BRAZIL

CHILD PROTECTION

The intermediary liability of online service providers for the actions of their customers and users.

ABSTRACT

This project collects information on Brazilian legislation, doctrine, and court decisions on the intermediary liability of Internet service providers with respect to child protection and children’s rights. This paper attempts to show that legislation, doctrine and Brazilian courts share the same understanding towards Internet service providers’ intermediary liability.

Examination of this material shows that recent Brazilian legislation on the Internet conforms to the pre-existing understanding already expressed by doctrine and court decisions. This pre-existing understanding revolves around the notion that Internet service providers should not be liable for their users and customers’ behavior, unless they are notified of the existence of crimes and illicit actions on the Internet and fail to remove the infringing content.

BIO

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INTRODUCTION

Brazilian legislation is extensively protective with respect to child and adolescent rights. Brazilian authorities and courts have been making efforts to guarantee the enforcement of these rights.

There is a current debate in the country by authorities, organizations, professors, researchers and the population in general about the vulnerability of children and adolescents on the Internet. Children are perceived to be easier victims due to their naïveté and inexperience. Also due to their lack of experience, traumatic situations can be more devastating to children and adolescents than to mature adults suffering the same trauma. Mary Sykes Wylie says that, according to a study made by Adverse Childhood Experiences (ACE), there is an “astonishing correlation between childhood maltreatment and later-life medical illnesses and premature death.”1

Internet access increases the risk of children communicating with strangers whom their parents or guardians would not allow them to communicate with in “real life,” without supervision. Furthermore, because the Internet can bring the “dangers of the streets” into people’s homes, it is necessary that parents pay as much attention to their children’s in-home and internet activities as they do when they go out with children. Moreover, the Internet provides the ability to disguise one’s true identity. Therefore, children can talk to an adult believing that they are talking to another child or an adolescent and be led to act in a way that they would not otherwise if they had known the true identity of the person they are communicating with.

Various Internet parental control tools have been applied to allow children and adolescents to use the Internet in a safer way. However, the effectiveness of these tools depends on parents knowing the tools exist and how to properly use them.

There are social problems that might have negative impacts on implementing efficient parental control on the Internet. Regardless, Internet service providers that clearly inform their users about the existence and importance of using parental control tools are deemed diligent and may avoid liability arising from neglecting to advise its users of the methods available for protecting children’s rights.

Another important way for Internet service providers to avoid intermediary liability involves removing the infringing material after receiving notice. This method requires the technical ability to remove infringing material immediately after receiving notice, either from the right holder (or its representative, in case of children and adolescents) or by the Court, depending on the violated right, defined by Articles 19 and 21 of the Brazilian Internet Bill of Rights, known as “Marco Civil na Internet”.

Brazilian legislation and Brazilian courts view the protection of child rights as a societal priority. Every effort one can demonstrate to preserve those rights is understood as evidence of good faith and diligence. With that in mind, it is relevant to analyze: (I) the main rules of Brazilian legislation concerning the protection of child rights; (II) areas of concern with respect to children and adolescents; and (III) the most recent Court decisions in the latest years regarding the protection of child rights and the prevailing doctrine.

I. BRAZILLIAN LEGISLATION

A. Federal Constitution

Children’s rights are extensively protected in Brazil. Article 227 of the Federal Constitution states that child rights should be treated as a priority in Brazil:

Article 227 – It is the duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

Paragraph 4 – The law will severely publish the abuse, the violence and the sexual exploitation of children and adolescents.²

The Federal Constitution also protects the privacy of personal information and confidentiality of communication:

Article 5 - 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:

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.3

B. The Statute of Children and Adolescents

The Statute of Children and Adolescents provides detailed rules for the protection of children’s rights.4 Defining children as persons under twelve years old and adolescents as persons from twelve to eighteen years old, the statute addresses a variety of issues regarding children’s rights.

As per Article 17 of the Statute of Children and Adolescents “the right to respect consists on the inviolability of physic and moral integrity of children and adolescents, comprising the preservation of image, identity, autonomy, values, ideas and faith, of the personal spaces and objects.”5

Article 18 of the statute states that “it is a social duty to protect the dignity of children and adolescents, keeping them safe from any inhuman, violent, terrifying, vexatious or constraining treatment.”6 This article extends to protect children and adolescents from exposure to “inhuman, violent, terrifying, vexatious or constraining” situations also on the Internet and expressly concludes that it is a duty of society, which includes Internet providers, to take the necessary measures to prevent children and adolescents from being victims of crimes and illicit actions, including those committed online.

Article 241 of the Statute of Children and Adolescents states that online service providers can be held liable for pornography involving children or adolescents transmitted or published by their customers and users if online service providers fail to disable access to the illegal content when officially notified. This failure is considered a criminal offense with a potential penalty of imprisonment of three to six years and a fine.7

In assessing the legislative intent of Article 241, Demócrito Reinaldo Filho explains that the “legislator intended to make clear that the webpage hosting service provider should

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3 Id. at Art. 5.
5 Id. at Art. 17.
6 Id. at Art. 5.
7 Id. at Art. 241.
be liable for child pornography if it contributes to it.” According to Reinaldo Filho, if the Internet provider, “aware of the infringement, provides the means for the transmission of an e-mail message containing child pornography material, it commits a crime.” Reinaldo Filho stresses that criminal liability only follows if the Internet provider is aware of the nature of the content it has allowed to be transmitted. Liability begins the moment the Internet provider becomes aware of the crime or illicit content.

In other words, even in situations where Brazilian law does not expressly mention the intermediary liability of Internet providers, liability attaches for crimes, including crimes against children’s rights, if the court finds that the providers facilitated the crime in any way or have failed to take reasonable measures to avoid or to stop the crime.

C. Brazilian Internet Bill of Rights (“Marco Civil na Internet”)

Article 18 of the Brazilian Internet Bill of Rights concludes that Internet connection providers are not subject to civil liability for content generated by third parties. Likewise, in principle, other kinds of Internet providers, (not application providers), would not be liable for illicit content put on the Internet, by Internet users. The secrecy of correspondence principle shields these providers from civil liability. For example, e-mail providers should not be liable for the content of the messages exchanged between their customers/users, for the same reason, among others, why the Post Office cannot be liable for illicit content of letters sent by mail.

Article 19 of the Brazilian Internet Bill of Rights 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 unavailable.” The court order requesting Internet providers to act with respect to illicit content on the Internet must clearly identify the infringing content requiring removal; otherwise, the request can be considered null.

Article 21 of the Brazilian Internet Bill of Rights provides a basis for intermediary liability for an Internet application provider that displays content generated by third parties if that content infringes on the privacy rights of others. Liability depends on the Internet

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9 Lei No. 12.965, de 23 de Abril 2014, art. 18 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 4.23.2014 (Braz.).
10 Id. at Art. 19.
application provider: exhibiting nudity, sexual and private acts without authorization; and failing to remove the infringing content after receiving notice of the content by the right holder or its representative. According to this article, content involving children pornography should be removed after notification by the right holder or its representative. Thus, it is not necessary to have a court order demanding the removal of the content.

According to Article 29 of the Brazilian Internet Bill of Rights, Internet users should be free to choose the parental control software they use, provided that the software is in accordance with the rules of the Statute of Children and Adolescents. Parental control should be encouraged, since it can reduce the instances of crimes against children on the Internet.

**D. 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.”

As per Article 927 of the Brazilian Civil Code, one who unlawfully causes damage to a third party is obliged to repair it. This article also states that the damage should be repaired independently of fault (in the cases the law says that it is not necessary to prove fault to have the damage repaired); or in the cases in which the activity usually offered by the one who caused the damage naturally implies risks to third party’s rights.

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. As discussed below, Brazilian courts do not deem the risk of violating third parties’ rights on the Internet as inherent to Internet providers’ activities.

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 also the Brazilian Internet Bill of Rights - “Marco Civil na Internet”).

**E. Brazilian Criminal Code**

Article 61, section “h” of the Brazilian Criminal Code increases penalties for crimes committed against children.

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11 Lei No. 12.965, de 23 de Abril 2014 art. 21, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 4.23.2014 (Braz.).
12 Id. at Art. 29.
14 Id. at Art. 931.
15 Decreto Lei No. 2.848, de 7 de Dezembro de 1940 art. 61, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 12.7.1940 (Braz.).
According to Article 111 item V of the Brazilian Criminal Code, the statutory limitations for lawsuits regarding crimes against the sexual dignity of children and adolescents will start only after the victim turns 18 years old, although the lawsuit can be filed any time before.16

Article 218 of the Brazilian Criminal Code defines sexual crimes against children, including those that can be committed on the Internet. Several other crimes against children and adolescents can be committed on the Internet17.

For example, Article 173 of the Brazilian Criminal Code states that it is a crime to take advantage of necessity, passion or inexperience of a minor, inducing it to commit any action with possible legal effect that can harm the minor or a third party. Accordingly, Internet users inducing a minor to commit a crime or a civil tort can be held criminally liable.18

Furthermore, Article 218 of the Brazilian Criminal Code states that it is a crime to induce a minor to run away from where its legal representative wants it to stay. Thus, Article 218 prohibits an Internet user from inducing a minor to run away from their parents, school etc.

**F. Brazilian Consumer Protection Code**

According to Article 3, paragraph 2 of the Brazilian Consumer Protection Code, a consumer relationship between Internet providers and its users exist regardless of whether the users pay for services.

Article 3 - 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.

Paragraph 2 - 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.19

In *I P da S B v. Google Brasil Internet Ltda.*, the Brazilian Superior Court of Justice, when deciding the special appeal No. 1.193.764 – SP, regarding the offensive messages against the appellant on Orkut, explained that “the fact that the service offered by the Internet provider was gratuitous did not eliminate the consumer relation, since the expression ‘subject

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16 *Id.* at Art. 111.
17 *Id.* at Art. 218.
18 *Id.* at Art. 173.
19 Lei No. 8.078, de 11 de Setembro de 1990, art. 3 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 9.11.1990 (Braz.).
to remuneration’ cited in Article 3, paragraph 2, of the Brazilian Consumer Protection Code, should be broadly understood, comprising indirect profits of the supplier.”

The Court found that Google had indirectly profited, stated that “in Google’s case, it was clear the existence of 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 Court 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 this decision, it is reasonable to conclude that even Internet providers that do not charge their users for services are in a consumer relationship with them, according to Brazilian courts understanding of the Brazilian Consumer Protection Code.

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 - 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.

Paragraph 1 - 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: the manner it has been rendered; result and risks that can reasonably be expected from it; the time it has been rendered.

Paragraph 2 - A service is not to be considered defective only because newer techniques have been adopted.

Paragraph 3 - The supplier of services will not be held responsible just in the case he is able to prove that: having rendered the service it had no defect; the fault is exclusive on the consumer or a third party.

Paragraph 4 - The personal responsibility of independent professionals shall be determined upon verification of the fault.

Internet providers, as service suppliers, are also strictly liable for defects on the services rendered by them under Article 14 of the Brazilian Consumer Protection Code. Nevertheless, as discussed above, Brazilian courts do not consider the risks of Internet users

20 S.T.J.L., Recurso Especial No. 1.193.764, Relator: Nancy Andrighi, 19.11.2013 (Braz.).
violating third parties’ rights resulting from their Internet activity as inherent to Internet
providers’ activities.

Therefore, the services offered by Internet providers do not per se constitute “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. However,
Internet providers are subject to strict liability due to defects on the services they do render,
including defects regarding data privacy.

The Brazilian Consumer Protection Code also forbids abusive marketing practices
aimed at children in Article 37, paragraph 2:

Article 37 - Abusive or misleading advertising shall be banned.

Paragraph 2 - It shall be understood as abusive, among others, any type of
discriminatory advertising that incites violence, exploits fear or superstition, profits
from the immaturity in judging and inexperience of children, disregards the
environmental values, or that can lead consumer to behave harmfully or hazardously
with respect to his health or safety.22

G. Convention on the Rights of the Child

The Convention on the Rights of the Child was legally accepted in Brazil.23 The
Convention provides the basis for the protection of children’s rights, such as integrity, honor
and reputation. This protection should also extend to the preservation of children’s rights on
the Internet.

H. CONANDA Resolution No. 163/2014 (about Marketing and Advertising to
Children, including on the Internet)

CONANDA is the Brazilian Council for the Rights of Children and Adolescents. The
Council serves as the highest federal body in charge of formulating, monitoring, and
evaluating policies aimed towards protecting and defending the rights of children and
adolescents in Brazil. The Council enacted Resolution No. 163/2014 in order to protect
children from abusive advertising.24 Specifically, Article 2 defines abusive advertisement and
marketing as any practice that aims to persuade children and adolescents to buy products and
services using the following aspects:

- child language, special effects, excess of colors
- songs for children or sung by children’s voices

22 Lei No. 8.078, de 11 de Setembro de 1990 art. 37, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 9.11.1990 (Braz.).
The Resolution intends to restrict advertisements to children in Brazil, in order to avoid the possibility of children being persuaded to buy a product or service due to their lack of experience or maturity. The Resolution has little practical effect. It is common in Brazil to see advertisements for children in all kinds of media, including on the Internet, in disagreement with the rules above listed.

II. AREAS OF CONCERN REGARDING CHILDREN AND ADOLESCENTS

A. Main Dangers for Children and Adolescents on the Internet

In general, the immaturity and inexperience of young people make them more vulnerable than adults to be victims of crimes and illicit actions or disturbances caused by age-inappropriate material.

Children and adolescents are harmed by the Internet in different ways. First, young people can access potentially offense and disturbing content that might be inaccessible outside of the virtual world, or at least would be inaccessible without an adult supervision. Second, children and adolescents can be in contact with people that may want to abuse or bully them. These risks can be due to young people’s own behavior or the behavior of others. For example, young Internet users may decide to disseminate nude photographs or videos of themselves on the Internet, or they may exchange these photos with a third party, who then disseminates the private material on the Internet.

Lastly, hidden costs and advertising can pass unnoticed to children and adolescents. Because of their inexperience, children and adolescents may be unduly led to buy or want to buy a product or a service. Awareness of the types of dangers is the first step in improving measures to protect children and adolescents from being victims of crimes and illicit actions on the Internet.

B. Pedophilia and Child Pornography

Although young people are subject to different kinds of offenses on the Internet, the main concern regarding the protection of children on the Internet seems to be avoiding their
vulnerable to pedophilia and child pornography. This concern is especially relevant because the Internet has facilitated the action of sexual abusers. This kind of harm is generally considered one of the most destructive harms committed against children and adolescents.

Professor Paulo Teotônio and researcher Flávia Horaguti argue that “in the same way that the Internet provides benefits of modern times, it also facilitates criminal torts, mainly due to the fact that the majority of Brazilian users are children and adolescents, therefore, potential victims of the crimes committed by pedophiles.”

Pedophilia and child pornography on the Internet are performed in different ways, including: websites disclosing nudity and sexual images of children and adolescents, or inciting sexual crimes against children; social networking websites inciting pedophilia or child pornography or depicting nudity and sexual images involving children and adolescents; and e-mails exchanges by Internet users containing content that can be considered as pedophilia or child pornography.

Marcio Oliveira Puggina also mentions the possibility of a picture of a child or adolescent displayed on the Internet in a legal way (by a fashion website, for instance) be used in pornography websites. According to Puggina, young people that are presented as models on fashion websites “often appear on websites of explicit erotic content or even on pornography websites, what suggests the existence of some intercommunication between those websites regarding the exploitation of child and adolescent models.”

Because the Internet provides various opportunities to victimize a child or an adolescent, the use of the Internet by young people must be under constant and attentive surveillance of their legal representatives. Moreover, society (including Internet providers) should also seek to protect children’s rights.

Another important aspect of pedophilia and child pornography is that the victims’ parents or legal representatives often commit these crimes. This reality makes the prevention and punishment of the crimes even more difficult. According to a notice published on the website of the State Courts of Bahia, “only 0.65% of the children and adolescents that have been victims of pornography on the Internet in the entire world are identified.” Because

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26 Paulo José Freire, Teotônio, Pornografia e Pedofilia na Internet, Prevenção e Punição, 43 Revista Magister de Direito Penal e Processual (2011).
28 Id.
these children are victims of the people that should be protecting them, society must be alert with regards to potential abusers against any child.

C. Parental Control

There are several parental control tools available on the market, including software offered by Internet providers and options that are free of charge. The effective use of these parental tools requires understanding the workings of devices that access the Internet, and awareness of the risks that children and adolescents face on the Internet so that adults can identify what they have to control.

Diligent Internet providers should offer parental control tools or at least inform their new customers of the importance of parental controls. Information on built-in tools and features allowing a parent to control the content accessible by children should be simple and direct to ensure that the tool is not difficult to use.

Evidence of Internet providers making the right arrangements in providing customers with tools (or with information about those tools) to protect children’s rights should be introduced if liability is being asserted based on its users’ actions against children and adolescents’ rights.

Despite the importance of parental controls, there is no filter tool capable of preventing any and all risk that children and adolescents face online. Therefore, reducing the likelihood of children becoming victims to online crimes or illicit actions requires talking to children and adolescents about staying safe online including advising children to be attentive of their behaviors.

D. Combat of Crimes on the Internet Against Children

There are public and private organizations that focus on investigating child pornography and pedophilia, and provide users with tools to report crimes committed online. For example, the well-known intergovernmental organization UNICEF, receives reports of child pornography on the Internet by e-mail at webmasterbrazil@unicef.org.30

Furthermore, among these organizations are the Humaniza Redes31 (a governmental organization) and Safernet Brasil32 (a non-governmental organization), which also supports Humaniza Redes. Both these organizations allow Internet users to report crimes online anonymously, including crimes against children and adolescents. These reports are analyzed and the organizations inform the relevant authorities of the reported crime.

30 See, e.g., www.unicef.org (last accessed on August 18, 2015).
31 See www.humanizaredes.gov.br (last accessed on August 4th, 2015)
32 See www.safernet.org.br (last accessed on August 4th, 2015)
The engagement of these entities in combating crimes on the Internet is reflected in a public civil suit, filed in the 17th Federal Civil Circuit Court, by the Brazilian Federal Public Ministry with Safernet Brasil’s support, against Google Brasil Internet Ltda.

The Federal Public Ministry required Google Brasil to disclose the information of Orkut’s users that were being accused of child pornography and racism. Google Brasil argued that it could not provide the authorities with the required information since all users’ data was stored in servers located in the United States and operated by Google Inc. to which Google Brasil could not access. The Federal Court rejected Google Brasil’s arguments and ordered it to disclose the required information, reasoning that the crimes had been committed in the Brazilian territory, and the company offered services in Brazil.

The Court also highlighted that in similar situations the Brazilian offices of Microsoft Corp. and Yahoo! Inc. were able to provide the Brazilian authorities with information necessary in identifying users. Google Brasil complied with the decision and provided the Brazilian authorities with the required information, so that the accused could be identified.

Beyond the entities focused on combating crimes against children and adolescents on the Internet, some organizations aim mainly to avoid abusive practices that usually are not considered crimes. For example, through the website www.criancaeconsumo.org.br33 it is possible to report abusive advertising practices related to goods and services for children and adolescents. The reports are investigated by the organization’s law team, which then sends warning letters that highlight the abusive practice to the advertisers, publicity agencies, media companies and governmental authorities. The cases are accompanied until their outcome.

In 2007, the organization sent a letter to the Internet provider IG concerning a banner of the website “Sex Clube” displayed on children’s website.34 The website “Sex Clube” contained pornography material inappropriate for children. IG responded by alleging that it was not responsible for the contents inserted on its websites by third parties, but it committed itself to improving the advertising filters, in order to avoid age-inappropriate publicity from being displayed on their websites.

According to the Brazilian Internet Bill of Rights (“Marco Civil na Internet”), Internet providers are not obliged to remove abusive advertisements due to third parties’ requests without a court order. However, Internet providers may take measures to prevent the maintenance of abuse without a court order if the providers can verify that children and

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33 Information obtained on the website www.criancaeconsumo.org.br (visited on August 6th, 2015), which is owned by Instituto Alana. Instituto Alana is a non-governmental organization that aims to protect children’s rights in view of publicity practices for children and adolescents.
34 www.tremencantado.hph.ig.com.br
adolescents are being subject to abusive marketing practice of their customers and users. Internet providers pursuing this route should proceed carefully, preferably allowing the owner of the infringing material to contest the allegation of infringement, in order not to jeopardize it.

III. INTERMEDIARY LIABILITY FOR INTERNET PROVIDERS IN BRAZILIAN COURTS

A. General Aspects of Liability of Internet Providers

Brazilian courts have decided that Internet providers should not be mandated to monitor the content that their users and customers display on the Internet. Although such precautionary control could serve as a safety measure against crimes committed or planned on the Internet, it would also substantially limit the beneficial and legal uses of the Internet or even make today’s Internet services impossible to offer.

However, Internet providers should promptly remove content that infringes third parties’ rights after being notified of the content by a court order or by victims in cases involving nudity or sexual images. Besides, Internet providers should be diligent when offering and rendering their services. Providers’ services should be capable of identifying Internet users so anonymous users do not avoid punishment after violating the rights of third parties.

Even before the enactment of the Brazilian Internet Bill of Rights (“Marco Civil na Internet”) in 2014, the Brazilian Superior Court of Justice based its decisions on these understandings. For example, in IP da S B vs. Google Brasil Internet Ltda. (discussed above) the Court found that, despite the undeniable existence of a consumer relationship on the service offered by the website Orkut, Google’s liability should be limited to the nature of Orkut’s activities.35

The Court stated that Google must be able to guarantee both confidentiality and privacy of information to its customers, as well as the operation and maintenance of the web pages that contain its users’ accounts. The Court further reasoned that the control of the content placed on the pages by each user, 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.

35 S.T.J.L., Recurso Especial No. 1.193.764, Relator: Nancy Andrighi, 19.11.2013 (Braz.).
Furthermore, the Superior Court of Justice highlighted the detrimental effects of holding Google accountable, noting 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.”36

The Court also argued that although many people use the Internet as a way of maintaining anonymity, users’ ability to remain anonymous cannot be unlimited. The ability to identify users is deemed a social burden that must be accepted by society, in order to preserve the integrity and the existence of the Internet. Otherwise, society would be indirectly helping infringers continue their criminal activity and avoid punishment by maintaining an absolute anonymity right on the Internet.

Thus, according to the Court’s understanding, users’ data must be recorded (for example, at the moment of the customer’s registration to use the service) and collected by Internet providers, but treated as confidential information. Such information will only be disclosed in case of crimes committed by users upon receipt of a court order. In these cases, Internet providers should be able to immediately disclose the information to authorities, in order to avoid users taking other measures to hide their illicit activities.

Furthermore, in Bresolin v. Google Brasil Internet Ltda., the Court held that requiring Internet providers to control the content of users displayed on its website would be unreasonable since this measure would cause the decline of the Internet.37

In Meister v. Microsoft Informática Ltda., the Court upheld Microsoft collecting user information by tracing the information through another access provider.38 The Court understood that although Microsoft did not request Hotmail users to register personal data on Microsoft’s websites, the company could efficiently trace back their access providers, which would be able to identify the IP address of Hotmail users. This measure of, “tracing back the relevant access provider,” would be enough to prevent Microsoft from being liable for damages resulting from the actions of Hotmail users. Therefore, the Court concluded that Microsoft was not negligent in collecting identify revealing information from its users in case users violated the rights of third parties.

36 Id.
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.\(^{39}\) Google was condemned for taking longer than a month to comply with the Plaintiff’s request to remove a fake profile, a request made through Google’s own system for reporting fake profiles.

Doctrine corroborates with Court decisions and Brazilian law (especially the Brazilian Internet Bill of Rights, or “Marco Civil na Internet”) in the understanding that intermediary liability for Internet providers should only arise when: providers fail to be diligent in gathering and keeping the information necessary to avoid violators escaping liability due to their anonymity; and when providers fail to remove infringing content after receiving proper notification.

The retired judge of the Brazilian Superior Court of Justice Sebastião de Oliveira Castro Filho concludes that the provider is not liable “for the content of the websites it hosts, since it has no control over them. The website is as 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 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.”\(^{40}\)

Antonio Jeová Santos, author of works about moral damages, argues that “ideally the Internet provider, when being chosen by a subscriber, customer or user, should request it all identification information.”\(^{41}\)

The act of gathering identification information would allow: (1) the victim 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 “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.”\(^{42}\) In other

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\(^{40}\) Sebastião de Oliveira Castro Filho, *Da Responsabilidade do Provedor de Internet nas Relações de Consumo*, 173 (Brasília Jurídica, STJ 2005).

\(^{41}\) Antonio Jeová Santos, *Dano Moral na Internet*, 143, (Método 2001).

words, monitoring the content displayed on the Internet by users is neither a duty nor a right of Internet providers. Moreover, as mentioned in Section I, “C,” 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 occurs when the illicit content is not limited to e-mails exchanged by their users, but posted publically in websites, social networking pages, or the like.

B. Liability of Internet Providers for Actions of Their Customers and Users Against Children and Adolescents

The 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 also applies to cases involving crimes or illicit activities against children and adolescents.

Brazilian courts have prioritized cases dealing with illicit content on the Internet involving children and adolescents, issuing categorical decisions prohibiting illegal online actions against children and adolescents.

For example, even almost 10 years before the Brazilian Internet Bill of Rights (“Marco Civil na Internet”) was enacted, the State Courts of São Paulo, when deciding the a lawsuit involving Internet child pornography (Bill of Review No. 381.078-4/0-00) explained the Courts’ understanding about the liability of Internet provider:

The Internet provider “becomes, with its lack of action, an acting part of the action that originates the moral damage, which allows its inclusion as a defendant in a civil liability lawsuit. Therefore, the liability of the Internet provider does not derive from the action of a third party, but from the evaluation of its behavior before a real situation that it should take into account.”

The Court also refused to enforce a contract between Terra and Lear Web that attempted to exclude Terra from liability for Lear Web’s blog activities, because the rights of third parties had been violated. This contract would, however, be valid between Terra and Lear Web. Thus, Terra would be able to pursue compensation for damages and losses if Terra had to assume responsibility for to Lear Web’s actions.

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43 T.J.S.P., No. 381.078-4/0-00, Relator: Ênio Santarelli Zuliani, 7.4.2005 (Braz.).
44 The company in charge of the blog (hosted by Terra) in which the pictures of the minor were displayed was Lear Web Solution Consultoria e Informática Ltda.
In the lawsuit filed by Tamires Cristina de Souza against Google Brasil Internet Ltda., the Judges of the Higher Court of the State of São Paulo affirmed the lower court’s decision requiring Google to pay Souza R$15,000,00 as compensation for moral damages after another person used her Orkut profile without authorization. In such a case, the judges reasoned that Google has not removed the profile from the Internet after it was notified several times by Souza and others that another person was using Souza’s profile to offend her and to unduly depict pictures of her. The judges also stressed that since Ms. Souza was thirteen years old at the time the infringement occurred, the case should be handled as priority in accordance with the Federal Constitution and the Statute of Children and Adolescents.

In another case, filed by Anselmo Joaquim Vieira and his minor son Leonardo Figueiredo Vieira against Google Brasil Internet Ltda., the Higher Court of the State Courts of São Paulo granted a preliminary injunction order requiring Google to remove an offensive video from its popular video-sharing website, “Youtube,” within 24 hours. The video accused Vieira of taking undue advantage of public tender processes and also mentioned the name of Mr. Vieira’s son, exposing him to a vexatious situation. The minor faced bullying at school as a result of the exhibition of the video.

The judges reasoned that it was not difficult for Google to at least temporarily remove the offensive video from Youtube’s website, and that if the lawsuit was later considered groundless, the video could be exhibited on the website again. Thus, no irreversible damage against Google would result from a decision ordering Google to remove the video from Youtube.

The State Courts of Paraná followed the same understating in deciding that Google Brasil Internet Ltda. should compensate a child for an 8-day delay in the removal of a documentary posted on the Internet in which the minor appeared without authorization from her legal representative. Google received a court order mandating removal of the video on October 15, 2008, but failed to remove the video until October 23, 2008. The Court that Google was liable for the damages stemming from user’s actions due to the 8-day delay.

Although there is no explicit reasonable period of time fixed by law to have an infringing material removed from a website by an Internet provider, Brazilian courts have implemented a period of 24 hours, beginning from the notification of a removal order.

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As previously explained, cases involving the violation of the rights of children and adolescents should be treated as a priority. This principle also applies to Internet providers. Therefore, Internet providers should promptly take all possible measures to remove infringing materials that might violate children’s rights after being notice of their existence.

CONCLUSION

The Internet brought new possibilities of communication to society. The technology, however, can also be used to commit illicit actions and crimes, including those against children and adolescents. The Internet provides users the possibility of easily hiding their identity from other users and the ability to disguise their genuine features. Although anyone can be misled by others, children and adolescents are more vulnerable to be victims of bad faith Internet users, due to their natural lack of experience and immaturity.

Even before the Brazilian Internet Bill of Rights (“Marco Civil na Internet”) was enacted, the prevailing understanding of Brazilian courts was that Internet providers should not be liable for the actions of their users unless they are aware of the existence of crimes or violations against the rights of third parties. According to Brazilian courts, Internet providers should not be forced to take preventative monitoring actions of their users, but they should be required to take immediate measures upon receiving notice of its users online infringements.

The Brazilian Internet Bill of Rights (“Marco Civil na Internet”) issued in 2014 endorsed the Courts’ prevailing view towards Internet providers’ liability by stating that internet providers should only be liable for users’ infringements of third parties’ rights after becoming aware of the infringements.

According to the Federal Constitution and the Statute of Children and Adolescents, society should make efforts to combat crimes against children and adolescents, including those committed on the Internet. As a part of society, Internet providers should be also attentive to the protection of children’s rights. Although it is not their duty to monitor the content placed on the Internet by their users and customers, they should be diligent in gathering their users’ information so as to avoid infringers’ ability to retain anonymity in cases of illicit actions or crimes against children. Furthermore, Internet providers should also cooperate with authorities if crimes against children are committed or planned on the Internet. Likewise, they should be technically able to remove infringing content and promptly remove undue content involving children and adolescents as soon as they are notified of the existence of such material.
Intermediary liability for Internet providers results when: Internet providers fail to disclose the identity of its users as 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 type of 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). Delays in taking the requisite steps to remove the infringing content from the Internet might be understood as a failure to comply with the request for removal.

Therefore, in order to avoid intermediary liability, Internet providers should: make the arrangements necessary to avoid the possibility of infringers retaining absolute anonymity; and promptly (preferably within 24 hours) remove materials from the Internet that might violate children and adolescents’ rights after being notified of their existence.
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