IGFLAC 9, San José, Costa Rica – Report

Session 5: Broadening our understanding of Internet intermediary liability: Scope and limits of intermediary liability within the digital ecosystem

Date: 28 July, 2016, 14:30 to 16:00 hs.

Session Moderator: Laura Tresca (Artigo 19)

Moderator in charge of remote participation: Angélica Contreras

Panelists: Alejandro Pisanty (ISOC Mexico), Cecilia Pérez Araujo (Ministry of Communications, Argentina), Carlos Humberto Ruiz Guzmán (CRC, Colombia), Carlos Guerrero (Híperderecho, Peru) and Marcel Leonardi (Google).

Rapporteur: Eduardo Ferreyra (ADC, the Association for Civil Rights, Argentina)

Panel Objectives: To gain a better understanding of the scope and limits of intermediary liability and its current status, as well as to address the challenges posed by this issue.

Report: The meeting began by posing questions intended to trigger discussions. Five questions were proposed:

1) What intermediary liability related phenomena have you noted in your country?

2) What are the new mechanisms for understanding the scope of intermediary liability?

3) What new regulatory approaches have you seen lately? Have you noticed any changes in court rulings?

4) What actions is the private sector implementing to align their activities as intermediaries with Human Rights?

5) In your opinion, what are the best practices for promoting a debate on intermediary liability?

The concept of liability was then addressed, which non-experts usually see as a highly specialized notion. In this sense, the question that needs to be asked is who are these intermediaries and why should people worry about them. The concept of intermediary liability is a very important one. It was forged based on providers of services such as email or website hosting. However, the role of these intermediaries has become increasingly complex throughout the years. The intermediary ecosystem is currently very complex, one in which major influential companies (e.g., Google, Yahoo or Amazon) play a key role. New intermediaries worth mentioning include commercial intermediaries and Cloud storage service providers. Today, the Internet is based on a very complex chain which includes major aggregators. Software modularization allows disaggregating network operations, which means that multiple new intermediaries appear.

Intermediaries used to be a part of one of the Internet's key aspects: voluntary collaboration. While this collaboration was based on long and complicated commercial contracts, voluntary

cooperation continued to be key. Intermediaries transported traffic without inquiring about its content. The principle of immunity is a way to materialize key Internet concepts such as end-to-end connectivity. This is why it is important to preserve the liability regime, as its modification would mean modifying the way major Internet operations are carried out.

The only way to achieve Internet scalability is for each person to take responsibility for that which is under their control. A person's behavior should be regulated considering what he or she is responsible for. Beyond that, intermediaries cannot be held responsible. Thus, their liability must be limited as much as possible, transparently and based on the principle of reality. The legal framework must be enforceable. There is no point in banning something that cannot be enforced or for which it is difficult to assign responsibility.

We must remove the Internet from the analysis and focus on behavior (preventing or promoting). Certain human behaviors are regulated in every country. The new aspects brought up by the Internet are mass scale and the fact that it allows concealing one's identity and crossing national borders. A test that can be applied to assess legislation is to determine whether it produces friction, affects openness, reduces interoperability, affects end-to-end connectivity, forces the network to make decisions that should be made by the ends of the chain, affects scalability, goes against the Internet's design or its very nature. In this sense, laws that affect network scalability, continuity and global reach must be avoided, as well as those that go against the principle of reality.

The challenges the region's countries must face was then discussed. Speaking of Argentina, there was talk of the debate between freedom of expression and fundamental personal rights such as the right to privacy, intimacy, reputation and honor. It was noted that regulations must respect technical Internet issues, but they must also take into account the rights of Internet users. Intermediary liability must be addressed considering the principle that there is no liability for third-party activities unless a legal or administrative resolution requests a certain action and one refuses to comply with the order. Intermediaries' role is to contact users who provided the content, but they do not produce, modify or interfere with content in any way.

It was observed that there are no specific regulations in Argentina. Intermediary liability is currently considered under the extra-contractual civil liability. There are currently debates as to whether strict liability should apply, where a person is legally responsible for the damage and loss caused by his/her acts and omissions regardless of culpability (there is no attributing factor). There have been interpretations in this sense. However, the interpretation of a 2014 Supreme Court ruling was more favorable, as it spoke of subjective liability. Thus, in order for an intermediary to be liable, they must have participated in an illegal activity or one which resulted in damages. Criminal intent and culpability (not risk) are the attributing factor. The ruling was on a case involving search engines, where a model requested remedy for damages resulting from her image being associated with pornographic websites. The Court decided that there was no intermediary liability. For intermediary liability to exist, a court notice would have to have been issued. On the other hand, it was said that the ruling didn't clarify certain issues related to what the notice should look like (private or court notice, administrative order). In turn, it establishes that a private notice applies in case of manifest unlawfulness. In this case, the intermediary should remove the content once the private notice is served, which

would leave access to information in the hands of private parties and endanger freedom of expression.

As to how to address this issue, it was stressed that regulatory efforts should be geared towards establishing a specific framework that is receptive to the points of view of the technical community, listens to all interested actors, and will consequently be as fair as possible. These regulations should include the principle of non-liability of intermediaries, except where there is a clear, concise court order that does not involve filtering or blocking.

The right to be forgotten was the next topic up for discussion. It was noted that this right originated after a case brought by a Spanish man, Mario Costeja, who requested the removal of information he did not want to appear when his name was entered in the search engine. The request was initially filed with the Spanish Agency for Data Protection, which seeks to protect users against companies collecting personal data. The case reached the European Court of Justice, which ruled that search engines are responsible for the content they point to and asked Google to remove the results. This ruling was followed by similar cases in Europe and the issue is now being discussed in Latin America.

In Peru, the right to be forgotten doctrine surfaced a few months ago, when the case of a citizen requesting de-indexing of a news item was brought before the national data protection authority. The authority recognized that Google is responsible simply because it is processing and handling data of Peruvian citizens. It also compared the search service to a data processing operation. Thus, Google is handling user data and is responsible for its misuse. This is an administrative ruling; the courts have yet to decide on the case.

Participants also discussed whether it was convenient to address the right to be forgotten from a privacy perspective, as in this case identifying the elements that fall under this concept would be enough. Adopting this perspective would also make matters easier, as in Peru there are no official data and official discourse is not quite credible, which means that many different versions exist and there is no single historical truth.

In Colombia, network neutrality regulations do not explicitly refer to Internet intermediaries. Net neutrality regulations are clear, open, and there are no restrictions for traffic management. The only exceptions are cases of child pornography.

As for copyright, the Ministry of Commerce is the regulatory authority. It establishes the obligations arising from free trade, establishing that, in order to promote innovation, regulations must be established that respect copyright. In 2011, a bill sought to establish conditions for the commitments made under free trade agreements. No law is currently in force, but there have been discussions between the government and various stakeholders, including civil society.

As for legal precedents, in 2015 the Constitutional Court ruled on the case of a person who was linked to human trafficking in 2000 and whose criminal proceedings prescribed without said person having been sentenced. In 2015, this person requested that a newspaper remove a news item to protect his good name and honor. The administrative court ordered the content to be removed, but the Court rectified this decision and ordered the content to be updated

instead of removed, under the rationale that the content published in 2000 was no longer in line with the current reality. This meant that the content had to be updated and that the newspaper was responsible not only for doing so but also for implementing tools so that the outdated content would not be seen.

Speaking of how to improve regulations, it was noted that one way to achieve this goal would be to create multistakeholder participation opportunities for establishing rules that can be applied to these topics.

Next, the situation in Brazil was analyzed. The difference was noted between the situation before and after the enactment of the Civil Framework. Prior to the Framework, the situation was similar to that of other Latin American countries. The first rulings stated that platforms were liable simply because they allowing users to publish harmful content. Brazilian courts then adopted subjective liability systems, based on the failure to remove content after having been notified that said content was causing damages. If an intermediary failed to quickly remove the content after being notified of its unlawfulness, the intermediary was considered liable. The problem was that a notification by the affected individual was enough to generate liability, i.e., a private notification had the same effect as a precautionary measure.

Under the Civil Framework, content removal can only be required by court order containing a necessity and proportionality analysis. Cases of child pornography and 'revenge porn' are the exception to this principle.

The Civil Framework improved the lives of Internet users. Civil Society has created mechanisms for monitoring compliance with the Civil Framework and new companies are using as reference the new legislation that protects intermediary liability.

After the panelists' presentations, the floor was given to the audience for questions or comments. Emphasis was placed on intermediaries' duty to promote and defend Human Rights and, in their absence, intermediaries' commitment to freedom of expression and privacy. Regarding the latter, it was noted that intermediaries do not notify users when content is removed and concern was expressed regarding the algorithms used by intermediaries. Likewise, participants stressed the need to deal with content sources, as content is often removed from one site but immediately uploaded to another. They also noted the need to address intermediary liability based on technical and legal principles, which establish that intermediaries are not liable for third-party content. In this regard, we must keep in mind that all information and every opinion circulating on the Internet should be analyzed considering the right to freedom of expression.

Another issue that was noted is the lack of specific legislation on intermediary liability in Latin America. One exception to this is Chile, where there was an expansive interpretation of the obligations under the free trade agreement with the United States. Participants also commented that Argentina is addressing the issue through a series of principles published by the telecommunications authority. This position was criticized, as addressing intermediary liability in telecommunications legislation means losing sight of the fact that the concept goes beyond intellectual property and is a more global and comprehensive issue.

Panelists then had the chance to comment on the topics brought up by the audience. This time they warned about the dangers of placing in the hands of intermediaries the authority to defend Human Rights by controlling the content they index or host. Expecting intermediaries to fulfill the role of judges means providing them with an authority they do not have, as there are State powers charged with guaranteeing freedom of expression.

Regarding the commission responsible for drafting Argentina's new communication bill, it was noted that non-liability of intermediaries derives from the principles included therein. It was also stressed that the principles are only intended to serve as guidelines for legislators and that, while it might be necessary to address this issue in a communications law, it is also necessary to create a specific law to regulate intermediary liability.

As for the right to be forgotten, panelists agreed that no single official truth exists. However, it was observed that personal data protection rights are often used as tools to settle matters that have to do with a person's honor, image or reputation.

It was also pointed out that the Internet has become increasingly important, a public sphere, the place where people can meet and talk in a neutral and open manner about any issue they wish. In addition, it is entirely based on private property (information is transmitted over private submarine cables, private servers, private data storage centers, etc.). As a result, legislation does not only include the law itself; it also encompasses the companies' terms and conditions.

After these comments from the panel, the floor was given to the audience once again. The relationship between the right to be forgotten and the regulation of personal data was brought up, particularly in countries with no specific legislation on the matter. Another topic highlighted by a member of the audience was that of websites that promote and position copyrighted content and their responsibility. A comment was also made in the sense that it is naive to say that intermediaries have no liability when the terms and conditions they impose condition how people share over the Internet. Likewise, the lack of transparency mechanisms for intermediary activities was also criticized – while in certain cases these mechanisms do exist, they are not very accurate. Finally, it was noted that asymmetries exist in content removal mechanisms, as the burden of proof is on the user, who must prove the lawfulness of the uploaded material.

After these comments from the audience, panelists noted the difference between content removal systems used in case of copyright violations and those used in case of violation of fundamental personal rights. The panel also discussed the inefficiency of the right to be forgotten, which does not achieve the outcome desired by the individual (removal of the content), as material is simply de-indexed. Finally, the panel highlighted the need to discuss these issues within a multistakeholder environment.

The floor was given once again to the audience, and participants suggested analyzing intermediary liability considering major companies, which hold economic and political power. In this sense, it is misleading to say that these companies have no responsibility when they create and develop policies that influence the Internet.

It was also noted that intellectual property laws exist, but that there are no laws to protect the right to access culture. Laws must be enacted to allow the free circulation of culture.

It was then time for final conclusions. The panel stressed the need to create a new social contract for the Internet, one that sets limits to countries with more repressive legislation to keep them from harming countries with more open legal frameworks, and that this social contract must be agreed through multistakeholder dialogue. It was also clarified that the non-liability of intermediaries is limited to content uploaded by third parties. It does not mean that intermediaries have no contractual liability for the activities they perform or their role as service providers or generators. In this sense, it was stressed that search engines are responsible for not removing manifestly unlawful content not protected by freedom of speech.

It was also noted that intermediaries being liable for all content and intermediaries not being liable for any content at all are two extreme alternatives, between which there are many other intermediate possibilities and that it is necessary for civil society to engage in multistakeholder dialogue.

Likewise, the panel stressed that legislations require that companies inform their users when content uploaded by them is removed, but not in the case of removal of content referring to them. Terms of use do not include this obligation.

Finally, it was observed that major companies have grown precisely thanks to user preferences, and that their success or failure depends on the quality of the services they offer.