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ABSTRACT

The authors explain the basis of the current Brazilian Legal system on Internet intermediary liability and the Brazilian legal position regarding the defense of freedom of speech and protection of data privacy. For a better understanding of the legal scenario the authors describe one of the first intermediary liability decisions and one of the latest.

Exhibit A displays the majority of Statutes concerning this matter, including the Brazilian Federal Constitution.

Exhibit B displays a table with data collected before the Superior Courts of Justice after a search with the keywords liability, provider (intermediary) and Internet.
AUTHORS’ BIO

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I. INTRODUCTION

Technology has improved more in the last 100 years than in the entire history of humankind, resulting in a society with a massive flow of information and fast communication. New tools, new habits, and new technology will always be introduced before the law can predict them. Thus, society will need to learn how to deal with these unforeseeable technological developments and judges will have to adjust within the current legal system in order to solve conflicts and eventually fill in the gaps in the law.

The Law of Introduction to the Brazilian Legal System expressly provides that a judge may decide cases according to analogy, general habits, and principles of law where the law is silent on a specific matter. The principle of this law has been used in cases dealing with virtual liability and data privacy. Local judges were forced to deal with conflicts based on this criteria due to the lack of specific rules dealing with virtual liability and data privacy.

To understand the position that Brazil has decided to adopt in relation to intermediary liability it is relevant to know the history of the doctrine of liability itself and of freedom of speech, as detailed in this work on the topics to follow.

Brazil faced years of an oppressive military regime (1964-1984). After the enactment of the Federal Constitution of 1988 protecting freedom of speech and freedom of thought as fundamental rights, Brazilians gradually regained the confidence to talk about and investigate the past, while assuring that no law would silence people’s voices under normal circumstances. After leaving behind the dark years of oppression, it is possible to affirm that people feel comfortable and confident enough to express themselves, especially on the Internet. However, perhaps Brazilians are still learning the systemic consequences and reach of their own acts and that the Internet is not a no man’s land.

Freedom of expression and freedom of thought are welcome, but those freedoms cease when one infringes another party’s rights. The law will not allow

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1 Decreto No. 4.657, de 4 de Setembro de 1942, DIÁRIO OFICIAL DA UniÃO [D.O.U] de 9.9.1942 (Braz.).

2 It was only in 2011 that the legislation was passed, creating the National Commission of Truth implemented on May 16, 2012 to investigate serious Human Rights violations occurred in Brazil from September 18, 1946 and October 5, 1988. See Lei No. 12.528, de 18 de Novembro de 2011, DIÁRIO OFICIAL DA UniÃO [D.O.U] de 11.18. 2011 (Braz.).
abuses and will provide an interested, legitimate party with remedies to exercise the right to access justice.

The Internet has even allowed direct democratic means for legislative procedures. For example, in 2007 the Secretary for Legislative Matters at the Ministry of Justice in Brazil created a project called “Thinking Law,” which seeks to connect politicians, scholars and others, who can debate openly on relevant topics and play a part in drafting more effective laws.\(^3\) Under this scenario it was high time to reflect and start working on the needs of the community in dealing with new forms of expression in the virtual world. From a privacy perspective, the world and its laws have to now deal with new forms of collecting and controlling all the information widely distributed on the plethora of devices capable of posting information on the Internet. Moreover, people are also learning the consequences of sharing their data online.

The development of new forms allowing easy collection of information through the Internet increases the importance of creating better and more transparent systems of controlling this information, and determining how it will be used. Governments will always try to use this information in order to conduct social interventions; corporations will seek to plan business and marketing strategies; and individuals will seek to obtain more transparency from both the corporations and the government.

The spirit of pluralism and open debates dominated the discussions leading up to the Internet Civil Landmark of April 23, 2014, which will certainly guide upcoming laws, help enhance transparency, and build clear rules. This work will focus on intermediary liability and privacy data protection.

II. BRAZILIAN LEGAL SYSTEM

The Brazilian legal system has its roots in Roman Civil Law. The Constitution primarily provides principles and rules followed by more specific codes, statutes and administrative acts. Interpretation of these rules applied to concrete cases builds a body of case law. Many pieces of legislation\(^4\) affect the subjects of this work, including:

- The Internet Civil Landmark Act, which establishes principles, guarantees, rights and rules for the use of Internet in Brazil.\(^5\)
- The Carolina Dieckmann Law which implements rules regarding cyber crimes.\(^6\)
- Law of the Access of Information.\(^7\)
- The Brazilian Civil Code\(^8\)
- Copyrights Act of 1998\(^9\)
- *Habeas data* law, which rules on the right to access information and on the habeas data procedure.\(^10\)
- Elections Law\(^11\)
- Industrial Property Law. Besides protecting patents and trademarks, it provides protection against unfair competition too.\(^12\)
- Code for the Defense of the Consumers\(^13\)
- Statute for Child and Teenagers\(^14\)
- Federal Constitution of 1988\(^15\)

\(^4\) Please refer to Exhibit A with copies of the statutes. The rules for the Adhesion contract with the Brazilian Domain Name registry were also included.
\(^6\) Lei No. 12.737, de 30 de Novembro de 2012 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 11.30.2012 (Braz.).
\(^7\) Lei No. 12.527, de 18 de Novembro de 2011 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 11.18.2011 (Braz.).
\(^8\) Lei No. 10.406, de 10 de Janeiro de 2002, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 1.10.2002 (Braz.).
\(^9\) Lei No. 9.610, de 19 de Fevereiro de 2012 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 2.19.1998 (Braz.).
\(^12\) Lei No. 9.279, de 14 de Maio de 1996 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 5.14.1996 (Braz.).
\(^13\) Lei No. 8.078, de 11 de Setembro de 1990 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 9.11.1990 (Braz.).
\(^15\) CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.).
-Press Law, which also involves rules on the freedom of expression of thought and information.16

-Convention of Labor Law.17

- Introduction Law to the Brazilian legal system18

In each specific case they may all apply to solve real world and virtual world conflicts.

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16 Lei No. 5.250, de 9 de Fevereiro de 1967 DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 2.9.1967 (Braz.).
17 Decreto-Lei No. 5.452, de 1 de Maio de 1942, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 5.1.1942 (Braz.).
18 Decreto-Lei No. 4.657, de 4 de Setembro de 1942, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 9.4.1942 (Braz.).
III. LIABILITY

According to Caio Mário da Silva Pereira, under the traditional theory of civil liability, the duty to compensate is a consequence of a combination of three elements: the unlawful behavior of a party; damage to the person or property of the victim; and the causal relation between the unlawful behavior and the damage. Scholars typically call this “direct responsibility/liability.”

This principle, however, does not fulfill the need of distributing justice in cases where the victim is unable to prove a causal connection between a particular person and the damage suffered. This led to the expansion of the liability theory to include third party liability for the acts of those who behaved unlawfully, which caused someone else’s damages. Caio Mário refers to this as liability for the act of third parties, fact of things, indirect liability, or complex liability. Indirect liability presupposes an intermediary and creates difficulty for victims in producing evidence. Basing his opinion on other works, Caio Mário argues, that this type of liability should only be used in exceptional cases.

The general idea is that the third party will be liable when it has a lawful and authoritative power over the person that acted unlawfully. Caio Mário links the origin of indirect liability to a primitive time when a group of people absorbed the individuality of its members, remaining jointly responsible for crimes committed by any individual in the group. If the assessment of direct liability lies traditionally on the concept of guilt, the indirect liability lies on the theory of risk.

The general rule of civil liability, within the doctrine of subjectivity, follows the principle that everyone is liable for their own guilt (unuscuique sua culpa nocet). However, to sustain the theory of indirect liability one needs to ignore the general rule and embrace the concept of presumed guilt. As Caio Mário da Silva Pereira highlights, indirect liability is not arbitrary. The victim cannot choose whoever it wishes to compensate its damages.

The Brazilian liability theory has been developed over a long period of time. The prior Civil Code of 1916 grounded its principle on subjective guilt. Here, guilt must

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19 Caio Mário da Silva Pereira, Responsabilidade Civil, 85-86 (9th ed. 2001)
20 Id. at 85
21 Id. at 86
22 Id. at 87
23 Id. at 87
be proved and a defendant would be found guilty if the victim shows that the
defendant had not been sufficiently diligent or taken the necessary steps to avoid the
damage. The development of the indirect liability theory led to the Brazilian Civil
Code of 2002, which embraced the possibility of holding someone liable for the
compensation of damages caused by a third party’s actions, even absent evidence of
independent guilt. 24

The status quo of current liability theory is greatly attributed to the economic
development, increase of indirect liability cases, and the influence of doctrine and
case law of other judicial systems aimed at enhancing the likelihood of victim
compensation. The concept of producing evidence of guilt becomes a question of
producing evidence of the existence of the fact.

Article 927 of the Brazilian Civil Code holds parties who acted unlawfully
causing damages to another liable for compensation. 25 The obligation to the
compensation for the damage is deemed independent from guilt in cases specified
under the law or whenever the activity of an agent who caused the damage naturally
implies risks against the rights of others.

Article 931 establishes product liability by stating that entrepreneurs and
companies will be liable for damages caused by the products they place on the market
regardless of guilt, unless the special law rules otherwise. 26

Articles 932 and 933 also expressly consider those that will be liable to
compensate the damages caused by third parties. 27 For example, an employer will be
held liable for the acts of its employees while exercising their work, or resulting from
their work; and those taking advantage of the product of the crime committed by
others until that advantage is limited. It is also worth mentioning that according to
Article 934, parties held liable to compensation for damage caused by another can
obtain reimbursement from the person who caused the damage, except when the
person who caused the damage is a descendent, or is deemed legally incapable under
the law. 28

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25 CÓDIGO CIVIL [C.C][CIVIL CODE] art. 927 (Braz.).
26 Id. at Art. 931.
27 Id. at Art. 932-33.
28 Id. at Art. 934.
Civil liability is independent from criminal liability. However, facts established by a criminal judge cannot be disputed in later proceedings. Finally, a victim’s right to receive compensation is transmitted to its successors.

Among the parties that the law expressly holds liable for the acts of third parties include: the parents of minors under their responsibility; tutors for the pupils under their care; owners of hotels, hostels and the like; employers for their employees; and those who had advantage over the product of crime. This paper focuses on the responsibility of employers for the acts of their employees and of those who take advantage of the results of a crime.

According to Caio Mário da Silva Pereira, it is important to understand what the law means by an “employee.” Silva Pereira concludes that an employee is anyone that follows the orders of another exercising power or direction, regardless of whether that person receives wages for following the orders.

Employees are extensions of the activities practiced by the employers. Thus, when the former are held guilty while practicing their professional activities, it is as if the latter were guilty too. Therefore, liability theory evolved to establish a presumption of guilt for employers.

The requirements for the characterization of employer liability are: (1) the existence of damage; (2) the labor relationship; and (3) the guilt of the employee, or, in other words, the condition that the unlawful behavior occurred during employment and while exercising the activities typically requested by the employer.

Establishing employer liability represented another step forward in the trend of objective liability, which generates the duty to compensate independently of the evidence of real or presumed guilt. Fábio Henrique Podestá states that liability must be taken from its objective perspective, meaning that the intention to cause the damage remains irrelevant. The evidence of the fact and causality are for the purpose of compensation. According to him, however, liability should be excused if

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29 Id. at Art. 935.
30 Id. at Art. 943.
31 Id. at Art. 932.
33 Id. at 93-94.
34 Id. at 95.
the person being held liable proves that it took all the precautions necessary to avoid the damages.

Cases involving the liability of those who took advantage of the results of crime obligate them to compensate the damages caused, regardless of the third party’s involvement in the crime. As long as there was an economic advantage the third party will be responsible for reimbursing the victim.

Establishing indirect liability does not eliminate direct liability. In any case of indirect liability the defendant will have the right to act against the party who directly caused the damage. Liability can result from either the breach of a contract or a breach of the law. Naturally, in the first case the victim needs to prove the contractual clause that was breached.

Local legislation concerning consumer protection law represents another important consideration that may affect privacy in Internet and the use of information.\(^{36}\) The CDC is primarily intended to protect the consumer against abuse, while assuring harmony and transparency in consumer relations. As the Brazilian Labor Code (CLT)\(^ {37}\) was established to stabilize the relations between workers and their employers, the Consumer Protection Code was conceived starting from the assumption that the consumer relation is unequal, favoring the suppliers of products and services.\(^ {38}\)

Consumer’s protection is a principle of economic order established in article 170, item VI of the Brazilian Federal Constitution of 1988.\(^ {39}\) The issue is deemed important since the relationship between the supplier and the destined party is essential in a “consumption society” for competition between companies and the development of the Brazilian capitalist system based on the decent existence of the individuals and on the maxim of justice.

A. Liability *Stricto Sensu*

Brazilian consumer protection law adopted the *stricto sensu* principle of liability in the indemnification of the damages caused or derived from the consumer relation. The *strico sensu* principle forces suppliers to repair consumer injuries caused

\(^{36}\) *CÓDIGO DE DEFESA DO CONSUMIDOR [C.D.C.] [CIVIL CODE] (Braz.).*

\(^{37}\) *CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [CIVIL CODE] (Braz.).*

\(^{38}\) *CÓDIGO DE DEFESA DO CONSUMIDOR [C.D.C.] [CIVIL CODE] (Braz.).*

\(^{39}\) *CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 170 (Braz.).*
by the supplier itself, or the products or services the supplier provides, regardless of fault or guilt.

In practice, the consumer may hold any of the companies that engaged in placing the product or service on the market liable for damages (manufacturer, distributor, seller are all defined in the CDC as suppliers). In these cases, the company that bears the loss is entitled to proceed in court against the other responsible parties for reimbursement.

Stricto sensu excludes the liability of an entrepreneur in cases in where their products or services caused damages to the consumer, upon proof that: (i) the entrepreneur’s company did not participate in the placement of the product/service in the market; (ii) that no defect exists, despite having placed the product/service in the market; or (iii) the defect results exclusively from the fault of the consumer.

These rules were tailored under the supposition that the supplier must assume the risks that are inherent to its business. Therefore, these three circumstances exclusively represent the situations where liability for indemnification is excluded under the CDC.

B. Adhesion Contract

Aimed at preventing any abuses resulting from adhesion contracts, Article 51 of the CDC mandates several contractual clauses to support the consumer’s contractual position. For example, the supplier cannot: (i) transfer its legal liabilities to third parties; (ii) invert the burden of proof in a lawsuit; (iii) unilaterally change prices; or (iv) unilaterally terminate an agreement without vesting the consumer with the same right.40

The CDC also determines that these types of contractual clauses must be in a written, comprehensible and clear form. Any provisions that restrict any right held by the consumer must be drafted to emphasize the restriction, allowing for easy and immediate comprehension. Furthermore, Article 423 of the Civil Code furthers the provisions established in Section III of the CDC by providing that any ambiguous or conflicting clauses established in an adhesion agreement shall be construed to the benefit of the adherent/consumer.41

40 CÓDIGO DE DEFESA DO CONSUMIDOR [C.D.C.][CIVIL CODE] art. 51 (Braz.).
41 Id. at Art. 423.
C. Statutory Warranty

Another important issue to consider is the difference between contractual warranty and statutory warranty. While the former consists in the warranty that is established by contract (voluntarily warranted by the supplier), the latter involves a warranty established by law and is entitled to a consumer irrespective of any other covenant.

According to the warranty established in the CDC, the user is entitled to either: the proper repair or exchange of the product or service that was purchased; or a repeated performance in the case of a service. The CDC requires a consumer to exercise such rights within 90 days in the case of durable goods, and 30 days for non-durable goods. Therefore, any clause that establishes a shorter period shall be deemed void.

These legal parameters should also govern the doctrine of liability in Brazil. As previously discussed, the basic rule is that everyone is liable for their own acts. However, under certain circumstances, third parties can be held liable for the acts of others, particularly in a commercial relationship involving the service provider and the consumer or user.

Because these are rules of public order, foreign companies must be in compliance when engaging in activities within Brazil.
IV. FREEDOM OF SPEECH

Understanding the liability of Internet intermediaries requires knowing how the Brazilian legal system has treated freedom of speech and freedom of thought.


Everyone has a right to freedom of thought and expression (freedom of speech). Daniel Sarmento explains that traditionally the freedom of expression is a negative right in the sense that it requests that the State abstain from action. This right limits the powers of the public, so that it cannot prohibit anyone from expressing its own ideas or opinions. However, the scholar states that this is an incomplete definition because the state must act in order to guarantee that everyone will actually enjoy the right of freedom of expression, especially in situations where the members of society are not considered equal.

According to Sarmento, the system of laissez-faire does not suffice to guarantee that people will use the freedom of expression because the market and the ability to mass communicate would be concentrated on the hands of a few. In order to allow the unequal to enrich debates by participating in the discussion, Sarmento defends the necessity of state intervention, despite the risk of censorship and manipulation. Therefore, the State should actively guarantee that the means of communication promote a democratic discussion.

Indeed, in some form, the Internet has created the space that allows more people to speak on behalf of more people. For example, Brazilian society is enjoying the Internet for debates via blogs and social media sites. These sites serve as a tool for

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democratic debates. The trend towards these debates appears to be in line with Article 13 of the Pact of San Jose, Costa Rica, which states that the right of freedom of expression and thought shall not be subject to prior censorship, but rather shall be subject to the subsequent imposition of liability. This liability shall be expressly established by law to the extent necessary to ensure respect for the rights or reputations of others or the protection of national security, public order, or public health or morals.

The principles recognized by democracies were put on the table and it is now a matter of balancing the limits of freedom of expression and thought with the legal consequences for infringing upon the barrier protecting personality rights.

A. Dealing With the Apparent Collision Between Free Speech and Personal Rights

Luís Roberto Barroso clarifies that the typical law enforcer of the Roman-German tradition, such as the Brazilian, will mostly adopt a line of thought consisting of examining the factual situation and identifying which rule is most adequate for use within the judicial system. The conclusion will be the consequence of framing the facts to the rules.

The interpreter’s role is relatively simple when it comes down to applying the facts to the juridical consequence described as a rule. In this case, the interpreter has little choice, it only reveals the choices contained within the scope of the rule. Thus, the traditional method of interpretation will apply the rules to the facts.

However, during the 20th century, this legislative technique has started to introduce open-ended clauses or undetermined concepts, including moral damage, lawful compensation, public order, and good faith. This new technique compelled the interpreter to make decisions traditionally left to the lawmaker. Under this new scenario, the law provides parameters and principles, which will only have a meaning

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45 João Costa Ribeiro Neto does not accept the affirmative. The author brings to the debates some of Google’s tools and the possibility of censorship by controlling results of searches. See João Costa Ribeiro Neto, A Eficácia Dos Direitos Fundamentais Nas Relações Privadas: O Caso Google, 83 Revista de Direito Constitucional e Internacional, 177 (2013).


depending on the facts, and on the subjects and objects involved. A judge will not only apply the principle to the fact, but will indeed interpret the principle according to its own subjective values.

While rules are objective and descriptive of acts applicable to detailed situations and that will generate yes or no answers; principles, in a democracy, will frequently signal different directions and, thus, will require that the interpreter weigh their applicability and suitability. There are no yes-or-no answers.

A good range of fundamental rights will find its protection within the group of principles, especially expressed in constitutions. Principles and rights protected under constitutions may incite tension, since in the concrete case they may contain equally relevant opposing values. For instance, the freedom of doing business versus consumer protection; privacy rights versus freedom of speech; press liberty versus image and moral rights; secrecy of correspondence and communication versus right of secrecy disclosure authorized by justice; freedom to obtain information versus secrecy of the source for professional purposes; right to property versus proceedings to cancel the right to property under a public interest rationale; right of defense versus limitations on the production of evidence and the use of certain types of evidence.

A characteristic of this judicial situation is the lack of a solution in theory for the problem. This only occurs because of the level of complexity and pluralism in modern societies and because fundamental rights are mainly expressed by broad principles. In Brazil, constitutionalists avoid defining any kind of hierarchy when fundamental rights are at stake, believing that all fundamental rights should enjoy the same position under the constitution. This is the main reason why it is not possible to establish a rule, which will govern permanently the priority of one against the others. The case will only be solved in concrete application.

Ana Paula de Barcellos also admits that it is not possible to create a hierarchy between the rights of freedom of speech and of information and the right to privacy as they are all fundamental rights, but a possible conflict between them should be decided by a judge, upon evaluation of the rights on a case-by-case basis. The lawmaker should then establish general standards, directions to be taken by the judge

or interpreter, thus giving the latter freedom to weigh the elements of the case in practice.

As Luís Roberto Barroso explains, the lawmaker can try to define special rules concerning fundamental rights, but if it does, the decision therefrom originated will be subject to a double review, one in thesis and one in concrete.\(^{49}\) Since the traditional interpretation and applicability of the law would be insufficient for difficult cases, other techniques emerged. For example, one technique involves weighing the values that might conflict with others according to a series of circumstances observed in practice. After balancing rights of each party involved, it is necessary to decide the degree of intensity of those rights compared to others according to principles of proportionality and reasonability. Every difficult case involves some degree of overlap of rights and demands that the judge decides for one reason or another. The problem is a judge’s justification for its decision.

Robert Alexy admits that the mechanics of law, and case law in particular, deal directly with evaluating choices. However, Alexy argues that this reality should not be a reason to deduce that what is left is a blank slate for moral and subjective choices of decision makers.\(^{50}\) Alexy tried to develop a method, which would take into account the belief widely accepted in prior legal discussions, without taking standards of correctness for granted.

However, this is not an easy task because it is difficult to have consensus on practical questions. Furthermore, decision makers have different backgrounds and experiences, which inevitably influence their decisions.

**B. Freedom of Information, Expression, Speech and Press.**

The Brazilian Constitution declares the rights of information, expression/speech and of press in Article 5, items IV, V, IX, XIV; 220.\(^{51}\) Brazilian Scholars distinguish freedom of information and freedom of expression. The former concerns individual freedom to communicate facts freely and of being informed by those facts, while the


\(^{51}\) CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. V (Braz.).
latter protects the right to express (for example) ideas, positions, opinions and beliefs. In other words, the freedom of information implies the truth of information.

Freedom of press has been conquered by the means of communication and encompasses freedom of information and of expression. It is of particular importance in democracies because the press enables the free circulation of information, which motivates democratic debates. Besides, the press enhances public control by disclosing public acts of public agents.

Indeed, even freedom of information and speech are not absolute rights and will limited by the rights of others, such as image rights or honor rights. The abuse of freedom of information, speech and press will be resolved under the system of civil liability, by compensating a victim for material and moral damages or holding a violator criminally liable.

After the Military Government, Brazil denies any instances of censorship. Prohibiting the prior publication of a fact or opinion is seen as an extreme measure not justified by the Constitution. Thus, scholars defend their right to publish regardless of the contents of the publications. Legal intervention should only occur afterwards when liabilities are assessed.

C. Standards of Interpretation in Cases Where Rights Overlap

Luís Roberto Barroso has suggested standards of judicial interpretation in cases where freedom of speech and information are confronted with rights of privacy, honor, intimacy, image and others. The standards should determine whether: the method used to obtain the information was illicit; the subject of the information is a public person; information involves a private or public place; the nature of the fact and whether the information enjoys a position for preferred post sanctions; and whether the information is of interest of the public. These are the factors that might mitigate liabilities on a case-by-case basis.

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52 Other limitations are ruled under specific laws, namely, Industrial Property Law; Copyrights Act; Child and Teenagers Statute etc.
V. PRIVACY GENERAL RIGHTS

The modern legal background regarding privacy in Brazil (of information, personal data, mail, communication) is considered in the Constitution, Civil Code, Consumer Code, Labor Law and special statutes. The Brazilian Congress is now analyzing bills related to Internet privacy and also enacted the “Marco Civil da Internet” (“Internet Civil Landmark”).

The Marco Civil da Internet is considered a “landmark” law concerning Internet issues specifically, and because it is founded on principles, it could essentially be regarded as an “Internet Constitution,” grounded on main pillars. These pillars include the principles: that the Internet should be neutral, with no discrimination on the circulation of data; online privacy; freedom of speech; that providers are not primarily liable for information uploaded by third parties, but must comply with court orders and/or take down notices; that providers should also safely keep information, but may be forced to disclose the information in case of investigation for illicit acts upon receipt of a court order.

The Brazilian Federal Constitution treats dignity, intimacy, privacy of information, mail and communication, and the right to not recite others, as “fundamental rights.” Based on the current legal framework, e-mails, information collected on online forums, and other information collected on the Internet cannot be disclosed. Information concerning fundamental rights should only be disclosed by third parties based on express consent or court order, except if such information is reliable and of public interest. All data gathered must be kept in a secure environment, and can only be used internally for the specific purpose for which it has been collected. Additionally, all information concerning how data will be used should be clearly informed to users and require their express consent for submission.

The Internet Civil Landmark is based mainly on three principles: Internet neutrality, freedom of speech, and user privacy. It adjusts the existing provisions related to dignity, intimacy, and privacy of information, mail and communication, in order to translate to the virtual world.

Specific rules regulating the use of information obtained through the Internet might not accurately reflect the Internet Civil Landmark which is based on principles.

Thus, it is very important for intermediaries to respect the current legal provisions available, especially by tailoring clear agreements (Privacy Policy, Terms of Use etc.) with its users and obtaining users’ express consent on the information being released.

The agreements must be in Portuguese and in capital and/or bold letters. Furthermore, the agreements must comply with the Consumer Statute and any provision that may reduce or limit a right of the user/consumer. It is also worth mentioning that the sole paragraph of Article 12 of the Internet Civil Landmark expressly states that in the case of a foreign company, its subsidiary, branch, office or establishment located in Brazil will be jointly liable for the payment of fines imposed by the law.

Possible sanctions provided by Article 12 include: a warning; or fines that can total the amount of 10% of the revenue of “the economic group in Brazil” on the last fiscal year, excluding taxes paid. Other sanctions involve temporary suspension or prohibition of activities.

Following the same understanding and confirming the major decisions established in Brazil in the past few years, (discussed below) Article 18 states that the intermediary will not be held liable for damages caused by third parties, except by failing to comply with court orders demanding the removal or exclusion of content infringing upon the rights of third parties.

This understanding derives from the Brazilian Civil Code regarding liability and the Brazilian Superior Court of Justice which held that: (i) providers are not liable for contents inserted by third parties; (ii) they cannot be obliged to control information previously uploaded; (iii) as soon as they are aware of the undeniable existence of illegal content, they should remove the information; and (iv) they should keep or seek to have a minimum effective system of identifying its users.

This decision occurred prior to the enactment of the Internet Civil Landmark, but it helps to illustrate that depending on the specific concrete case and the specific function of the Internet provider, it should continue to invest in transparent rules, flow control, and safety of information.

55 In general, the “economic group in Brazil,” refers to a subsidiary or any national company with a contractual business relationship with the company offering services in Brazil.
56 S.T.J.L., No. 1.193.764, Relator: Nancy Andrighi, 19.11.2013 (Braz.).
For example, the law created an exception, allowing a victim to directly serve the intermediary with a warning letter requesting that the intermediary immediately remove any material bearing sexual acts or nudity. In these cases, the intermediary should comply with the terms of the letter under penalty of being held jointly liable with the offender.

Other specific exceptions may arise in the future through other special statutes or case law. In copyrights and industrial property matters, it is very common to send takedown notices through warning letters, directly requesting the infringer or the intermediary to remove the illicit material. In our opinion, the Regulatory Authority for Publicity (CONAR) might also have the power to send takedown notices in some publicity cases involving infringements posted on the Internet.

Brazilian regulation authorities tend to have a stricter view of collected information relating to health, labor and other sensitive matters (such as intimacy, personal images and honor) reasoning that this information may cause shame, discriminatory and moral damage if disclosed to third parties. For example, Article 10 of the Internet Civil Landmark mandates that the storage of personal data comply with the necessity of keeping intimacy, privacy, honor, and image of parties (directly or indirectly involved) safe.

Legislative discussion regarding data storage and transfer occurred during the drafting of the Internet Civil Landmark, but since Congress wanted to approve the bill faster, the debate regarding these issues was postponed.

In the future, executive authorities may issue a decree concerning these matters. So far, it is not possible to identify a trend concerning whether there should be an obligation of keeping information in data centers in Brazil or informing authorities where the information is being kept. The obligation right now involves keeping users very well-informed as to the reason their information is being collected, and disclosing how and where it will be stored and used.

58 Afraid that the Government would issue a Law requiring agencies/companies to obtain a previous authorization and an official certificate/seal before releasing advertisements and publicity material, great names from the advertising sector proposed the implementation of an auto-regulation, inspired on the English model. CONAR is a very respected entity and resolves several conflicts based on its rules (and general legislation) between companies vs. companies; advertiser vs. advertisers and consumers x companies advertisers.
59 The same understanding justified not including copyrights on the Internet Civil Landmark Act. The reporter of the Internet Civil Landmark explained that it would take much longer for the enactment if they were to include copyrights. Copyrights demanded more debates and there was no time for that.
Based on the current legal framework, e-mails, information collected on forums and other information collected on the Internet cannot be disclosed except when properly authorized by the law, court order, or with the user’s consent. This data must be kept in a secure environment and may only be used internally.

We also understand that this data could be disclosed during judicial procedures for defense purposes. There are some bills currently pending regarding databases and privacy protection, including bill no. 3.494/2000 at the House of Deputies. The bill involves the structure and use of databases and the procedure of habeas data, but some argue that the bill is generic and not innovative with respect to present laws. Also pending is bill No. 6891/2002 at the House of Deputies that runs together with bill No. 3.494/2000. This bill was inspired by the French and Portuguese models, and suggests the creation of rules for the protection of privacy while proposing clear obligations regarding gathering, purposes, correction and storage of data. It describes personal data and the information system, prescribes the treatment of personal data, determines who is responsible for the treatment of personal data, and defines the third party, the addressee, valid consent of the owner of the data, and the interconnection of data. The bill mandates that the treatment of personal data follow certain procedures, describes the process of using personal data for the purposes of criminal investigation, and determines which information will be provided by the responsible party that gather the data and how these will be protected.

Article 21 of the Brazilian Civil Code provides for the protection of privacy and intimacy. Anyone may request that a judge adopt any necessary measures to cease a violation. It does not specifically refer to virtual acts, but it is an available remedy.

As discussed above, the Internet Civil Landmark Act is based on general principles, guarantees, and rights and duties for the use of Internet in Brazil. On the other hand, the Brazilian legal system originates from Roman Civil Law and it is still part of the culture seeking defined rules on a certain subject for the purpose of judicial

61 Available at http://www2.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=56678.
62 See id.
63 CÓDIGO CIVIL [C.C][CIVIL CODE] art. 21 (Braz.).
safety. A legal system based on principles rather than rules may create the perception that too much will be decided by a judge alone based on its own subjective sense of proportionality and reasonability.

That led scholar Leonardo Greco to criticize the lack of specific legislation on privacy, because deciding on a case-by-case basis generates uncertainty. Greco suggests that one should take advantage of the German solution grounded in the study of doctrine and judicial decisions. This solution established the theory of the three degrees of privacy protection: intimacy linked with dignity beyond the reach of the state; private life in which the state could intervene if collective rights must be protected; and the public or social life, which does not interfere with the development of the personality and, thus, is not protected as private life.

Although the theory is not absolute, according to Greco it tries to establish objective criteria for evaluation. The German application of the principle of proportionality and balancing of interests assumes that none of the fundamental rights are absolute and must be limited by another fundamental right.

Luís Roberto Barroso highlights two specificities of personal rights. First, these rights are natural rights, which can be invoked by any human being, are recognized under any modern constitution, and defended against anyone or the government. Second, although the infringement of these rights does not necessarily produce patrimonial or economic damage, the compensation for the infringement can be either the right for a response, the public excuse, or the patrimonial compensation for moral damage.

Personal rights can be divided in two groups: (a) rights involving physical integrity, including the right to life, the right to the one’s body (living or dead); and (b) the rights to moral integrity, honor, liberty, privacy, intimacy, image, name, copyrights and the like.

Intermediary liability will be sensitive primarily to the rights of privacy, intimacy, honor and image. The fifth article of the Brazilian Constitution provides for the protection of these rights. Item V of the fifth article guarantees the right of

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response and the compensation for material, moral or image rights. Item X states that intimacy, private life, honor, and image cannot be infringed, and that the remedy to compensate any harm to these rights is via compensation of material or moral rights.67

Although “private life” and “intimacy” have different meanings, they belong to the same concept of privacy. The right to privacy recognizes that there are limits to third parties curiosity towards another’s life. Elements of privacy include: ordinary facts pertaining to one’s life; facts that occur in one’s domicile or in private spaces; and habits, personal choices, private comments, family life, and love life. These are generally not of interest to the public.

Both scholars and case law mitigate privacy rights depending on the degree of a person’s exposure. Generally, the standards for the protection of privacy rights in connection with categories of people who have a more public life, such as politicians, athletes, singers, and artists are not as rigid as those applicable to people who do not have a public life, because, as Luís Roberto Barroso puts it, public people depend on the self-exposition for personal promotion or because their attitude due to the position they enjoy, are crucial for transparency and public control of their behavior. Of course, privacy rights are guaranteed to anyone, but special circumstances will mitigate the effects of possible public exposure.

For example, the Superior Court of Justice reversed the decision of the a quo Higher Courts, which had condemned editor Abril S/A (a relatively known editor on a local level) for the infringement of moral rights because of the use of a judge’s image on the famous magazine “VEJA.” The Court understood that the judge was a public person and thus, the acknowledgement of the moral damage was restricted because its photograph was used in a journalistic work without any offense to his private life. The picture of the judge had been taken on public premises, so the Court reasoned that the use of his image did not cause moral damages.68

Luís Roberto Barroso also defends that privacy rights will not be jeopardized if a fact had been announced, especially via mass media, and had already been considered of public domain and of public interest. This is exactly what the Superior Court of Justice decided when the family of a victim of a famous crime that had occurred in 1958 requested that a major television network compensate the family for moral damages after producing a television documentary on the crime that mentioned

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67 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.)
the name of the victim. The family also claimed the right to be forgotten, but the Court understood that because the crime had a national historical relevance, production of the documentary without mentioning the victim’s name would have been impossible.

The Brazilian Constitution also guarantees the right to honor. Both scholars and case law have established limitations for the effects of the exposition of “annoying” facts. These limits are assessed by the truthfulness of the relevant fact. If the “annoying” facts are not of public interest and damage the personal honor, the victim may raise the defense of the “secrecy of bad honor.”

“Annoying” facts that affect honor but are considered of public interest, and thus, eliminate the ability to oppose the facts, are generally crimes. Disclosing information of a crime considered true, based on evidence that is obtained legally should not harm the honor of the subject. The information is deemed to be of public interest not only because it should serve as example that the law is being enforced, but also to discourage others to commit crimes.

Although image rights protect the physical representation of the body or its parts, the image becoming public mitigates any alleged offense to honor or intimacy. However, it might not interfere with the image rights involved in its reproduction. There are facts considered public under the law, such as judicial acts and judgments in general, with some exceptions. Thus, images made public during the exhibition of a judgment will also mitigate complaints in this regard.

1. The protection of personal data

Luiz Fernando Martins Castro recognizes the undeniable advantage of technological progress and the benefits technology generates for everyday life. However, the common practice of data gathering cannot jeopardize privacy rights. Castro highlights that people are being constantly segregated without even realizing it. For example, people are discriminated for being bad payers, for being suspected of

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69 A thorough work on the right to be forgotten and freedom of expression analyzed under the Brazilian Constitutional perspective can be read at http://www.migalhas.com.br/arquivos/2015/2/art20150213-09.pdf (last accessed on August 30, 2015). The work is a result of a legal opinion requested from Globo Comunicação e Participações S/A to the Scholar Daniel Sarmento, PHD in Public Law obtained at the State University of Rio de Janeiro and post-PHD at Yale.

70 S.T.J.L., No. 1.335.153, Ministro Luis Felipe Salomão, 10.9.2013 (Braz).

71 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93 (Braz).

engaging in illicit acts, or for practicing a particular religion. Furthermore, this kind of information is collected and used without their knowledge.

Têmis Limberger understands that the importance of protecting personal data stems from the fact that this data is economically valuable and can be used in various commercial ways.73 Most of the time, users might provide personal data without knowing how the data will be used. The data can be collected by different means and can reveal aspects of a user’s behavior, preferences, habits, which can be used for tailor made marketing.74

Another aspect of this issue is that a party might hire data storage services that must be protected against any kinds of possible leaks of the material. The use of databanks can have both good and bad implications because the power belongs to those able to access the information. An employer who knew beforehand religious preferences of a possible candidate for an employment opportunity could choose another candidate just because it would prefer not to deal with someone who thought differently.75 The same risk would be possible if the employer knew that a possible candidate was HIV positive. An employer might not even schedule an interview because of the candidate’s health condition.

For this reason, democratic regimes are already aware of how to deal with the excessive control of each citizen’s private life. Luiz Fernando Martins Castro notices that in 2002, forty countries had already acted to specifically treat the protection of personal data in accordance with the principles of the protection to human and citizen rights. Personal data includes not only information such as name, date of birth, and parents’ name, but any information directly associated with the person, including telephone number, address, e-mail address, license plate and information that identifies a person such as DNA, or finger prints.

Although the 1988 version of the Constitution foresaw the protection of personal data, the Habeas Data Act was only enacted in 1997. The act protects against the abusive use of personal data, (mainly gathered without permission) containing sensitive information, including religion, philosophical opinion, party

affiliation, and sexual preferences.\textsuperscript{76} Furthermore, the act also protects against the maintenance of data not authorized by law. This principle was drafted in a special context clearly against political files maintained by Social Control Authorities during the military regime prior to the Constitution of 1988.

\textit{Habeas data} will be granted to assure the right of a claimant to know the personal information regarding the claimant that governmental or public entities are keeping in their databases.\textsuperscript{77} The claimant is allowed to know the information for correction purposes, and to allow the claimant to add any comments to the data being kept.\textsuperscript{78} An initial claim must show that the correction or amendment had already been requested, but had been denied by the legal authority. Luiz Fernando Martins Castro highlights that the effect of the law is corrective, most likely because of the context in which it was drafted; however, it does not prevent the problems it intends to correct from happening.

The Code for Consumer Defense recognizes the utility of databases for commercial purposes, but establishes that the consumer will have access to all information gathered, including the relevant sources of that information. When noting false or incorrect information, the consumer can order that the data be immediately corrected.\textsuperscript{79}

Article 43 of the law states that no negative information will be kept for a period of more than five years. These databases are often locally used to inform a consumer of its debt with other institutions likely to block it from hiring new services or buying goods until it pays prior debts.\textsuperscript{80} There are also sanctions to the representative of those databases that fail to rectify or deliver the information upon a consumer’s request. \textsuperscript{81}

With respect to the gathering of data, Google Brasil Internet Ltda. is currently involved in class action No. 2015.01.1.000575-6, filed on January 7, 2015, before the 23rd Civil Chamber of law courts in Brasilia by the Brazilian Institute for Cyber

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\textsuperscript{76} Lei No. 9.507, de 12 de Novembro de 1997 DIÁRIO OFICIAL DA UniÃO [D.O.U] de 11.12.1997 (Braz.).
\textsuperscript{77} Id.
\textsuperscript{78} Id. at Art. VII.
\textsuperscript{79} CÓDIGO DE DEFESA DO CONSUMIDOR [C.D.C.] [CIVIL CODE] (Braz.).
\textsuperscript{80} Id. at Art. 43.
\textsuperscript{81} Id. at Art. 72-73.
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politics and law. The institute seeks collective damages for the gathering and use of crossed data by the extinct site Google Buzz. The case is pending.

After Google privacy policies came into force in 2012, José Antonio Milagre, a lawyer and expert specializing in information safety, had already questioned cross references from the same user as a result of searches in different web pages.82 Although he recognizes that the cross references improve the management of information, he argues that it would be difficult to control phishing expeditions and private rights could be jeopardized. Milagre points out that the Bill pending for the protection of data privacy rules that the user must expressly authorize any combination of information. The user has the ability to revoke authorization at any time.

In fact, as observed during the research, Google is a key player in the Brazilian jurisdiction involved in the majority of cases, that have reached the Superior Courts of Justice, and has helped advance the state of the local law. In general, this topic is still under development in Brazil and much more is expected to happen.

2. Intermediary liability – the obligation of the provider to identify the user that accesses the Internet

Among the bills that have been discussed, one had attracted attention because it set the obligation for Internet (or any other net of computers) providers to identify its users of the services via prior registration. The details needed for the registration were specified and included: name, password, identity number, Tax Payers Registry at the Ministry of Finance and the like. One of the proposed articles also created the obligation of the provider to maintain the user data for at least three years, under the threat of penalty of detention and fine.

According to Judge Demócrito Reinaldo Filho, (of the 32nd Civil Chamber of Recife) the critics state that these rules would affect the democratic guarantees and the freedom enjoyed in the Internet.83 Identification of the user would result in lack of

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privacy and restriction to worldwide access, which would only be controlled in
countries that limit freedom such as China, North Korea, or Iran.

Many lawyers also argue that, the proposed rule would not be effective in
fighting cyber crimes, since criminals would be able to open accounts in others
countries where the rule does not exist. At the end of the day, people of goodwill
would be punished. Thus, the critics would again rather support freedom, and punish
only those who abuse that freedom.

Judge Reinaldo Filho believes that these complaints are partly exaggerated.
Reinaldo Filho believes that the identification of users is a positive measure because it
will assist in the prosecution of possible criminals, since nowadays it is not mandatory
for the providers to check the correctness of the users’ data. The suggestions on the
bill would make providers assess the accuracy of those data by analyzing the users’
documents.

For Reinaldo Filho, this would not be an Internet access control, but rather a
normal procedure for the signature of contracts, as done with any telecommunication
company when the client contracts for a telephone line. According to him, collecting
data for contractual purposes does not violate privacy rights, because this is what has
been done for a long time in real world. Because freedom presumes responsibility,
everybody is free to use the internet, but must be held liable if third party’s rights are
damaged.

The only additional comment Reinaldo Filho provides is that the bill considers
the omission of the provider a crime. Reinaldo Filho disagrees with this and instead
suggests that the provider be sanctioned administratively or with the payment of fine.
The law should typify as crimes the misconduct of hackers.

Four years later, in 2011, the same judge published an article entitled
“Provider Liabilities for Publications on Internet: The Recent Decision of the Superior
Courts of Justice and its Effects.”84 The Superior Court of Justice decided that
providers should not be liable for illegal material produced by its users navigating
their system. Unlike traditional means of communication, the provider of the online
channel is not always the one who publishes the information. For example, a
provider’s position cannot be compared to that occupied by an editor. The latter has

84 Demócrito Reinaldo Filho, Responsabilidade do Provedor Por Publicações na Internet: A Recente
complete control over the information it is publishing and can decide whether or not it will publish the information in the first place.

In practice, the power to control the publication of harmful information will determine liabilities, according to Demócrito Reinaldo Filho. The Internet provider operates another platform and judging from how the system was designed, it is not possible to control the contents of the messages prior to publication. Consequently, it is understood that it is not possible to require that providers have the same liability as editors.

The main idea is that the provider would only be liable if it had been requested to remove defamatory content, but did not proceed accordingly. When the conflicts started locally, Brazilian Courts have followed a different trend but gradually began to accept the notion that providers would only be liable for the contents of the messages as long as they refused to identify the direct offender or in failing to remove the information.

One of the first rulings in favor of providers rendered by the Brazilian Superior Courts was in answer to the Special Bill of Review No. 1.193.764. The claimant IP DA SB filed suit against Google Brasil Internet Ltda. because of infringing material posted on Orkut and obtained a preliminary injunction for the removal of any offensive material. The decision by the trial judge confirmed the obligation to remove the offensive material, but did not award compensation for moral damages.

The Higher Courts of São Paulo State rejected the claimant’s appeal and decided that the provider for “Orkut” could not be compared to an editor or director of a newspaper or magazine for messages released by users on a home page. The Higher Courts expressly stated that the provider’s acts were not illicit, nor could it be held liable for the offenses. Besides, no one could request that the provider review all the material within its site and the prior examination of the material would violate the freedom of speech and expression.

The claimant filed a Special Bill of Review before the Superior Courts questioning the liability of providers of social sites on the Internet in connection with information placed on the site. The claimant argued that the relationship with the

85 While searching for rulings with the keywords “liability, provider and internet” on the Superior Courts database at www.stj.jus.br, the results retrieve 50 cases amongst which many involve the party Google Brasil Internet Ltda.
86 S.T.J.L., No. 1.193.764, Relator: Nancy Andrighi, 19.11.2013 (Braz.).
provider characterized a consumer contract and thus, the liability of the provider would not depend on guilt. The claim further alleged that the services failed in their obligation of identifying its users.

The Superior Courts defined the nature of the services offered by Internet providers, especially, by Google. According to the Court, providers generally offer services to make the international net of computers operate. Google would be considered a content provider. The users of its services can create personal pages, through which they interact with other users, debate and express themselves. The contract with the users would also be within the scope of the Consumer Defense Code. Although its users would not pay for the services directly, they are supposed to register before Google and to accept the conditions of the services rendered. User registration would generate a database for various commercial uses and create cross marketing practice.

Google’s services should guarantee the secrecy, safety and protection of users’ private data and good performance of its Internet webpages. Surveillance of the contents of the pages is not the primary activity of the service and thus, it cannot imply failure. Google is just an intermediary that provides the means on which the messages are being posted and cannot be liable the harmful acts of others.

The perspective of business risk can not be taken into account for liability purposes because moral damage cannot be considered a risk inherent to the activities developed by providers. Moreover, the surveillance and censorship of content prior to their release is considered a breach of the principle of correspondence secrecy rule under the Brazilian Federal Constitution. In addition, the main attraction of the Internet – transmission of data in real time - would be jeopardized and would also represent a step back from many advancements.

Even if the providers were to run a prior assessment of content being circulated, another problem would arise. Given the subjectivity of what might be considered offensive, it would be impossible to set adequate parameters to be used by providers. At the end of the day the practice could prove to be arbitrary, especially if rendered by providers. That is why courts have decided that Google should not be obliged to control the flow of information on Orkut.

On the other hand, the courts recognized that the Internet should not remain a free territory for the practice of illicit acts, reciting the U.S. Communications Decency
Act\textsuperscript{87} and Article 15 of the European Community Directive of 2000.\textsuperscript{88} Thus, once the providers have knowledge of offensive content, either by judicial order or warning letter, they should immediately remove the infringing material under penalty of being held liable by the offender. This is the equivalent of a takedown notice.\textsuperscript{89}

The Brazilian Constitution of 1988 protects free speech but refuses anonymous expressions. In this sense, the provider should be cautious enough to guarantee that each user can be identified to respond to their own expressions. Otherwise, they can be held liable for failing to identify the user.

In short, Internet providers are not liable for the illegal acts of its users, cannot be obliged to control the flow of information in advance, should promptly remove infringing content after learning of its existence, and maintain a minimum ability to identify the users.

Although the enacted Internet Statute stipulates that providers are only obliged to comply with takedown notices after a receiving a court order, the complete legal framework in Brazil suggests that providers may also be held liable after receiving a warning letter. As to the case discussed above, the Superior Courts understood that Google, once knowing about the existence of offensive content, took all the appropriate measures for the immediate removal of the material as well as to identify the offender.

In a recent decision from the Superior Courts with Google as the claimant, (Special Bill of Review No. 1.512.647 MG/2013/0162883-2)\textsuperscript{90} the Court maintained the understanding that a provider cannot be held liable for copyrights infringement by others because the structure of the services have not motivated the infringements \textit{per se} and there were no material damages owed from Google’s side.

The original plaintiff was involved with educational products and discovered undue reproduction of its materials on Orkut. The plaintiff stated that although having sent warning letters to Google, the company remained silent. However, Google argued that the plaintiff had not disclosed the exact the URL necessary for any measures to be taken. The Court determined that Google should compensate the

\textsuperscript{89} Anderson Schreiber, Twitter, Orkut, Facebook-Considerações Sobre a Responsabilidade Civil Por Danos Decorrentes de Perfis Falsos nas Redes Sociais, 3 Diálogos Sobre Direito 4, (2012). The author criticizes the practice of the take down notice, because since most users are unknown to the victim it will not be compensated for the damages caused prior to the exclusion of the illicit material.
\textsuperscript{90} S.T.J.L. No. 1.512.647, Relator: Luís Felipe Salomão, 13.5.2015.
material damages and disclose the user’s IP address, as well as remove the pages identified by the plaintiff.

The Higher Courts of Minas Gerais State confirmed the Trial Court’s decision. Google filed a Special Bill of Review because it was impossible to comply with the final decision, since the plaintiff had not indicated the relevant URL. Google also tried to reverse the condemnation. The Superior Court of Justice cited the Internet Civil Landmark Act in its decision and confirmed that Google should not be held liable because the social media structure, (Orkut) that the provider did not contribute definitively to the infringement, and Google had not caused any harm meriting compensation.

The judges mentioned the Sony, Universal Studios, Napster cases and others and confirmed that Google had not been directly involved in the copyright infringements. The judge reporter of the case mentioned that holding Google liable would be the same as holding the post offices liable for written crimes on letters, which would be unreasonable. In addition, it was not clear that Google benefited economically with the infringements and no material harm had been shown. Finally, the Court concluded that Google should not be liable for any compensation for the infringements.

The decision was published on August 5, 2015 and there is still a Bill of Clarification pending regarding decision. The decision is in line with the Internet Civil Landmark act as noted above.

3. Remarks

It is also worth noting that some bills that intend repress cyber crimes in Brazil have been enacted and others are still being discussed. One of them is No. 12.737 of November 30, 2012, which earned the nickname “Carolina Dieckman,” representing the actress who was blackmailed after 36 pictures showing her naked were leaked to the Internet.

The articles incorporated to the Brazilian Criminal Code state that trespassing upon third parties’ computer devices is a crime, regardless of whether the computer is connected to the Internet.
Another relevant law includes No. 12,735, also of November 30, 2012, which states that the police must have teams specialized in cyber crimes and that discriminating material of any kind must be removed.
VI. CONCLUSION

Following the Pact of San José, Costa Rica, Brazil continues the fight to preserve the right of freedom of speech and expression, meaning that no prior censorship will be tolerated and liabilities will be ascertained if third party’s rights have been infringed.

The Internet should remain an open space for the expression of speech and thoughts and for enhancing debates while possibly enhancing interaction between people and their communities or society.

Brazilian lawmakers decided not to hold Internet intermediaries liable for the acts of third parties, except in very limited cases defined by the law. The exceptions involve holding an Internet provider liable whenever the intermediary fails to comply with a court order or valid requests from warning letters if sensitive intimacy users’ data are at stake. Although the Brazilian legal system still aims for more well-defined laws regarding data privacy, the Constitution, federal laws, pieces of legislation and now the Internet Civil Landmark Act offer minimum protection for internet users and intermediaries.

On the other hand, if the Intermediary is found guilty for the leakage of private information, it will probably be held liable for the failure to protect the data or at least for failing to take the necessary precautionary measures reasonably available.

Last but not least, Google has contributed a lot for debates in this area of expertise and for the advancement of the state of law.
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