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Inputs to the draft Policy Framework on Intermediary Liability

Internet Society's Policy Development Process (PDP)

Internet Society – Brazilian Chapter
Working Group on Intermediary Liability



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Introduction

In October 2024, the Internet Society launched an open consultation, inviting its chapters to provide feedback on a preliminary version of the Policy Framework for Internet Intermediaries. This initiative was carried out as part of the organization's Policy Development Process (PDP). After receiving feedback from multiple stakeholders within the ISOC community, the Internet Society revised the Policy Framework and published a final version in December 2024, available in English.

The Brazilian Chapter actively engaged in this process, providing a comprehensive evaluation of the draft framework and highlighting contemporary challenges in the field. We commend this effort to systematize a policymaking perspective that addresses today's pressing issues while upholding a **global, open, interconnected, secure, and trustworthy Internet**. It is worth noting that while ISOC Brazil is committed to the mission and principles of the Internet Society, it may issue policy considerations that, while aligned with these foundations, reflect the specificities of the Brazilian context and may differ in certain aspects.

We were pleased to contribute to this consultation and to see that several of our proposed **trends and challenges** were incorporated into the final document, particularly regarding content-related issues. The Policy Framework provides valuable insights by analyzing intermediaries based on their **functions**, rather than categorizing them strictly by entity type. This functional approach more accurately captures the complexity of the current Internet ecosystem, where intermediaries assume multiple roles and interact with third-party-generated content in diverse ways. The framework also underscores the necessity of **protecting intermediaries from liability for third-party content**, offering a critical resource for policymakers to understand how improperly designed regulations can disrupt the Internet's functionality.

One of our key contributions was advocating for a **critical reassessment** of the traditional analogy between Internet intermediaries and postal services. We emphasized that this comparison oversimplifies the complex and evolving role of intermediaries. While **infrastructure intermediaries** may have no direct knowledge of the content they transmit and that is often forgotten by policymakers, **social media platforms and similar entities actively curate, display, and disseminate third-party content**, which is the fundamental change that brings significant social, legal, and regulatory challenges. We were encouraged to see that the final document of the Framework **partially adopted** a more nuanced perspective on the matter, even without opening space for alternative models that might better address these evolving responsibilities that should not, on the other hand, implicate liability for third-party content.

Recognizing these dynamics, our contribution sought to map **emerging global trends** in intermediary liability, expanding the discussion beyond the perspectives of the **Global North**. We also argued that Internet policy is at a crossroads of a need to evolve to reflect

contemporary realities while maintaining its specificities. Additionally, we emphasized the growing importance of addressing jurisdictional conflicts and diverging legal interpretations across different cultural and legal contexts. The final document made important strides in acknowledging some of these concerns, particularly through a more detailed inclusion of the Brazilian Marco Civil da Internet in the Executive Summary, acknowledging Brazil's special role in the global discussion on the topic.

We believe that future iterations within this framework should provide a **more inclusive, globally relevant discussion** on intermediary liability. As such, we re-emphasize the value of the principles developed in the Brazilian Chapter 2021 "Decalogue of Recommendations on the Brazilian Model of Intermediary Liability" (Decálogo de Recomendações sobre o Modelo Brasileiro de Responsabilidade de Intermediários, in Portuguese). These 10 technical and policy recommendations were developed from a principled-based approach to policy evaluation and have proven to be enduring and adaptable to various scopes and purposes concerning intermediary liability, including the analysis of international and cross-border regulatory issues.

The more detailed inclusion of the **Brazilian Marco Civil da Internet** and the deeper exploration of the various current trends were significant advancements in the final version of the Policy Framework. We encourage the Internet Society to continue broadening its policy lens to ensure that future developments on intermediary liability remain adaptable, effective, and representative of the diversity of the global Internet ecosystem. In this regard, we present below some of our key inputs submitted during the PDP.

Other principles for making policies and laws concerning Internet intermediary functions

In response to this question, the Brazilian Chapter of the Internet Society proposed additional principles that aim to enhance the Policy Framework's comprehensiveness and adaptability to global challenges. These principles emphasize a more nuanced approach to intermediary liability, considering emerging trends, regional perspectives, and the need for balance between innovation and accountability.

The principles already cited in the document form a relevant framework for addressing issues, trends, and concerns regarding the development of these policies. One example is the emphasis on the importance of conducting impact studies that consider the technical and operational structure of the Internet as reference points. Additionally, the proposed division into three categories of principles – divided by levels of specificity – enhances the comprehension of the Framework's proposal.

Nevertheless, we consider that other fundamental principles can contribute to ensuring that policies regarding intermediary liability guarantee an open, globally connected, secure,

and trustworthy Internet. This evaluation is based on the experience of the Brazilian chapter of ISOC, which, in 2021, developed a set of 10 technical and political recommendations for intermediary liability, called the "Decalogue of Recommendations on the Brazilian Model of Intermediary Liability" (Decálogo de Recomendações sobre o Modelo Brasileiro de Responsabilidade de Intermediários, in Portuguese).

In the Policy Framework draft, we observed the absence of principles regarding procedural and participatory matters that should guide the development of policies in this area. Therefore, we emphasize the importance of a principle that underscores the need for policies to be developed through participatory and multistakeholder processes. In these terms, the third recommendation of the Brazilian ISOC Decalogue on Intermediary Liability states that **“the broadest participation of all relevant sectors should be ensured in any process of policy or regulation development related to the Internet”**. We trust that incorporating the multistakeholder approach, historically defended by ISOC and globally integrated into our participation in regulatory processes such as the Global Digital Compact, is equally essential in the case of policies related to intermediary liability. In our assessment, the value of this inclusion is directly connected to part of the assumptions adopted by the document but could be better reflected with a specific principle.

Reflecting the fourth recommendation of the Brazilian Decalogue, we believe it is important to accentuate to policymakers that, in addition to considering the different functions of digital intermediaries in defining the scope and characteristics of policies, it is necessary to recognize the multiple interests at play and the various asymmetries among the actors in the digital ecosystem. These asymmetries involve factors such as economic capacity, business model, and service reach. It is also worth emphasizing the diversity in civil liability regimes existing in each country, region, or institution.

Lastly, we reiterate that a fundamental characteristic of the Internet can and should be extended to the issue of digital intermediary liability, warranting a specific alert to legislators and other involved actors: its functioning as a General Purpose Network. In these terms, the Brazilian Decalogue connects the aforementioned indications to the recommendation that a policy should not be based on the specificities of business models and technical configurations, which are highly mutable within a short period. Thus, we are convinced it is possible to emphasize to legislators and other interested actors that understanding the rapid technological change driven by the critical properties of the Internet and the Internet Way of Networking (IWN) is crucial to minimizing the risk of regulatory obsolescence and inefficiency in the responses proposed to address problems in the area of intermediary liability.

We are certain that the three above principles, which ultimately show the value of open participation and *multistakeholderism*, can contribute to the section **“Overarching principles that are applicable to any policymaking regarding the Internet or its use.”**

Furthermore, we consider that the section “Specific general legal and policy principles that can be applied to intermediary functions without undermining Internet communications”

could respond even more to the challenges that the Policy Framework proposes to address. In this respect, we return to the Brazilian Decalogue to collaborate with three principles that establish obligations for digital intermediaries without directly incurring civil liability for third-party content. Together, they concern the creation of transparency and accountability obligations. Additionally, it is recommended that the policies adopted by the intermediaries themselves (usually called terms of use or terms of service) should also aim to provide access to information and ensure due process for users.

The Policy Framework mentions transparency as a legal principle that can be applied to intermediaries and also quotes some aspects that may support a more accountable online environment, but we believe such principles are specially relevant.

Finally, we consider that the debate surrounding intermediary liability has currently introduced new layers of responsibility that extend beyond the classic scope and applicability of liability for third-party content. In this context, we believe that ISOC should actively embrace these new trends in its reflection, discuss their implications for intermediary liability, and work to consolidate new consensuses that reflect this evolving landscape. These principles must engage with the conceptual and technical foundations ISOC has built over the years, while also addressing the new regulatory trends that challenge the classic notion of full protection for digital intermediaries.

Other policy trends that should be considered when reflecting on policy about intermediary liability

The Brazilian Chapter of the Internet Society acknowledges that the Policy Framework provides a strong foundation for addressing intermediary liability. However, we add other possibilities.

We give prominence to the following:

- **Monetization of third-party-generated content:** a growing trend in the debate on intermediary liability relates to the monetization of content produced by third parties, as mentioned in the Policy Framework **Spotlight on “Policy considerations for payments and other economic compensation for ‘user-generated content’ covered by Internet intermediary principles.”** As illustrated by the questions cited in the document’s analysis of such cases, numerous challenges and complexities arise from this issue. Though, this discussion was not accentuated at the “trends” section, which may have restricted the extent to which the problem was incorporated into the establishment of principles. Moreover, we postulate it is necessary to distinguish it at two levels: not only the financial dynamics between platforms, common users, and content creators, but also at the level of differentiated curation functions in relation to advertising functions.

- **Remuneration for journalistic content:** A related discussion concerns the demand that intermediaries be required to compensate content creators monetarily for circulating their work on platforms, and to establish specific behaviors when dealing with such content. This topic has sparked significant controversy, with various models proposed and implemented worldwide. A prominent example is the Australian model, introduced through the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021, which requires digital platforms like Google and Meta to negotiate payments with news outlets for content shared on their platforms. Similarly, there are ongoing discussions in other countries. The Canadian Online News Act has been critically analyzed in an ISOC Internet Impact Brief, examining its potential implications for the Internet. In Brazil, several bills are currently under consideration, also presenting problematic issues and based on the assumption that digital intermediaries should have extra obligations, even though they are not always reflected in liability for third-party content. The theme is a current topic of research in our Chapter.

- **Content promoted or generated by Artificial Intelligence:** the rapid advancement of Artificial Intelligence (AI), especially in recommendation systems, moderation, and content generation, raises new challenges for policies regarding the liability of Internet intermediaries. For example, in generative AI systems, there is a direct interaction between technology and users in content creation, which increases the complexity of determining whether providers of these tools should be held responsible for content generated by their AIs based on user prompts.

Concerning this subject, Section 230¹, which traditionally exempts intermediaries from liability for third-party-generated content, becomes less clear when platforms participate more actively in the content creation process. In the Brazilian context, it is worth mentioning that Bill 2338, known as Brazil's AI Legal Framework, includes among the high-risk AI systems those developed and used for the purposes of large-scale, significantly automated content production, curation, dissemination, and recommendation by application providers, aiming to maximize the time of use and engagement of affected individuals or groups, thereby imposing specific obligations and responsibilities.

- **Curation activities performed by algorithmic systems:** a persistent trend in intermediary liability focuses on the role intermediaries play in content curation and reach, which can be considered active and liable when conducted

¹ Enacted in 1996, Section 230 of the United States' Communications Decency Act is a fundamental milestone in regulating the liability of digital intermediaries for third-party content. It establishes that online service providers cannot be treated as publishers or held legally responsible for user-generated content on their platforms. Although this provision has been a reference in shaping the digital ecosystem, different regulatory approaches – such as Brazil's Marco Civil da Internet – and various challenges to the framework contribute to the global debate on intermediary liability, which often focuses almost exclusively on digital communication platforms.

through algorithms and recommendation tools. Even if ISOC has established its position on this topic in opportunities such as the ISOC’s Amicus Curiae contribution to the Gonzalez vs. Google case, the Policy Framework does not establish a trend that explicitly details this issue, potentially creating a significant gap in the foundation needed to establish principles for policies surrounding intermediary liability.

- **Establishment of criteria for regulatory asymmetry:** we consider that there is a trend of regulating intermediaries based on criteria of regulatory asymmetry, raising relevant questions that must be addressed. In the case of the European Union’s Digital Services Act (DSA) or the ongoing Bills in Brazil, the number of users on platforms is adopted as one of the parameters for determining their responsibilities. On the one hand, it makes sense to differentiate between the different players – an approach consistent with the Brazilian Decalogue’s Fourth Recommendation (4), which suggests that new regulatory models should consider the diversity of business models and the economic capabilities of Internet application providers. On the other hand, it is important to discuss the best criteria for this distinction. In the case of the parameters currently being adopted, they may raise concerns such as legal uncertainty, especially for new digital market players, as the number of users on a platform can fluctuate significantly, and emerging intermediaries that grow rapidly may face complex regulatory requirements without adequate time for adaptation. Additionally, accurately measuring the number of users can be problematic, as many intermediaries face issues such as fake profiles or users operating under pseudonyms.
- **Child and adolescent protection:** the liability of intermediaries for third-party generated content is also increasingly prominent in the context of child and adolescent protection. In addition to the “Age-Specific Requirements” mentioned in the Framework and other scattered references to the protection of children and adolescents, we consider that the issue constitutes an important emerging trend. There are frequent provisions or attempts to hold intermediaries accountable in cases where moderation and control measures are judged as insufficient or ineffective, allowing — and in some cases even directing — inappropriate content to this vulnerable audience.

Notable examples include the Online Safety Act and the Children’s Code (or Age-Appropriate Design Code) in the United Kingdom, as well as the Kids Online Safety Act (KOSA) and the Children’s Online Privacy Protection Act (COPPA) in the United States. These laws and propositions reinforce the need for intermediaries to actively moderate third-party-generated content in order to ensure the safety of children and adolescents.

In Brazil, Bill 2628/2022 follows the same direction. In addition to imposing a duty of care and honoring the principle of full protection of children, the bill mandates the removal of content that violates the rights of children and adolescents as soon as platforms are notified of the offensive nature of the publication, regardless of a court order. This approach has even been applied by Brazilian courts, based on the

precedent established in the ruling of REsp 1.783.269, in which the Brazilian Superior Court of Justice (SCJ in English, STJ in Portuguese) held that Internet application providers are civilly liable for moral damages if they fail to remove offensive content about minors after being formally notified, even without a court order. Thus, a "notice and take down" regime is established in this case, in contrast to the general rule set out in Article 19 of the Marco Civil da Internet.

- **Establishment of stricter rules in “crisis situations”:** another trend worth mentioning in the Framework is the strengthening of rules on intermediary liability for third-party content during times of crisis, such as pandemics, natural disasters, or election periods with risks of political violence. The UNESCO Guidelines for the Governance of Digital Platforms, for example, emphasize the need for digital platforms to adopt stricter measures to mitigate the risks associated with the spread of misinformation and harmful content during such periods. The recommendation includes promoting fact-checking and implementing policies to limit and monitor the monetization of harmful content related to armed conflicts and other crises.

In Brazil, a relevant measure was the Resolution 23.732/2024 of the Superior Electoral Court (SEC in English, TSE in Portuguese), which, during the electoral period, reduces the general safeguard for application providers provided in Article 19 of the Brazilian Civil Rights Framework for the Internet (MCI). This resolution establishes that application providers are jointly responsible, both civilly and administratively, if they fail to immediately disable content or accounts that disseminate misinformation or compromise the electoral process. Following the publication of the resolution, ISOC Brazil issued a statement warning of the risks of a sub-legal legislation, thus overriding the Marco Civil da Internet without having been approved through the proper legislative process.

- **Transparency and accountability in applying platform Terms of Use and Service (TOUS):** an emerging trend that deserves attention in the framework is the need to ensure that digital platforms apply their own terms of service in a consistent, transparent, and responsible manner. Inconsistent content moderation, where platforms fail to enforce their own rules or apply them selectively, can attract liability for third-party content. Cases like X (formerly Twitter), where anti-doxxing rules were violated by the platform itself, exemplify this issue.

In this regard, Recommendations 8 and 9 of the Brazilian Decalogue emphasize the importance of platforms being transparent and accountable in enforcing their policies, providing users with clear information on how these rules affect their rights and guarantees.