

## Conclusions and recommendations

### Eduardo Bertoni

On September 12<sup>th</sup> and 13<sup>th</sup>, 2011, the Center for Studies on Freedom of Expression and Access to Information (CELE) hosted the regional workshop “*Freedom of Expression and the Internet: Regulatory Aspects in Latin America*”, which was held at the Universidad de Palermo Law School. This workshop was within the framework of CELE’s project “*Freedom of expression and the Internet*” which aims to explore, through the topics below, the impact of Internet regulation, case law, and policies in the region on the right to freedom of expression:

**ISP Liability:** Forms of liability imposed on Internet service providers (ISPs)

**Internet filtering:** Exploration of regulation and policies of filtering of Internet content

**Retention and protection of personal data:** Review of regulation and policies for the retention and protection of personal data

**Defamation and jurisdiction:** Online defamation and the problem of libel tourism

The pool of participants to the workshop was made up of professors, scholars and experts on Internet law and regulation from different countries in Latin America, including Brazil, Chile, Peru, Colombia, Uruguay, Puerto Rico and Argentina. The local participants represented a cross-section of the legal community including professors, practicing attorneys, representatives from the Judiciary and representatives of non-governmental organizations. The prominence and diversity of the participants contributed to an open and rich discussion of the topics that were addressed at the workshop.

The methodology for the working sessions of Monday, September 12<sup>th</sup> and Tuesday, September 13<sup>th</sup> included an initial presentation of a paper on one of the four topics that are the subject of CELE’s “*Freedom of Expression and the Internet*” project. This initial presentation was followed by a second presentation by a discussant who commented on the topics of the paper. The presentations were followed by a debate open to contributions from all participants. The papers presented during the workshop are included in this publication.

The recommendations and conclusions summarized below for each topic are the results of the analysis of topics covered in the workshop and of CELE’s research carried out during the aforementioned project. They have been compiled by CELE.<sup>1</sup>

#### a) Liability of Internet Service Providers (ISPs) and Intermediaries

- Regulation on ISP liability is scarce and incomplete.

---

<sup>1</sup> These recommendations and conclusions do not necessarily arise from a consensus among all participants. Diverse opinions were heard on some topics. CELE thanks all participants for their contributions. These recommendations should not be understood as a compilation of all contributions.

- Responsibility of intermediaries should be regulated specifically to guarantee that ISPs and other intermediaries are not held responsible for content of third parties, when they do not control it or are unaware of their illicitness.
- It is recommendable that regulations be unambiguous. When regulations are unclear they may incentivize intermediaries to make their own decision to remove content for fear of being considered responsible for it, which could potentially affect freedom of expression rights.
- Specific regulation on this topic requires consideration of the rights and interests in play in each area that could generate responsibility of intermediaries, such as the areas of defamation, child pornography, or intellectual property. A general approach that attempts to cover all of these areas without addressing the particularities of each context—the protected legal right as well as the interests of expression in play—may be inadequate.
- For penal responsibility of intermediaries to exist, if this is admissible, it is imperative that any penal regulation of this kind adheres to the fundamental principals underlying criminal law.
- When regulating the civil responsibility of intermediaries, it should be clear that Internet activities should not be considered “risky” per se and subject to strict liability.
- Intermediaries can be exempt of responsibility under the “Notice and take down” model. However, when implementing these exemption circumstances, it should be considered that notices are judicial; that the creator of the content to be taken down is notified; and that simple and expedited judicial processes should be carried out in all cases.
- The study of the obligation of intermediaries to take responsibility for the removal content is advisable, as this could be carried out arbitrarily, discriminatorily and without due process.

#### **b) Retention and protection of personal data**

- The importance of agreeing on the definition of “personal data” in the region should be highlighted. A topic that needs to be discussed is whether the IP address should be considered a personal datum. It should be emphasized that the IP address does not directly identify a person and that an affirmative response to this question could blur the legal right that it intends to protect. However, the inevitable switch from IPV4 to IPV6 technologies could include unique identification of electronic devices and with them the need for the IP to be considered a personal datum.
- Any policy on data retention must include information on why the data is being retained, for how long, who is retaining it, and what is being done with the data.
- Regarding the reasons why personal data is being retained, a fundamental aspect to take into account is the consent of the owner of the data. While cases may exist in which consent is not necessary, when it is necessary, it should be clear and certain.
- In reference to the time period for data retention, the economic burden that could be incurred by the obligation of retaining data for long periods of time should be taken into consideration.
- With respect to who is retaining the data, notification methods should be implemented to alert the owners of the data.

- Regarding the use of the retained data from the time it is obtained, regulations should exist to regulate the transmission of data and judicial intervention in certain cases.
- The regulation known as the “right to oblivion” is not advisable, as in principle it appears to violate freedom of expression and access to information.

### c) Content filtering

- At the moment there are many bills in Latin America for regulations that would allow the possibility of filtering content on the Internet. This is troubling given that, in principle, content filtering is considered limitation of freedom of expression and access to information and for this reason should be implemented as an exception.
- To implement public policies in this area it is necessary to have accurate data on filtering activities, among which are included activities carried out by both private entities and governmental entities.
- It is recommended that there be transparency regarding filtering mechanisms and decisions. There is voluntary filtering by intermediaries that is not being adequately controlled. Often users do not know the reasons certain content has been removed.
- Latin American countries have a tradition of filtering content related to child pornography, but defamation, copyright and political issues have been the principal motives for content removal without the existence of clear regulations permitting it.
- It is recommended that training policies be implemented for legal professionals. Many judges are uninformed on technological issues that could cause judicial rulings for the excessive removal of content.
- As we will address later, the regulation of content filtering should be exceptional and should follow norms established in article 13 of the American Convention on Human Rights (known as the tripartite test). Additionally, at a minimum, the following norms should be established:
  - The filtering should adhere to narrow, objective, definite standards to constrain the discretion of filterer.
  - Regulations should be implemented that establish transparency when filtering mechanisms are applied to enable Internet users to be informed of censorship determinations and to allow processes of appeal and/or responsibility for illegitimate filtering.
  - Simple judicial appeals with rapid resolution should be implemented against filtering decisions..
  - Narrow tailoring of any filtering or blocking orders should apply only to the illegal content itself.
- The prohibition of prior restraint in article 13 of the American Convention on Human Rights could imply the prohibition of any type of filtering on the Internet, excepting the provision in paragraph 4 of the aforementioned article. To clarify this point the organs of the Inter-American system—including the Inter-American Commission on Human Rights—could be urged to request an advisory opinion before the Inter-American Human Rights Court. The consultation with the Court might be specifically whether the existing content filtering regulations are compatible with freedom of expression and the prohibition of prior restraint in article 13 of the American Convention on Human Rights.

#### **d) Defamation and jurisdiction**

- It is fundamental to define jurisdictional guidelines for cases that bring to court those who create content that could be considered defamatory. The uncertainty about the applicable law or the court that tries the case could cause a self-censorship effect among those who want to express themselves on the Internet.
- When judges in Latin America have been presented with penal or civil complaints of defamation for expressions on the Internet, they have adopted different criteria to determine territorial jurisdiction.
- Since the Internet multiplies possibilities for determining where the conduct was executed and where its effects were produced, problems arise in applying traditional criteria for determining jurisdiction when it comes to Internet activity.
- Among existing criteria, criteria that grant jurisdiction in the location of residence of the author of the expression should be given prevalence. While this may cause inconsistency, it guarantees the right of defense on the part of the author and minimizes negative effects on freedom of expression.
- Another possible solution that can be implemented to resolve tensions caused by the determination of territorial jurisdiction is the adoption of regulations that prevent the enforcement of foreign judgments contrary to international standards guaranteeing freedom of expression.