DEFAMATION: THE INTERMEDIARY LIABILITY OF ONLINE SERVICE PROVIDERS IN BRAZIL FOR THE ACTIONS OF THEIR CUSTOMERS AND USERS

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Abstract: This project involves gathering information on the legislation, doctrines, and court decisions regulating intermediary liability of Internet providers for the actions of their customers and users classified in Brazil as “crimes of honor.” The goal of this paper is to show that the legislature, doctrines, and Brazilian courts all share the same understanding towards Internet providers’ intermediary liability. With that in mind, Brazilian laws, legal doctrines, and court decisions have been examined and compared. Upon examination of this material, it is possible to say that recent legislation regulating the Internet in Brazil followed the understanding already expressed in legal doctrines and court decisions: that Internet providers should not be liable for their users’ and customers’ behaviors, unless they are notified, by a judicial order, of the existence of crimes or illegal actions on the Internet, and do not remove the infringing content.

I. INTRODUCTION

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Brazilian legislation prohibits the so called “crimes of honor,” i.e., communication that harms the reputation of a person. The crimes are divided into calumny, difamação (a specific type of defamation) and insult, according to Brazilian Criminal Code.\textsuperscript{1} The definition of each crime and its particulars are described below:

1. **Calumny**: Is the false accusation of a crime to damage one’s reputation. If the accusation is true, there is no crime of calumny. It is necessary that third parties are aware of the false accusation for the crime to exist.

2. **Difamação**: In Brazil the concept of what we will call defamation is the act of making statements about a person which damage his/her reputation.\textsuperscript{2} It is irrelevant whether the statement is true or false. Provided that the statement offends one’s reputation, there is the crime of defamation. But as in cases of calumny, it is also necessary that third parties are aware of the defamation for the crime to exist.

3. **Insult**: It is the verbal or written statement that offends one’s dignity.\textsuperscript{3} As in cases of defamation, it does not matter whether the statement is true or false. It suffices that someone’s dignity is damaged by the insult. The crime exists even if the offending party is the only one aware of the insult.

The Internet allows people to easily communicate their opinions to millions of users in a free, non-bureaucratic and easy way. Although false in the majority of cases, the sense of anonymity creates a favorable scenario for defamatory acts on the Internet.\textsuperscript{4} Many people that would think twice before damaging one’s reputation in the “real world” do not hesitate to give their “opinion” on the Internet, making defamatory statements online about other people.\textsuperscript{5}

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\textsuperscript{1}See generally, CÓDIGO PENAL [C.P] (Braz.).

\textsuperscript{2}Id. art. 139.

\textsuperscript{3}Id. art. 140.

\textsuperscript{4}Juliana Carpanez, Sensação de anonimato facilita Cyberbullying, GLOBO (July 27, 2007), http://g1.globo.com/Noticias/Tecnologia/0,,MUL110445-6174,00.html (“[m]any users take advantage of the false sensation of anonymity to commit cyberbullying.”).

\textsuperscript{5}Id. (“It is unlikely that a student would make jokes of teachers and of the school staff in the school without being punished, but in the web it is possible that this happens.”).
With the Internet, defamatory statements spread much faster than before virtual communication,\textsuperscript{6} and they can quickly reach people everywhere in the world. Besides, defamatory postings are usually more difficult to remove from social networks websites, blogs, etc.; and, therefore, are more difficult to forget than defamation statements made before the creation and develop of the Internet.

Besides criminal condemnation, these “crimes of honor” also allow the offended party to seek compensation for moral damages from those that are liable for the offense and its publication and divulgence. According to Brazilian Law, Internet providers are not subject to liability for content generated by third parties, unless they do not remove the infringing content after being officially notified by a court order to proceed accordingly.\textsuperscript{7} Therefore, Internet providers should technically be able quickly to remove contents and avoid liability associated with defamatory Internet acts, if so ordered by the Brazilian courts.

It is also possible and desirable for Internet providers to build Use Policies warning users that they cannot make defamatory statements and that they are liable for any statement that they make online.\textsuperscript{8} However, there is not a provision in Brazilian Law allowing Internet providers to restrict access to contents that they consider to be defamatory without a court order. Thus, if Internet providers want to restrict availability of certain material, for considering it defamation, and there is no court decision ordering the restriction, they might be liable for censoring the Internet,\textsuperscript{9} if the courts find that the removal of the content or the policy itself is abusive or discriminatory in any way.

In order to avoid violating the freedom of speech right, Internet providers may argue that they will remove defamatory content only when notified by a court order.\textsuperscript{10} Although this position may be regarded as the safest for Internet providers, it can pose a

\textsuperscript{6}Brendan Nyhan, Why Rumors Outpace the Truth Online, N.Y. TIMES (Sept. 29, 2014), \url{https://www.nytimes.com/2014/09/30/upshot/its-so-much-more-fun-to-spread-rumors-than-the-truth.html?_r=1} (“What’s even more striking, though, i show initial false reports can be circulated much more widely than later corrections.

\textsuperscript{7}Art. 19 of the Brazilian Internet Bill of Rights (“In order to ensure freedom of expression and to prevent censorship, an Internet application provider can only be subject to civil liability for damages stemming from the content generated by third parties if, after specific court order, it does not take action, according to the framework and technical limits of its services and within the time-frame ordered, to make the infringing content unavailable.”)

\textsuperscript{8}Termos de uso, Valor, http://www.valor.com.br/termos-de-uso(last accessed May 25, 2017)(Braz.) (“Comments - The user/visitor is the sole and exclusive responsible person for the content of the comments published in the website. Valor Econômico is not liable for any damage eventually stemming from opinions and comments made by third parties.”)

\textsuperscript{9}Id. art. 19.

\textsuperscript{10}Id. art. 19.
more difficult challenge to the victims of defamation on the Internet. These victims will find that Internet providers are inflexible if the victims attempt to have defamatory statements removed or suspended by contacting the Internet provider without a court order. If the defamatory content also infringes other people’s rights to privacy by exhibiting, without authorization, nudity, or sexual and private acts, then Internet providers should remove the content immediately after being notified by the right holder.\footnote{Id. art. 21 (“An Internet application provider that makes third party generated content available will be liable for the breach of privacy arising from the disclosure of images, videos and other materials containing nudity or sexual activities of private nature, without the authorization of the participants, when, after being notified by the interested parties or their legal representative, does not remove, in a diligent manner, within its own technical limitations, such content.”).} But the rules specifically elaborated for the Internet world are new and are still being “tested” in Brazil. Depending on how efficient these rules are within the next years or decades, they can be maintained, improved or substantially changed.

II. BRAZILIAN LEGISLATION

A. The Brazilian Internet Bill of Rights (‘‘Marco Civil na Internet’’ in Portuguese)

Article 18 of the Brazilian Internet Bill of Rights states that the Internet connection provider will not be subject to civil liability for content generated by third parties.\footnote{Id. art. 18 (“The Internet connection provider will not be liable for civil damages resulting from content generated by third parties.”).} Likewise, in principle, other kinds of Internet providers, such as application providers, would not be liable for illicit content inserted on the Internet by Internet users.\footnote{Id. art. 19.}

Article 19 of the cited law states that “in order to ensure freedom of expression and to prevent censorship, an Internet application provider can only be subject to civil liability for damages stemming from the content generated by third parties if, after specific court order, it does not take action, according to the framework and technical limits of its services and within the time-frame ordered, to make the infringing content
The court order asking Internet providers to take action in regard to illicit content on the Internet should clearly identify the infringing content that needs to be removed; otherwise it can be considered null as per Article 19 of the Brazilian Internet Bill of Rights.

Article 21 of the cited law states that the Internet application provider will have intermediary liability if it displays content generated by third parties that infringes other people’s rights to privacy by exhibiting, without authorization, nudity or sexual and private acts after being notified by the violated right holder of its legal representative if the application providers does not make the right arrangements to make the content unavailable. According to this article, the content involving child pornography should be removed after notification by the right holder or its representative, i.e., it is not necessary to have a court order demanding the removal of the content.

B. Federal Constitution

The freedom of speech and expression (known in Brazil as “liberdade de expressão”), and the privacy of personal information and confidentiality of personal communications are protected as fundamental rights under Article 5 of the Federal Constitution. Article 5 states:

All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

IV – the expression of thought is free, and anonymity is forbidden;

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14 Id.  
15 Id. ¶ 1 (“The referred court order must include, under penalty of being null, clear identification of the specific infringing content, allowing the material to be precisely located.”)  
16 Id.  
17 Id. art. 21.  
18 Id.  
19 Id.  
20 Constituição Federal [C.F.] [Constitution] art. 5 (Braz.).
Item IX – the expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license;

Item X – the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured;

Item XII - the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts.21

Likewise, the right to expression as a mean of social communication is guaranteed by Federal Constitution in Article 220:

Article 220. The manifestation of thought, the creation, the expression and the information, in any form, process or medium shall not be subject to any restriction, with due regard to the provisions of this Constitution.

Paragraph 2.Any and all censorship of a political, ideological and artistic nature is forbidden.22

C. Brazilian Civil Code

Article 186 of the Brazilian Civil Code states that “one who, by voluntary action or omission, negligence or recklessness, violates third parties’ rights and causes damages to them, even if only moral damages, commits an unlawful act.”23 As per article 927 of the Brazilian Civil Code, one who, by an unlawful act, causes damage to a third party, is obliged to repair it.24 The paragraph of this article states that the damage should be repaired independently of fault when determined by law or in the cases in which the

21Id.
22Id. art. 220.
23CÓDIGO CIVIL [C.C] art. 138 (Braz.).
24Id. art. 927.
activity usually offered by the one who caused the damage imply, by its nature, risks to third party’s rights.\textsuperscript{25}

Article 931 of the Brazilian Civil Code states that individual entrepreneurs and companies will be liable independently of fault for the damages caused by the products they put on the market.\textsuperscript{26}

As it will be shown ahead, the Brazilian Courts do not find that the risks of violation of third parties’ rights, including the “right to reputation,” on the Internet are inherent to Internet providers’ activities.\textsuperscript{27}

Therefore, the strict liability mentioned in the paragraph of article 927 should not apply to Internet providers in accordance with the prevailing understanding of Brazilian Courts (and currently also due to the Brazilian Internet Bill of Rights).

\textbf{D. Brazilian Criminal Code}

Brazilian Criminal Code prohibits the so called “crimes against honor,” as the following three crimes. First, Article 138 of the Brazilian Criminal Code describes calumny as the false accusation of an act of someone defined as a crime.\textsuperscript{28} The penalty for this crime is ranges from six months to two years, and includes a fine.\textsuperscript{29} Those who divulge a false accusation may also be liable for a penalty.\textsuperscript{30} And calumny may also punishable even when committed against those individuals who are deceased.\textsuperscript{31}

However, under the crime for calumny there is an exception to truth.\textsuperscript{32} Evidence of truth is admissible, except in the following three scenarios: (1) if the crime is not punishable by a final sentence, prosecuted through a private action; (2) if the act is attributable to any individual mentioned in Article 141, item I; or (3) if the accused is acquitted.

\textsuperscript{25}Id.
\textsuperscript{26}Id. art. 931.
\textsuperscript{28}C.P. art. 138.
\textsuperscript{29}Id.
\textsuperscript{30}Id. ¶1.
\textsuperscript{31}Id. ¶2.
\textsuperscript{32}Id. ¶3.
Second, Article 139 describes the crime of defamation as follow: to defame someone, accusing him/her of a fact offensive to his/her reputation.\textsuperscript{33} The criminal penalty for defamation ranges from three months to one year, and includes a fine.\textsuperscript{34} And like calumny, there is an exception to truth.\textsuperscript{35} The exception of the truth will only be admissible if the offended is a civil servant and the offence is related to the exercise of his/her functions.\textsuperscript{36}

Third, Article 140 describes the crime of honor of insult as an insult towards an individual that offends his or her dignity.\textsuperscript{37} The penalty for the crime of insult ranges from six months to one year, or a fine.\textsuperscript{38} A judge may defer from applying this penalty if the accuser directly provoked the insult, or if the insult is in response to a previous insult.\textsuperscript{39}

The crime of insult may also carry additional punishment if this insult is violent or aggressive in a manner that is considered humiliating.\textsuperscript{40} The penalty for this kind of insult includes detention ranging from three months to a year, a fine, and the possibility of prosecution for any crime associated with the violence inflicted.\textsuperscript{41} Similarly, if the insult incorporates comments regarding ethnicity, race, national origin, religion, age, or disability, the penalty ranges from one to three years detention, plus a fine.\textsuperscript{42}

Additionally, the rules that apply to defamatory statements in general also apply to defamation on the Internet, since Brazilian Criminal Code does not determine "where" the defamation must occur to be punishable.\textsuperscript{43} It is important for Internet providers to have in mind that defamatory statements are not protected by free speech,\textsuperscript{44} and, except in cases of calumny,\textsuperscript{45} it does not matter whether the statement is false or not. However, as the issue can be very subjective and controversial, it would be extremely difficult for Internet providers to preventively monitor and remove
defamatory statements, since in many cases only analyzing both parties’ allegations (the offended’s and the offender’s), one can verify whether defamation has occurred or not.\textsuperscript{46}

For instance, the lawsuit \textit{Marcelo Machado Rocha vs. Simone Biangolino Rocha} brought in the State Court of Rio de Janeiro.\textsuperscript{47} In that the case, the parties had been recently separated.\textsuperscript{48} Mr. Rocha excluded their son from his private health insurance plan, having advised Ms. Biangolino that he would proceed with the exclusion.\textsuperscript{49} Mr. Rocha, who was a doctor, has not advised her when he indeed proceeded with the exclusion.\textsuperscript{50} The son needed health treatment and Ms. Biangolino was then aware that his father had excluded him from the health insurance plan.\textsuperscript{51} She contacted the doctors she knew, who were also acquaintances of Mr. Rocha, asking for information on what she should do, since her child had no health insurance plan because his father had cancelled it.\textsuperscript{52}

Mr. Rocha filed the lawsuit asking for payment of moral damages, claiming defamation. In his lawsuit, Mr. Roach claimed that Ms. Biangolino could not tell everyone that his son had no medical insurance plan because he had cancelled it and that she should have contracted the insurance services for the child.\textsuperscript{53} The High Court understood that although it was possible that Ms. Biangolino was trying to defame Mr. Rocha due to the end of their relationship by saying to common acquaintances that he had cancelled their son’s health insurance plan, he has not proved that this was her intention and it was also natural that she contacted the doctors she knew for help when her son was ill and without private medical assistance.\textsuperscript{54}

\textsuperscript{46}The “intention to defame” must be present in defamation crimes, as exemplified in the report of Judge Mauricio Caldas Lopes of the High Courts of the State of Rio de Janeiro.\textit{See} Appeal No. 0455306-61.2012.8.19.0001 (\textit{Marcelo Machado Rocha vs. Simon Biangolino Rocha}), 5.11.2013.

\textsuperscript{47} Lawsuit no. 0455306-61.2012.8.19.0001.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} See High Courts of the State of Rio de Janeiro, Appeal No. 0455306-61.2012.8.19.0001 (\textit{Marcelo Machado Rocha vs. Simon Biangolino Rocha}), 5.11. 2013, Judge Mauricio Caldas Lopes: “Although it is not necessary to verify whether the defamatory statement is false or not, in the present case it was true and the Plaintiff has not proved that the Defended had the intention of defame him.”

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As demonstrated in the above cited case, the “intention to defame” is a requirement for civil and criminal condemnation due to defamation.\textsuperscript{55} Thus, it would not be reasonable to request Internet providers to analyze and remove defamatory statements, since in many cases the accused party could be only narrating a fact with no intention to defame a third party.

Frequently, in cases involving potential defamation, many aspects should be analyzed before evaluating if the infringement occurred or not. Therefore, unless in cases in which the infringers expressly confess they are willing to defame someone or in which the intent to defame is somehow unquestionable and crystal clear, demanding Internet providers to remove potential defamatory content could represent an unwanted way of censorship.

\textit{E. Brazilian Consumer Protection Code}

According to Article 3, paragraph 2 of the Brazilian Consumer Protection Code,\textsuperscript{56} there is a consumer relationship between Internet providers and the users of their services, even if such users do not pay for the services.\textsuperscript{57} This provision states:

\begin{quote}
Supplier is any public or private, national or foreign individual or body corporate, as well as entities without a legal identity carrying on business in the field of production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products, or rendering of services.

Service is any activity offered in the consumer market subject to remuneration, including those of banking, financial, credit and insurance nature, except those resulting from a labor relationship.\textsuperscript{58}
\end{quote}

The Brazilian Superior Court of Justice, in \textit{IP da SB vs. Google Brasil Internet Ltda.},\textsuperscript{59} explained that “the fact that the service offered by the Internet provider was

\begin{itemize}
\item \textsuperscript{55}Id.
\item \textsuperscript{56}LEI Nº 8.078, DE 11 DE SETEMBRO DE 1990.
\item \textsuperscript{57}Id.
\item \textsuperscript{58}Id.
\item \textsuperscript{59}Id.
\end{itemize}
gratuitous did not eliminate the consumer relation, since the expression “subject to remuneration” cited in article 3, paragraph 2, of the Brazilian Consumer Protection Code, should be broadly understood, comprising indirect profits of the supplier." In the cited decision of the Brazilian Superior Court of Justice, the Judges found that “in Google’s case, it was clear the existence of the so called cross marketing, which consists in a promotional action of products and services, in which one of them, although not profitable per se, provides gains due to the sale of the other.” The decision also mentioned that “although gratuitous, ORKUT requests that the user register itself on the website and agree with the conditions of the service, generating a data base with infinite commercial possibilities. Moreover, ORKUT is an important tool of promotion and growth of the trademark “GOOGLE” – the most valuable mark in the world.”

Based on the above, it is possible to say that even Internet providers that do not charge their users for the services are in a consumer relationship with them, according to the Brazilian Consumer Protection Code and the Brazilian Courts’ understanding. Besides, as per Article 14 of the Brazilian Consumer Protection Code, the supplier of services is subject to strict liability for the damages caused to consumers due to defects on the services. Article 14 states:

The supplier of services is responsible, regardless of culpability, for the redress of damages caused to consumers for defects related to the rendering of services as well as for incomplete or improper information about their use and risks.

A service is to be considered defective when it does not offer the safety which consumers should expect from it, being considered the relevant circumstances such as: (1) the manner it has been rendered; (2) results

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60Id.
61Id.
62Id.
63CÓDIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR [C.D.C.] art. 14 (Braz.).
and risks that can reasonably be expected from it; or (3) the time it has been rendered.

A service is not to be considered defective only because newer techniques have been adopted.

The supplier of services will not be held responsible just in the case he is able to prove that: (1) having rendered the service it had no defect; or (2) the fault is exclusive on the consumer or third party.

The personal responsibility of independent professionals shall be determined upon verification of the fault.64

Internet providers, as suppliers of services, are also subject to strict liability due to defects on the services rendered by them, in accordance with Article 14 of the Brazilian Consumer Protection Code.65 Nevertheless, as above explained, Brazilian courts do not consider risks of violation of third parties’ rights due to contents inserted on the Internet by users as inherent to Internet providers’ activities.66

Therefore, the services offered by Internet providers do not per se comprise “content control” services. Consequently, Internet providers should not be subject to strict liability due to defects in “content control,” since this is not a service they intrinsically offer. They are, however, subject to strict liability due to defects on the services they render, e.g., defects regarding data privacy.

III. COURT DECISIONS ON DEFAMATION ON THE INTERNET

Cases of potential defamation involving celebrities, politicians and famous people in general are frequently on the news. The Courts have been deciding that Internet providers should remove defamatory content and inform the identity of the Internet user that violated third parties’ rights by committing crimes against honor.

64Id. ¶¶ 1-3.
65Id.
In 2014, the Elections Courts of Justice of the State of Rio de Janeiro decided that Google Brasil Internet Ltda. should remove the link lindbergduascaras.com (the expression "duas caras" means "double face" in Portuguese) in which there were defamatory content against the politician Lindberg Farias and the defamation could jeopardize his chances of success in the election. The decision also ordered that Google should inform the Court of the identity of the creator of the relevant website.

Likewise, the Superior Court of Justice, in the lawsuit *Loducca Publicidade Ltda. and Dafra Amazonia Industria e Comercio de Motocicletas Ltda. vs. Google Brasil Internet Ltda.*, determined that Google removed a video from YouTube which was an altered and defamatory version of an advertisement of Dafra's goods. Google had argued that the removal was technically impossible, but the Superior Court found that the company could remove the cited video and that the Court was not asking it to do a preventive control on the videos uploaded to YouTube by its users, but only to remove material that was considered defamatory by a judicial decision. Google also alleged that the 24-hour period determined by the court decision to have the video removed was extremely short. Nevertheless, the Superior Court of Justice understood that the 24-hour deadline should be maintained since the speed in which defamatory statements are spread on the Internet is really fast and there was no reason to postpone the removal and, consequently, increase the damages against the Plaintiffs. The Superior Court of Justice also stressed that although hate speech, racists messages and defamatory statements, as well as child pornography and advertisements of illicit drugs can be found on social networking websites belonging to Google, they are not protected by the freedom of speech rule nor as free expression of thinking.

Following the same understanding above, the State Court of the State of Ceara decided that Google Brasil Internet Ltda. should remove a blog in which there was

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67Tribunal Regional Eleitoral do Rio de Janeiro - Precautionary No. 208-59.2014.6.19.0000, Relator: Judge Wagner Cinelli de Paula Freitas (*Senator Luiz Lindberg Farias Filho vs. Google Brasil Internet Ltda.*) 2.9.2014: "critics to the Plaintiff exceed the limit of freedom of speech and harm the image and reputation of the Plaintiff."

68Id.


70Id.

71Id.

72Id.

73Id.
defamatory content against a mayor of a city in the State of Ceará.\(^{74}\) Google argued that
the removal would constitute censorship of the freedom of speech and the right to access to information.\(^{75}\) However, the Court stressed that the freedom of speech and the right to information are not absolute,\(^{76}\) because is forbidden to disclose information that could unduly expose the intimacy or cause damages to the honor or image of people or offend their dignity.

As we can see, the courts in Brazil have been issuing similar decisions regarding the liability of Internet providers due to their users’ actions.

IV. LIABILITY OF INTERNET PROVIDERS FOR ACTIONS OF THEIR CUSTOMERS AND USERS

A. General aspects of liability of Internet providers

Brazilian Courts have been deciding that Internet providers should not be requested to monitor the content that their users and customers include on the Internet.\(^{77}\) Although such precautionary control could be understood as a safety measure against crimes committed or planned on the Internet, it would probably become a means for substantially limiting the good and legal use of the Internet or even for making impossible the offer of Internet provider services as they are today. In some cases, this control could be considered as undesirable or even illegal censorship of online contents by Internet providers.

However, Internet providers should promptly remove contents that infringe third parties’ rights after being notified of their existence through a court order or by the right holder in the cases involving nudity, sexual images etc. Besides, Internet providers should be diligent when offering and rendering their services. They should make the

\(^{74}\) High Courts of the State of Ceará - Appeal No. 0027820-98.2013.8.06.000(Ana Teresa Barbosa Carvalho vs. Google Brasil Internet Ltda.), Relator: Judge Sérgia Maria Mendonça Miranda, Diário de Justiça Eletrônico [D.J.e.] 10.10.2013.

\(^{75}\) Id.

\(^{76}\) Id.

right arrangements to be able to identify Internet users in case they violate third parties’ rights, so that such users do not remain unpunished due to anonymity.

Collecting true information from Internet users when allowing them to use the service and warning them that they will be liable for any harm caused by their actions against third parties are measures that can contribute to the prevention of crimes, including the crimes against honor.

Even before the Brazilian Internet Bill of Rights (“Marco Civil na Internet”) was enacted in 2014, there were decisions from the Brazilian Superior Court of Justice understanding that Internet providers were not liable for the actions of Internet users:

1. **IP da SB vs. Google Brasil Internet Ltda.:**

First, in the case of *IP da SB vs. Google Brasil Internet Ltda.*, the Court found that, in spite of the undeniable existence of consumer relation on the service offered by the website Orkut, Google’s liability should be limited to the nature of Orkut’s activities. The court stated that Google must be able to guarantee to its consumers confidentiality and privacy of their information, as well as the operation and maintenance of the web pages that contain its users’ accounts. With regard to the control of the content inserted on the pages by each user, this would not be a service inherent to Google’s activities related to Orkut and the lack of content control cannot be considered as a defect of Google’s services. Besides, on this decision, the Superior Court of Justice highlighted that:

requesting Internet content providers to monitor information displayed on their websites by their customers would be a huge retrogression on the virtual world, making impossible the offer of services that nowadays are broadly used by millions of people on a daily basis. Such a requirement would have a negative social and technological impact.

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79 *Id.*

80 *Id.*

81 *Id.*
The court argued that although many people use the Internet as a way of maintain their anonymity, this cannot be unlimited.\textsuperscript{82} According to the court, the existence of means that allow the identification of the users is deemed a social burdens that must be accepted by the society, as a way of preserve the integrity and the existence of the Internet;\textsuperscript{83} otherwise, the society would be, in some way, helping infringers to maintain their crimes unpunished due to an absolute anonymity right on the Internet, which would be stronger and more important than the existence of a crime or a violation of someone’s rights.

Thus, according to the court’s understanding, users’ data must be required (e.g. at the moment of the customer’s registration to use the service) and collected by Internet providers, but treated as confidential information.\textsuperscript{84} Such information will only be disclosed in case of illicit committed by users and due to a court order.\textsuperscript{85} In these cases, Internet providers should be able to immediately disclose the information to authorities, in order to avoid that the users are able to take other measures to try to hide their illicit activities.

2. \textit{Eduardo Bresolin vs. Google Brasil Internet Ltda}

In the case of Eduardo Bresolin vs. Google Brasil Internet Ltda,\textsuperscript{86} the court decided that it is not reasonable to request Internet providers to control the content inserted into the website by users, since this measure would cause the internet decline.\textsuperscript{87}

3. \textit{José Leonardo Bopp Meister vs. Microsoft Infomática Ltda}

In the case of José Leonardo Bopp Meister vs. Microsoft Informática Ltda,\textsuperscript{88} the court understood that although Microsoft did not request that Hotmail users registered

\textsuperscript{82}Id.
\textsuperscript{83}Id.
\textsuperscript{84}Id.
\textsuperscript{85}See Superior Tribunal de Justiça - Special Appeal No. 1.193.764 - SP/ 2010/0084512-0 (I P da S B vs. Google Brasil Internet Ltda.), 14.12.2010, Minister Hon. Judge Nancy Andrighi: "The content provider should make the right arrangements to allow the means for the identification each user, avoiding anonymity."
\textsuperscript{87}Id.
their personal data on Microsoft’s websites, the company could efficiently trace back their access providers, which would be able to identify users’ IPs. This measure, “tracing back the relevant access provider,” would be enough to prevent Microsoft from being liable for damages originated in actions of Hotmail users. In other words, it was decided that Microsoft was not negligent in collecting information from its users capable of identifying them in case they committed illicit actions against third parties.


In G S de M vs. Google Brasil Internet Ltda., the court determined that Google should compensate the plaintiff for damages stemming from a fake profile on Orkut. Google was liable because it took more than one month to comply with the plaintiff’s request for removal of the fake profile, which was made through Google’s own tool for reporting fake profiles.

In accordance with court decisions and Brazilian Law (especially the Brazilian Internet Bill of Rights), the legal doctrine corroborates the understanding that Internet providers should only be liable for the actions of their users if they are not diligent in gathering and keeping the necessary information to avoid anonymity, in case of violations of third parties’ rights, and in case they do not remove the infringing content after being notified to proceed accordingly.

In the case of Google, the retired judge of the Brazilian Superior Court of Justice Sebastião de Oliveira Castro Filho found that the provider not liable:

for the content of the websites it hosts, since it has no control over them. The website is as a safe in which its owner puts whatever it deems convenient or useful. The hosting service provider only stores the content. Taking into account that the provider has no access to the

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89 Id.
90 Id.
92 Id.
93 Id.
content of the safe, it cannot be liable for such content. Likewise, the Internet connection provider cannot be liable for the content either. Once the safe is opened and it is verified that the content is illegal, the provider should immediately suspend the service, otherwise it might also respond for the infringement.94

And Antonio Jeová Santos, author of works about moral damages, says that “ideally the Internet provider, when being chosen by a subscriber, customer or user, should request it all identification information.”95

The act of gathering identification information would allow (1) the owner of the violated right to identify the infringer and request compensation for damages and losses stemming from the violation, and (2) the Brazilian authorities to identify the infringer and pursue legal actions against crimes committed on the Internet. Professor Marcel Leonardi explains that “the Internet providers have technical conditions to monitor the content of the communications of their users, but this does not allow them to monitor communications without a court order, in accordance with the law.”96 In other words, monitoring the content inserted on the Internet by users is neither a duty nor a right of Internet providers.

This kind of preventive control was not included in Brazilian law as a duty of Internet providers, since this could mean censorship of posts on the Internet. It would be possible for political, economic, or social organizations to control Internet providers, removing contents from the Internet by alleging that certain statements are defamatory. Thus, people would face the unrealistic situation in which Internet users would have to file a lawsuit to guarantee that their posting was disclosed. Moreover, as mentioned in Part I above, in principle, Internet providers that provide only e-mail services should not be liable for the illicit content of the messages exchanged on the Internet. The main issue regarding liability of Internet providers is when the illicit content is not limited to e-mails exchanged by their users, but published on websites, social networking pages, etc. Therefore, even in cases of insult, in which it is not necessary for third parties to be aware of the defamatory statement, if the insult was

94Sebastião de Oliveira Castro Filho, Da Responsabilidade do Provedor de Internet nas Relações de Consumo, in 15 DOUTRINA DO SUPERIOR TRIBUNAL DE JUSTIÇA 143, 173.
95ANTONIO JEOVÁ SANTOS, DANO MORAL NA Internet 143 (2001).
96MARCEL LEONARDI, RESPONSABILIDADE CIVIL DOS PROVEDORES DE SERVIÇOS DE Internet85 (Juarez de Oliveira eds., 2005).
restricted to e-mails to the offended party, Internet providers would not be liable for the sender’s actions.

B. Liability of Internet providers for actions of their customers and users against third parties’ honor and reputation

The same understanding that Internet providers are liable for their users’ actions on the Internet only due to the delay or refusal to remove the infringing content from the website is also applied to cases involving crimes of honor.97

V. CONCLUSION

The Internet has introduced into society new possibilities for communication. The technology, however, can also be used to commit illicit actions and crimes, including those against the honor and the reputation. Through the Internet, people can more easily hide their identity; Internet providers should therefore make the appropriate arrangements to avoid anonymous users that cannot be identified even if ordered by a court decision.

Brazilian courts and the Brazilian legislature have stated that Internet providers should not be liable for the actions of their users, when they were not aware of the existence of crimes or violation of third parties’ rights. Therefore, Internet providers are not required to take preventive actions to control the content inserted posted on the Internet by their users. Internet providers should, however, immediately take all necessary measures to remove the infringing content when notified by a court order (when required by law) or by the rights holder.

Defamatory statements, websites, blogs, etc. posted on the Internet by users should be removed by Internet providers soon after the provider is notified by a court order. Although the concept of defamation can be controversial and very subjective, both the legislature and the courts agree that the right to information and to freedom of speech does not permit people to defame others. Internet providers should, although it is

not mandatory according to the law, have use policies warning their users that they will be liable for any defamatory content they disclose on the Internet.

If Internet providers fail to disclose the information about their users’ identity when required by a court order or if they fail to remove illicit content from the Internet after being notified by the interested parties (when the law states that this notice suffices) or by the Court (in the cases in which it is necessary to have a court order, according to the law, determining the removal of the infringing material), they should be liable for the crime or illicit content too. Delays in making the necessary steps to remove the infringing content from the Internet might be understood as a failure to comply with the request for removal. Courts have found that a 24-hour period is reasonable for the removal of infringing content after notification.

If Internet providers make the right arrangements to be able to avoid anonymity of their users and customers and if they promptly remove defamatory materials from the Internet, after being notified of their existence by a court order, they should not be liable for their users’ actions or for neglect in collecting their information.