service providers to investigate, identify and prosecute crimes or any infringement of copyright or related rights.

⁸² See article 5:

Suppliers of data transmission, routing or connection services. Suppliers of data transmission, routing or connection services shall not be responsible for the data transmitted provided that the supplier:

a) does not modify or select the content of the transmission. The technological handling of the material that is necessary to effect the transmission through the net, such as packet division, shall not be considered a modification of content;

b) does not initiate the transmission;

c) does not select the recipients of the information;

d) establishes general and public terms under which service providers may terminate contracts with content providers who are repeat infringers of copyright or other related rights;

e) does not interfere with technological measures aimed at protecting and administering the rights of copyrighted works;

f) is not involved in the creation or selection of the material or its recipients.

Additional paragraph:

When the above conditions have been met, the competent tribunal may only issue a temporary injunction or ruling requiring the adoption of such measures as may be reasonable to disable access to a certain infringing or supposedly infringing content which should be clearly identified by the requesting party, and under no circumstances should other lawful content be blocked.

of third parties,⁸⁵ carefully setting aside (at least in a formal sense) search, linking and reference service providers.⁸⁶ As for the content, there are no differences (except some formal

⁸³ In the same way as the Chilean law, it is striking that the provider should establish its own unilateral power to terminate the agreement in case of repeat infringement.

⁸⁴ See article 6:

Suppliers of temporary storage services through automated processes. Suppliers of temporary storage services through an automated process aimed exclusively at ensuring a more efficient transmission of data to other recipients of the service shall not be liable for the stored data, on condition that the provider:

- a) complies with the conditions for access by users and the rules applicable to the updating of the stored material established by the source site provider, unless such rules are used by said provider to prevent or unreasonably hamper the temporary storage referred to in this article;
- b) refrains from interfering with compatible and standardized technology used in the source site to obtain information regarding the online use of stored material, when such use is in conformity with the law and is consistent with generally accepted industry standards;
- c) does not modify the content upon transmission to other users;
- d) expeditiously removes or disables access to material that has been removed or disabled in the source site, upon receipt of a notice of removal in accordance with the procedure under articles 9, 10, 11, and 12 of this law;
- e) establishes general and public terms under which service providers may terminate contracts with content providers which are repeat infringers of copyright or other related rights;
- f) does not interfere with technological measures aimed at protecting and administering the rights of copyrighted works; and
- g) is not involved in the creation or selection of the material or its recipients.

Additional paragraph:

When the above conditions have been met, the competent court may take as injunctive or final relief reasonable measures to remove or disable access to the infringing material, which should be clearly identified by the court; and/or to cancel certain accounts of repeat infringers, which should be clearly identified by the requesting party, when the account holder is using the system or network to infringe copyright or related rights.

⁸⁵ See article 7:

Providers of storage services, at the request of a user of material residing on a system or network controlled or operated by or for the provider. Service providers that, at the request of a user, by themselves or through others, store data in their network or system, shall not be liable for the content stored, on condition that the provider:

- a) does not have actual knowledge of the alleged illegal nature of the data;
- b) does not get a financial gain directly attributable to the infringing activity, in cases where the provider has the right and ability to control such activity;
- c) expeditiously removes or disables access to material stored in accordance with the provisions of articles 9, 10, 11, and 12;
- d) publicly appoints a representative for receiving service of process and appropriate means to receive applications for withdrawal or blocking of allegedly infringing material;
- e) establishes general and public terms under which service providers may terminate contracts with content providers which are repeat infringers of copyright or other related rights;
- f) does not interfere with technological measures aimed at protecting and administering the rights of copyrighted works; and
- g) is not involved in the creation or selection of the material or its recipients.

Additional paragraph:

When the above conditions have been met, the competent court may take as injunctive or final relief reasonable measures to remove or disable access to the infringing material, which should be clearly identified by the court; and/or to cancel certain accounts of repeat infringers, which should be clearly identified by the requesting party, when the account holder is using the system or network to infringe copyright or related rights.

distinctions) between the Colombian law and the provisions of the free trade treaties with the United States, or the Chilean law.

The most relevant differences in the bill, and which have encountered strong civilian resistance,⁸⁷ result from the procedure established to claim liability exemptions. In the same way as the systems for notice and take-down, full notice must be given to the service provider who is required to remove or block content. In the Colombian bill, however, this communication, although complete, does not require judicial intervention.⁸⁸ The requirements are: formal

⁸⁶ See article 8:

Providers of services consisting of referring or linking users to an online site by using information search tools, including hyperlinks and directories. Suppliers that provide search, linking and/or reference services to an online website by using information search tools, including hyperlinks and directories, shall not be liable for the data stored or referred, on condition that the supplier:

- a) does not have actual knowledge of the alleged illegal nature of the data;
- b) does not get a financial gain directly attributable to the infringing activity, in cases where the provider has the right and ability to control such activity;
- c) expeditiously removes or disables access to material stored in accordance with the provisions of articles 9, 10, 11, and 12;
- d) publicly appoints a representative for receiving service of process and appropriate means to receive applications for removal or blocking of allegedly infringing material.

Additional paragraph:

When the above conditions have been met, the competent court may take as injunctive or final relief reasonable measures to remove or disable access to the infringing material, which should be clearly identified by the court; and/or to cancel certain accounts of repeat infringers, which should be clearly identified by the requesting party, when the account holder is using the system or network to infringe copyright or related rights.

⁸⁷ An illuminating analysis of the whole process can be found in the contextualization and description provided by Botero, Carolina: “Ley Lleras, crónica de una polémica social anunciada”, in *Open Business Latin America*, June 18, 2011, available [online] at: <<http://www.openbusinesslatinamerica.org/wp/2011/06/18/leylleras-cronica-de-una-polemica-social-anunciada>>. [Editor's note: accessed on 11/5/11.]

⁸⁸ See article 10:

Requirements for applications to remove or block content. Applications for removal or blocking of content made under the previous article by copyright or other related right holders or their representatives shall comply with the following requirements:

- a) Be submitted by electronic or other written means;
- b) Include the name, address, phone number, and email address of the copyright or related right owner or their representatives;
- c) The right owner or their representative shall be domiciled or reside in Colombia and, where appropriate, shall be sufficiently authorized to receive service of process on behalf of the right owner;
- d) Attach information reasonably sufficient to allow the service provider to identify the work or content protected by copyright or related rights that is allegedly being used without appropriate authorization;
- e) Identify the rights which have been allegedly infringed, indicating clearly the owner of such rights and the manner of infringement;
- f) Attach the URL or any other information reasonably sufficient to enable the service provider to locate the allegedly infringing material residing in a system or network controlled or operated by or for the provider, and which is supposedly the subject of infringing activity and that should be removed or blocked;
- g) The right owner or their representative shall make a declaration expressing that they believe in good faith that the material is being used without the permission of the holder of the copyright or related rights or his representative who is entitled to grant such permission or under the law;
- h) If possible, attach information containing data enabling the service provider to identify the user who provided the allegedly infringing material;

communication in writing; identification of the rights owner or its representative, and domicile in Colombia; identification of the copyrighted work which is being used without authorization and manner of infringement; location in the net; good faith statement regarding infringement and the accuracy of the information and, if possible, identification of the infringing user; and, finally, the corresponding signature.

Once this information has been sent and the service provider has taken measures to remove, disable or block the content without a court order to this effect, the provider shall be exempt from liability,⁸⁹ provided that such measure is informed to the alleged infringer in due time.⁹⁰

In fact, this is just a mechanism for assigning liability which under no circumstances may preclude applications for similar precautionary or⁹¹ permanent⁹² measures made to a court of

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- i) Make a declaration to the effect that the information contained in the request for removal or blocking is correct;
 - j) The application must be signed by the person making the request for removal or blocking. For this purpose, a signature transmitted as part of an electronic communication shall satisfy the above requirement.

Additional paragraph:

Anyone who knowingly provides false information concerning alleged infringements of the rights recognized under this law shall provide monetary relief to any interested party for any damage caused, where such damage results from actions taken by the network service provider based on said information.

⁸⁹ See article 9:

Procedure for detection and removal of content. If service providers, having met the other requirements established under articles 6, 7 and 8 and acting in good faith, remove or block access to material based on a claimed or apparent infringement, they shall be exempt from liability for any resulting claims, provided that they take reasonable steps promptly to inform the alleged infringer who made the material available on their system or network that such material will be removed or disabled.

Additional paragraph:

If the alleged infringer makes a request to restore the removed or disabled material and is the subject of an infringement lawsuit, the service provider shall restore the material, unless the person who made the initial request seeks an injunction within a reasonable time.

⁹⁰ See article 11:

Obligation to report the removal or blocking to the alleged infringer. Upon receiving a request for removal or blocking of content and having verified compliance with the requirements stipulated in the previous article, the Internet service provider shall, within 72 hours of receipt of the complaint, inform users in writing of the request for removal of the allegedly infringing material and furnish said users with all evidence provided by the right owner or their representative.

⁹¹ See draft article 245 of Law No. 23 of 1982 (Precautionary Measures), second paragraph:

Additionally, for the infringement of copyright or other related rights committed in or through networks or systems controlled or operated by or for service providers, the right holders may request the court with jurisdiction over the service provider, even if such court is not competent to hear the matter, and as a precautionary measure, to remove or block access to the infringing material that is clearly identified by the requesting party, and/or to cancel certain accounts of repeat infringers, which should be clearly identified by the applicant, and whose holders are using the system or network to infringe copyright and related rights. Also, any other interim measures aimed at protecting rights, preserving evidence, and preventing further damage as result of the alleged infringement.

Nevertheless, in the case of providers of data transmission, routing or connection services, the judge may only grant interim relief in the form of reasonable measures to disable access to infringing content which has been clearly identified by the requesting party and which does not involve blocking other legitimate content To this end, the request for precautionary measures should clearly indicate:

justice. At such point, only measures aimed at identifying the alleged infringer may be requested.⁹³

Notwithstanding these mechanisms to remove permanently infringing content from the net, the exemption from liability based on a system of private notice implies that the decision about whether content should be removed or maintained online rests with the Internet service provider. Clearly, the provider will have to act, in theory, as a judge who determines the propriety and admissibility of the complaint concerning the infringing content but, at the same time, as an interested party, as the removal of such content will release the provider from any potential liability, whereas its preservation will not have the same positive consequences. As a result, the service provider will decide whether to interfere with the fundamental rights of the users who provided the content. Such decision will be made without any judicial intervention, upon receipt of a complaint and without any prior determination as to the unlawfulness of the content by the relevant institutional bodies.

In the event that notice was not appropriate, judicial intervention only occurs when an action is brought against a measure that has already been taken and by means of a request for restoration of the removed content.⁹⁴ Such request will be subject to formalities at least as

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1. The rights which have been allegedly infringed, noting precisely the owner of such rights and the manner of infringement;
 2. The infringing material,
 3. The location of the infringing material in the networks or systems of the relevant service provider.

⁹² See article 16:

Final order to remove or block access to infringing material and/or for the cancellation of accounts. The measures under article 13 will become final when a competent judge so orders. These measures shall be issued with due regard for:

- 1) The relative burden to the service providers, users and subscribers;
- 2) the proportionality of the damage inflicted on the right owner;
- 3) the technical feasibility and efficacy of the measure; and
- 4) whether less burdensome enforcement methods are available to ensure the cessation of the infringement and the restoration of the right whose protection is sought.

Such measures shall be applied restrictively to access by the public to online communication services. When these services are purchased as part of packaged commercial offers including other services such as telephone or television, the measures shall not apply to the latter.

⁹³ See article 15:

Delivery of information on alleged infringers. The competent court, at the request of the right owners who have applied for a precautionary measure or have filed a complaint requesting the removal or blocking of infringing material and/or the cancellation of accounts, may direct the service provider to furnish any necessary information to identify the alleged infringer, including confidential information. The information so received shall be handled pursuant to the legal provisions concerning the protection and confidentiality of personal data.

⁹⁴ See article 12:

Elements of the application for reinstatement. To be effective, the request to restore any material removed or disabled under the additional paragraph of article 9 shall be submitted in writing or by an electronic means and shall include the following:

- a) the name, address, telephone number, and email address of the alleged infringer;
- b) identification of the material that has been removed or to which access has been disabled;
- c) the location at which the material appeared before it was removed or access disabled;
- d) a statement under penalty of perjury by the alleged infringer indicating that they provided the material and that it is their good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material;

stringent as those applicable to requests for removal, and may be excessively cumbersome for users. In these circumstances, service providers will act in their own interests and favor an act of censorship which, even considering the possibility of a claim, seems less burdensome than keeping the content available online.

There was some controversy over the bill and, after extensive debate, it was sent to archives (that is, the parliamentary proceedings have been suspended indefinitely), in early November 2011.⁹⁵

II.C.IV.b. ARGENTINA. Argentina had its own share of controversy after a set of rules -similar to those proposed by Colombia- were adopted at the federal level through a bill submitted days before the “Lleras Law” was introduced.

In late March 2011, a draft Regime for Internet Service providers, also known as the “Pinedo Law”, was submitted to the National Congress.⁹⁶ The scope of the law, however, is much wider and is not limited to intellectual property, as discussed below. Like many other bills and academic studies, the first section contains definitions of service providers⁹⁷, including within the scope of the law access, interconnection, hosting, content and information services.

e) a statement that the alleged infringer consents to the jurisdiction of the courts for the judicial district in which they are domiciles, or if the infringer’s address is outside of the territory of the party, any judicial authority with jurisdiction over the territory of the party in which the service provider may be found, and in which a claim for the alleged violation of copyright or related rights may be filed;

f) a statement that the applicant agrees to accept notification of any such claims; and

g) the signature of the person making the request for restoration of the removed or blocked material. For this purpose, a signature transmitted as part of an electronic communication shall satisfy the above requirement.

⁹⁵ "Congreso y Gobierno acuerdan archivo de 'Ley Lleras'", in *Semana.com*, of October 20, 2011, available [online] at: <<http://www.semana.com/nacion/congreso-gobierno-acuerdan-archivo-ley-lleras/166045-3.aspx>>. [Editor's note: accessed on 11/5/11.]

⁹⁶ Bill: Parliamentary Proceedings 208 [Proyecto: Trámite parlamentario 208] (of February 22, 2011), endorsed by Federico Pinedo, National Deputy for Buenos Aires.

⁹⁷ See article 1:

For the purposes of the present law, the terms below shall have the meaning given in this article:

1) Internet service providers: includes Internet access providers, interconnection providers, hosting providers, content or information providers, and service providers.

2) Internet access providers: are providers that connect customers to the Internet using different technical means.

3) Interconnection providers: are suppliers that provide the structural means to circulate Information over the Internet, regardless of the type of connection or the flow of information in the net.

4) Service providers: search engines and other providers of services and/or programs that depend on the Internet to supply the service in question or to use such applications or programs.

5) Content or information providers: those responsible for providing content over the Internet, irrespective of the format used and regardless of whether the content is provided through their own web sites or third-party sites.

6) Search engines: a website used for searching on the Internet links to other websites containing or which have contained the search terms entered by users.

7) Hosting providers: these providers offer the technical means to website developers and/or owners so that they can make available their content to all Internet users, and may or may not store the sites' content in their own servers.

8) Specific content: all types of files, regardless of nature or format, which can be accessed through the Internet.

The Pinedo Law stipulates that automatic storage providers shall be liable only for third-party content they knowingly host.⁹⁸ With regard to content, hosting and service providers that offer links to infringing content, the bill stipulates that they shall be liable only in cases where they have actual knowledge that the information stored violates any laws or rights of others.⁹⁹ As for transmission providers, they shall only be liable when they originate, modify or select the content or the recipients.¹⁰⁰

Measures aimed at removing or blocking content shall be ordered by a court of justice in a summary proceeding, and such temporary injunctions may also be issued *ex parte* or at the request not only of right holders but also of any person with respect to content that allegedly infringes rights or guarantees recognized by the Constitution or the law. The judge has the exclusive power to identify such person as affected or as the holder of a potentially infringed right.¹⁰¹ Also, the Public Ministry shall be responsible for requesting such measures when the sexual rights of minors have been violated.¹⁰²

The actual knowledge referred to under this law is dependent upon notice of the above-mentioned measures.¹⁰³ This clearly requires judicial intervention. However, this is not the most

⁹⁸ Article 2: Internet service providers shall be liable for the automatic storage of third-party content only to the extent that they have actual knowledge, pursuant to the terms of this law, that the stored content violates any laws or rights of others.

⁹⁹ See article 6:

Hosting, content and service providers that offer links to other websites or information provided by third parties shall be liable for such content only in cases where they have actual knowledge that the information stored violates any laws or rights of others.

¹⁰⁰ See article 5:

Internet service providers shall be liable for transmitting or retransmitting third-party content only when such Internet service providers are the originators of such communication, or when they modify or select the content and/or select the recipients of the information that is transmitted or retransmitted.

Modification shall mean any actual variation, in whole or in part, of content, excluding any changes in the format of content being transmitted or retransmitted which are strictly technical.

¹⁰¹ See article 3:

Any natural or legal person may request a court with jurisdiction in their domicile to remove or restrict access to specific content -in the form of text, sound, images or other information or expression- that infringes rights or guarantees recognized by the National Constitution, a treaty or a law of the country. The court may temporarily grant the measures requested without hearing the other party, in particular when the possibility of a delay would probably cause irreparable damage to the right holder or when there is a credible risk that evidence may be destroyed. The judge may require the claimant to produce any evidence reasonably obtained in order to establish with sufficient certainty that the claimant is the holder of the right in question and that such right has been or will be soon infringed, and may also require the claimant to take a promissory oath or to post a bond or provide other security to protect the respondent and prevent abuses. Except as otherwise expressly provided by this law, the measure established under this article shall be taken pursuant to the rules of procedure of articles 232 and 321 (second subsection) of the Federal Code of Civil and Commercial Procedure (Código Procesal Civil y Comercial de la Nación) and related provisions of the provincial procedural laws.

¹⁰² See article 4: The Public Ministry shall be primarily responsible for requesting the measures under article 3 of this law in the event of specific content featuring children under eighteen (18) participating in explicit sexual activities or portraying their genitals for predominantly sexual purposes.

¹⁰³ See article 7: For the purposes of this law, Internet Service Providers shall be understood to have actual knowledge of the fact that certain content violates any laws or rights of others from the moment they are provided with notice that any of the measures under article 3 of this law have been issued or that there has been other judicial determination to this effect.

problematic aspect of the Argentine bill, but rather the ambiguity of its terms and the possible loopholes in its enforcement. If any person is entitled to request that a specific content be removed or disabled in circumstances which are not specified in the bill, and the measure could be issued without notifying the provider based on an assessment of seriousness that is also not contemplated by the bill, then it may be too easy to seek the removal of content. It is in this respect that the flaws of the bill are more aggressively challenged. Fundamental rights should not be subject to an action that is so ambiguous in its terms and vague in its requirements. If the online development of freedom of expression is not protected by formal guarantees, in an attempt to protect themselves from liability service providers will be guided by their own interests rather than by the rights and freedoms of users who generate and provide content.

II.C.IV.c. BRAZIL. The Brazilian case is the most controversial and, as a result, it poses the greatest challenge for analysis. At the end of 2009, during the presidency of Luiz Inácio Lula da Silva, the Ministry of Justice invited all citizens to participate in the development of a Civil Internet Framework,¹⁰⁴ coordinated by the Ministry and the Center for Technology and Society of the Getulio Vargas Foundation, which would provide the country with a new regulation for the relationships between fundamental rights, the public interest, the interests of the content and telecommunications industry and the digital environment. The call was a consequence of years of academic and social discussion about the need to regulate this issue.

After several months of debates, in mid-2010 a document was drafted that seemed to sufficiently reflect all citizen demands in a relatively balanced way. The final version of this document provided explicitly that an Internet service provider shall not be liable for content made available by third parties.¹⁰⁵ Such providers (which also include those with “authority to moderate” third-party content)¹⁰⁶ may only be liable if they have been provided with judicial notice that an order has been issued to remove or disable access to the material and which meets all the requirements concerning the identification of the copyright owner, the work, the rights which have been infringed, the type of infringement and the location of the infringing

¹⁰⁴ In this respect, see the discussion website [online], at: <<http://culturadigital.br/marcocivil/>>. [Editor's note: accessed on 11/5/11.]

¹⁰⁵ See article 19: O provedor de conexão à Internet não será responsabilizado por danos decorrentes de conteúdo gerado por terceiros.

¹⁰⁶ See article 23: Os usuários que detenham poderes de moderação sobre o conteúdo de terceiros se equiparam aos provedores de serviços de Internet para efeitos do disposto nesta Seção.

material,¹⁰⁷ and they nevertheless fail to comply with such order.¹⁰⁸ However, providers were required to inform the user (when such user is identifiable).¹⁰⁹

The process for debating the Civil Framework run parallel to the Forum for Public Consultation on the Copyright Law Reform, which focused not on the Internet in general but rather on intellectual property rights and their regulation in Brazil, also with significant citizen involvement. However, all these efforts seemed to have been in vain when, on January 1, 2011, the new government of Dilma Rouseff, through the Minister of Culture, Ana de Hollanda, compromised the review of the process for the amendment of laws applicable to online content. After heated discussions, the Civil Framework is still to be debated in Congress, while a new amendment to the Copyright Law of 1998 was waiting to be submitted to Congress in July 2011.

This last aspect is of particular relevance. Without taking into account the bill which was drafted based on the Civil Framework and changing the conditions for consultation for the amendment of the Copyright Law, the new Minister created a new consultation process on the basis of a new draft bill that was put forward after the public consultation conducted in 2010.¹¹⁰ Together with other amendments, the majority of which sought to establish greater protection for copyright, a new and extensive article, 105-A¹¹¹, was added to the Copyright Law. The

¹⁰⁷ See article 21:

A intimação de que trata o art. 20 deverá conter, sob pena de invalidade:

I- identificação da parte que solicitou a remoção do conteúdo, incluindo seu nome completo, seus números de registro civil e fiscal e dados atuais para contato;

II- identificação clara e específica do conteúdo apontado como infringente, que permita a localização inequívoca do material;

III- descrição da relação existente entre a parte solicitante e o conteúdo apontado como infringente;

IV- justificativa jurídica para a remoção.

¹⁰⁸ See article 20: O provedor de serviço de internet somente poderá ser responsabilizado por danos decorrentes de conteúdo gerado por terceiros se, após intimado para cumprir ordem judicial a respeito, não tomar as providências para, no âmbito do seu serviço e dentro do prazo assinalado, tornar indisponível o conteúdo apontado como infringente.

¹⁰⁹ See article 22: Ao tornar indisponível o acesso ao conteúdo, caberá ao provedor do serviço informar o fato ao usuário responsável pela publicação, comunicando-lhe o teor da intimação, nos casos em que o usuário responsável seja identificável.

¹¹⁰ See *Anteprojeto de Lei*: Altera e acresce dispositivos à Lei no 9610, de 19 de fevereiro de 1998, que altera, atualiza e consolida a legislação sobre direitos autorais, e dá outras providências.

¹¹¹ See article 105-A:

Os responsáveis pela hospedagem de conteúdos na Internet poderão ser responsabilizados solidariamente, nos termos do Artigo 105, por danos decorrentes da colocação à disposição do público de obras e fonogramas por terceiros, sem autorização de seus titulares, se notificados pelo titular ofendido e não tomarem as providências para, no âmbito do seu serviço e dentro de prazo razoável, tornar indisponível o conteúdo apontado como infringente.

§ 1º. Os responsáveis pela hospedagem de conteúdos na Internet devem oferecer de forma ostensiva ao menos um canal eletrônico dedicado ao recebimento de notificações e contranotificações, sendo facultada a criação de mecanismo automatizado para atender aos procedimentos dispostos nesta Seção.

§ 2º. A notificação de que trata o caput deste artigo deverá conter, sob pena de invalidade:

I- identificação do notificante, incluindo seu nome completo, seus números de registro civil e fiscal e dados atuais para contato;

II- data e hora de envio;

III- identificação clara e específica do conteúdo apontado como infringente, que permita a localização inequívoca do material pelo notificado;

purpose of this article was to regulate the liability of Internet service providers, in particular of content hosting providers. The draft bill makes Internet service providers jointly liable for any damage resulting from content made available by third parties and for the refusal to remove such content after being notified. The debate is not gratuitous. The proposed articles require an address for notification purposes (§ 1º); establish formal requirements for such notification (§ 2); require that the third-party who provided the infringing material should be informed and given “reasonable time” to remove the material permanently (§ 3); and compel the *hosting* provider to continue blocking the content if the content provider is not identifiable (§ 4). The draft bill also enables the content provider to file a counter-notice to keep the content online, but in this case the provider would be fully liable for any damages (§ 5), and allows any interested parties to file such counter-notice assuming the same liability (§ 6). As in the other bills, liability is established for the dissemination of false information (§ 7), and in the same way as the Civil Framework bill, users with moderating powers are assimilated to those responsible for providing hosting services (§ 8).

This brief analysis covers only the current text of the draft bill. Although it does not differ significantly from other bills, the most notable features being that it does not require immediate take-down and that it provides for counter-notice procedures, it has created a mechanism that operates without specific judicial intervention. Furthermore, once the formal requirements of the bill have been met, a private act of communication shall be considered sufficient notice to trigger the hosting provider liability or to exempt them from liability if the material has been taken offline. Once again, it is up to Internet service providers (and their moderators) to establish responsibility, although not based on the infringement of any laws or third-party rights, but on the likelihood that they may be held liable for the acts of third parties which allegedly violate intellectual property rights. The solution advanced by the new authorities is perceived as a form of private “cooperation” that grants little protection to users who provide online content. Which bill is going to prevail in Congress is a question that remains unknown.

IV- descrição da relação entre o notificante e o conteúdo apontado como infringente; e
VI- justificativa jurídica para a remoção.

§ 3º. Ao tornar indisponível o acesso ao conteúdo, caberá aos responsáveis pela hospedagem de conteúdos na Internet informar o fato ao responsável pela colocação à disposição do público, comunicando-lhe o teor da notificação de remoção e fixando prazo razoável para a eliminação definitiva do conteúdo infringente.

§ 4º. Caso o responsável pelo conteúdo infringente não seja identificável ou não possa ser localizado, e desde que presentes os requisitos de validade da notificação, cabe aos responsáveis pela hospedagem de conteúdos na Internet manter o bloqueio.

§ 5º. É facultado ao responsável pela colocação à disposição do público, observados os requisitos do § 2º, contranotificar os responsáveis pela hospedagem de conteúdos na Internet, requerendo a manutenção do conteúdo e assumindo a responsabilidade exclusiva pelos eventuais danos causados a terceiros, caso em que caberá aos responsáveis pela hospedagem de conteúdos na Internet o dever de restabelecer o acesso ao conteúdo indisponibilizado e informar ao notificante o restabelecimento.

§ 6º. Qualquer outra pessoa interessada, física ou jurídica, observados os requisitos do § 2º, poderá contranotificar os responsáveis pela hospedagem de conteúdos na Internet, assumindo a responsabilidade pela manutenção do conteúdo.

§ 7º. Tanto o notificante quanto o contranotificante respondem, nos termos da lei, por informações falsas, errôneas e pelo abuso ou má-fé.

§ 8º. Os usuários que detenham poderes de moderação sobre o conteúdo de terceiros se equiparam aos responsáveis pela hospedagem de conteúdos na Internet para efeitos do disposto neste artigo.

II.D. Limiting the liability of Internet providers

As has been noted, different liability regimes may be established for Internet connection and hosting service providers, but all of them will give rise to endless legal debates to protect the interests at stake. Although prior judicial intervention appears to be desirable, there are in the Latin American legal culture, as well as in comparative law, movements promoting “cooperation” between the stakeholders,¹¹² which would favor more expeditious out-of-court solutions, nevertheless regulated by the law,¹¹³ and which would often forego judicial intervention altogether.

However, more reasonable ideas seem to have permeated the opinions of legal authors and recent case law. Some legal authors believe that different Internet service providers should not be subject to specific regulations, but that the existence of negligence or intent, as well as the obligation to compensate any damage caused, should be established by applying the general rules of civil liability.¹¹⁵

Somehow, it is reasonable to assume that the proliferation of specific systems of civil liability would cause more problems than it solves. A new liability regime that places obligations on those who have the technical capacity to interrupt the circulation of unlawful content through Internet would seem unnecessary if the system is capable of delivering solutions on the basis of general principles that need only be adjusted to new realities. However, the complexity of this context requires us to adapt the criteria employed to make such a determination of liability. In view of the different lines of opinion at the academic level and among social organizations, normative solutions become urgent: there is no apparent justification for making abstract decisions in future cases based on complex discussions when it is very unlikely that a consensus will be reached.

However, we believe that control over content that is transmitted through digital networks should never be entrusted to Internet service providers, regardless of whether they are access, connection or content providers that do not apply any sort of *a priori* control over the material

¹¹² Apart from the above examples, see also 301 Report of the United States Trade Representative, which repeatedly refers to the search for “cooperation” mechanisms that could help effectively avoid the infringement of intellectual rights .

¹¹³ See *supra* note 39:

In considering whether such service providers should be treated as electronic editors who are responsible for the transmission of unauthorized (illegal) content, or as the “Internet mailmen” who are exempt from all liability, we should bear in mind that even if they do not provide the content or participate in the decision to disseminate the works, they nevertheless have direct involvement in the dissemination of such content and, except in specific cases, they shall be responsible for fraudulent content, even in cases of intermediation in which the service provider acts as mere conduit, but the infringed author or the holder of related rights has given notice to the online service provider about the illegal nature of the unauthorized content and has requested such provider to remove the content. In this case, the service provider may not invoke ignorance or good faith.

¹¹⁴ Santos, Fabio Lima dos, “Responsabilidade civil dos provedores de conteúdo de Internet”, in *Dos blogs aos jornais online*, Jus Navigandi, Teresina, year 16, 2783, February 13, 2011, available [online] at: <<http://jus.uol.com.br/revista/texto/18489/responsabilidade-civil-dos-provedores-de-conteudo-de-internet>>. [Editor's note: accessed on 11/5/11.]

¹¹⁵ One of the most comprehensive studies on the Brazilian context has reached the same conclusion; see Leonardi, Marcel, *Responsabilidade Civil dos Provedores de Serviços de Internet*, São Paulo, Juarez de Oliveira, 2005.

provided by them. There are several reasons for this, from those related to the operation of the network and the non-exclusion conditions which are necessary for the transmission of content since the dawn of Internet time, usually grouped under the controversial net neutrality regulations, to those associated with the exercise of fundamental rights in the online environment, especially considering the opportunities for control that private parties would have over the exercise of freedom of expression on the Internet.

Any system of liability for Internet service providers, either created by law or legal doctrine, should in the first place refrain from treating providers as subject to strict liability, to prevent them from policing the content that is transmitted through their networks. A more adequate system of civil liability for service providers should take into account the above considerations and challenges, and should be founded on widely accepted responsibility principles in cases where there has been inexcusable negligence or intent on the part of the agent.

Secondly, and given the obstacles faced by the judiciary in establishing responsibility under the rules of fault-based liability, the obligations of Internet service providers should be clearly specified. That is, if we are to consider their fault or negligence, we must try to establish which are the duties that may have been breached.¹¹⁶ General rules are particularly useful for this task, especially laws guaranteeing some of those duties. Irrespective of the existence of such general rules, we believe that service providers should comply, at a minimum, with the following requirements:

- providers should use technologies that are adequate for their purposes, and should be liable for any damage caused as a result of poor maintenance of the physical and logical structure: a defective or harmful service resulting from neglect on the part of those responsible for its maintenance is not significantly different from the risks recognized under the legal systems which were analyzed;
- providers should be aware of and handle the data provided by their users, so that they can track them under special circumstances, such as when combating crime under strict judicial supervision;
- providers should keep for a specified period of time, which should be clearly established by law, certain information concerning their users and their online activity; however, this shall not entitle them to disclose such information. This is of paramount importance for criminal prosecution, as well as for establishing civil liability. Nevertheless, the length of such period of time is still a matter of discussion;¹¹⁷
- providers should maintain the secrecy of the information about their users. This applies not only to their clients, but to any person using their services. Once again, any exceptions to this general rule should be authorized by a court on well-founded considerations, and under no circumstances for purposes of police investigation or at the initiative of other institutions involved in criminal investigation;

¹¹⁶ In this respect we follow the opinion of Leonardi, *id.*, without prejudice to our own opinions.

¹¹⁷ While the rules of civil liability are often subject to statutes of limitations of several years, and this would justify a similar time period for record keeping, there are serious privacy and confidentiality concerns, as well as additional concerns regarding the inviolability of private communications, the difficulties associated with storing information over long periods of time and the possibility that such information may no longer be adequate to identify a specific user or infringer.

- providers should refrain from monitoring content that is transmitted through their networks, as these are private communications and their secrecy is protected as a fundamental right. The exception would be that of criminal prosecution, pursuant to strict limitations established by law; and
- providers should refrain from interfering with communications taking place in the network. Other less important duties can be derived from the above, including several obligations which are often categorized as “net neutrality”, a principle that advocates against discrimination or restrictions based on content, sites, platforms, types of equipment that may be attached, and modes of communication. It also suggests that providers should not interfere with, filter, censor or block in any way communications between users, except when there is a court order to that effect.

There seems to be an additional duty in this respect:¹¹⁸ the duty to report the unlawful acts verified by the service providers. The discussion often focuses on the technical capacity of the Internet service providers to identify unlawful acts occurring through their services and to protect the interests affected by the unlawful acts, which would require the holder of such technical capacity to inform the authorities. We disagree. We do not believe that the privacy and confidentiality of communications should only be protected where there is an adequate and lawful use of the services, but that any measure concerning the use of such services should necessarily be based on a reasoned judicial order, on the understanding that any regulation to this effect should also be assessed, and that the regulatory policies should be decided, taking into account the guarantees set forth in the Constitution.

This idea is key to understanding the scale of the problem. Although there seems to be no trend in favor of regulating or solving these issues through the rules of strict liability, but rather through fault-based liability under specified conditions (as is the case of the international rules described above and the Chilean law), there is also a clear tendency towards establishing special prosecution conditions requiring cooperation between the affected parties and Internet service providers. But requiring information on illegal activity, without considering the degree of control exercised by the relevant service provider, immediately puts that provider under a duty to monitor the acts of third parties and, even worse, to report or monitor situations which may only be unlawful in appearance, as is often the case with alleged infringements of intellectual property rights.

It is for this reason that content notice and take-down systems have been created. Under notice and take-down systems, providers may exempt themselves from liability to the extent that they remove the unlawful material once they become aware of their existence. Such systems are regulated differently under the US DMCA and the European Directive 2001/31/EC, previously noted. The above-mentioned cooperation may exist within such systems, provided that a private notice is required to establish that the suppliers have actual knowledge of the unlawful act and to make them liable if they fail to remove the content.

Clearly, in such cases, the possibility of abuse of the system could be enormous. On the one part, it would create a perverse incentive to solve situations affecting private rights without a

¹¹⁸ See Lipszyc's argument, *supra* note 39 and Leonardi, *supra* note 110.

court intervention that could safeguard the rights and freedoms of the person who commits the allegedly infringing act. This undermines the very nature of the judicial system as an impartial mediator between different stakeholders or, like in this case, as a guarantor of the fundamental rights of victims, as well as the rights of those accused of having infringed the victims' rights. There is no forum to ensure this balance of interests. Strictly speaking, it would be a way of privatizing Justice even without the express consent of those who have sought to exercise their rights and freedoms on the Internet, and such rights would be left to entities that lack the capacity and legitimacy to make decisions about them, and which is inherent to courts of justice, in order to defend private rights and interests.

This clearly threatens those same rights and freedoms. If the unlawful act is defined and punished by private parties, excluding those who have engaged in such act, but with the support of an institutional framework that effectively seeks to ensure impartiality in other settings, this would clearly discourage speech. This is especially true where, without resort to the courts, Internet service providers are held directly liable. The case would be as follows: an Internet service provider whose property and operations could be threatened by a potential lawsuit against which there are little chances of success, as a result of applicable liability rules, would immediately take all actions or measures necessary to avoid such liability. Such actions or measures to avoid civil liability in many cases will result in the removal of potentially unlawful or unauthorized content, without such decision having been made by the courts. Moreover, the effect becomes even more serious as we realize that the actors who will be primarily involved, at least in this private proceeding, shall be collective societies advocating for the interests of their members against companies conducting any of the activities that the law defines as “provision of services”, as has been explained earlier. In this way, the end user, the potentially infringing party, will be in a weak position to negotiate if there is no judicial body to oversee the measures taken to combat the illegal use and traffic of content.

In short, when the service provider is in charge of establishing if a content is lawful and the measures to be taken, such provider will not necessarily seek to protect the affected rights and interests, but will most likely ensure that the threat of sanctions and liability does not materialize. The provider will decide in favor of the alternative that is *safer* to avoid possible lawsuits or sanctions. And there is no guarantee that such system will not be used to suppress and remove critical speech, acts related to the exercise of other freedoms, or even acts authorized by law, as is the case of the exceptions to copyright. In fact, in the US there is extensive literature on the negative effects of the private notice and take-down systems.¹¹⁹ Since the actions we take online are protected by the right to freedom of expression, a weak legal framework for the exercise of such freedom will end up turning it into something abstract. Taking freedom of expression on the Internet seriously, in this context, requires the adoption of legal rules to protect digital communication from the tension created by the over-regulation of copyright and the onslaught of regulations aimed at protecting business models which fail to address this issue *from the perspective* of fundamental rights.

This is also the opinion of the United Nations Special Rapporteur on freedom of opinion and expression, Frank LaRue, who concluded unequivocally in its annual report with regard to the

¹¹⁹ See Gr.<<http://www.chillingeffects.org>>. [Editor's note: accessed on 11/5/11.]

liability of intermediaries as a possible restriction to freedom of expression that censorship measures should never be delegated to private entities and that no one should be held responsible for content generated by others, and emphasized that orders should be issued by a court or at least an independent body.¹²⁰ We should add that for such measures to exist the system must guarantee the possibility of recourse or defense. In our opinion, making intermediaries liable undermines the enjoyment of the right to freedom of opinion and expression and results in widespread and self-protective censorship, without any sort of transparency or due process guarantees.¹²¹

This position was also recently adopted by the rapporteurships for freedom of expression of several international organizations. On June 1, 2011, the UN Special Rapporteur on Freedom of Opinion and Expression, Frank LaRue; the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS), Catalina Botero Marino; the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Dunja Mijatović; and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression, Faith Pansy Tlakula; issued a joint declaration¹²², in which they emphasized the fundamental importance of the Internet for freedom of expression, and recognized its crucial function and the need to adopt rules that can prevent arbitrary actions affecting information and content transmitted over the net. They have recognized that access to Internet is a basic right that should be respected and protected as a means of communication that is becoming increasingly massive, and that States should facilitate access to the web and establish rules to protect neutrality and freedom.

In this declaration, the rapporteurs emphasized the responsibility of Internet intermediaries, that is, the providers of the different services which facilitate communication over the web, and noted in this respect:¹²³

- a) No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, **as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content**, where they have the capacity to do so ('mere conduit principle').
- b) Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others

¹²⁰ LaRue, Frank, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN, May 2011, p. 20.

The Special Rapporteur emphasizes that censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes individuals' human rights. Any requests submitted to intermediaries to prevent access to certain content, or to disclose private information for strictly limited purposes such as administration of criminal justice, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences.

¹²¹ *Id.*.

¹²² *Joint Declaration on Freedom of Expression and the Internet*, available [online] together with the press release at: <<http://cidh.org/relatoria/showarticle.asp?artID=848&IID=2>>. [Editor's note: accessed on 11/5/11.]

¹²³ *Id.* [Authors' note: added emphasis.]

under the same conditions as in paragraph 2(a). At the very least, **intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression** (which is the case with many of the ‘notice and takedown’ rules currently being applied).

III. Conclusions and recommendations

Of all the laws and regulations we have examined, it is apparent that Latin American regimes are far from finding a widely accepted answer to the question of liability of intermediaries for content made available by end users, or whether it is possible to recognize, establish and limit such liability. Moreover, from a comparative perspective it is also not possible to identify criteria which are widely accepted and reflected in the law. The inherent political decision of regulating the liability of intermediaries on the Internet is still subject to considerable debate. With regard to the strategies implemented in different systems, as we have noted earlier, these have been dominated by the interests of the world trade agenda and have adopted an unbalanced regulation which favors private measures of control, to the detriment of the public interest.

The UN Special Rapporteur understands the need to move towards the adoption of a liability regime for Internet service providers as intermediaries. The Report of the Rapporteur has created a test that should be applied to any restriction to online content, and which may be used as guidance for a reasonable and balanced regulation:¹²⁴

- a) it must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and
- b) it must pursue one of the purposes set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and
- c) it must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).

Any type of regulation should always contemplate the possibility of opposition, judicial review and formality so as to ensure a reasonable level of certainty before measures are taken which could suppress or prevent the flow of information or countless forms of speech. Ultimately, it is not economic criteria about efficient allocation of the cost of damages that should prevail, but other considerations of constitutionally protected principles and fundamental rights which now, more than ever, can be enjoyed and exercised, but also have never been more vulnerable to the capricious whims of others. A framework that ensures respect should not promote activities that could undermine such principles, for the sake of democracy and the development of the rights of citizens in the region.

¹²⁴ See *supra* note 115.