

An assessment of the role of Marco Civil's Intermediary Liability Regime for the Development of the Internet in Brazil

by Bruna Martins dos Santos

TECHNICAL DATA

An Assessment of the Intermediary Liability Model of the Civil Rights Framework for the Development of the Internet in Brazil

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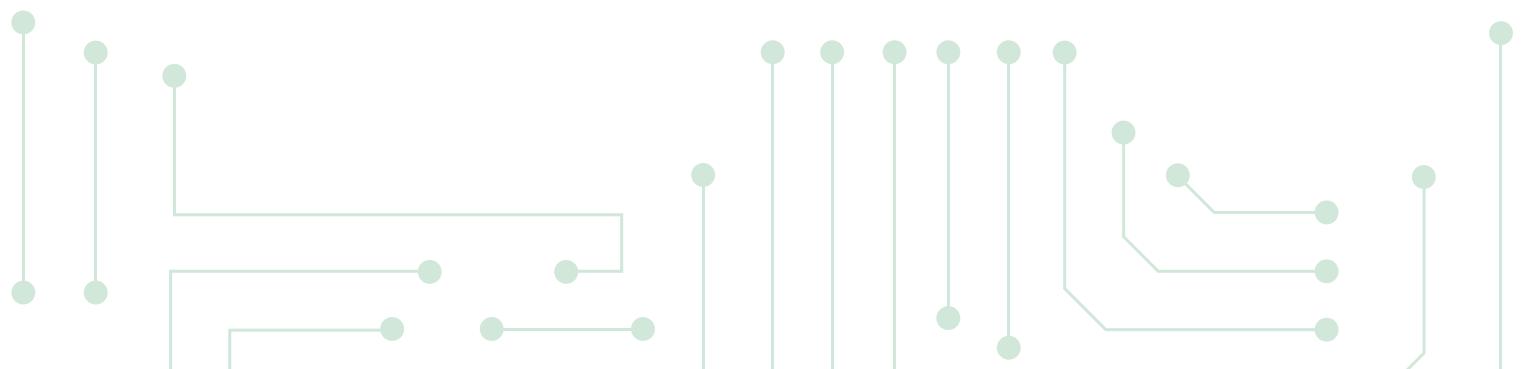
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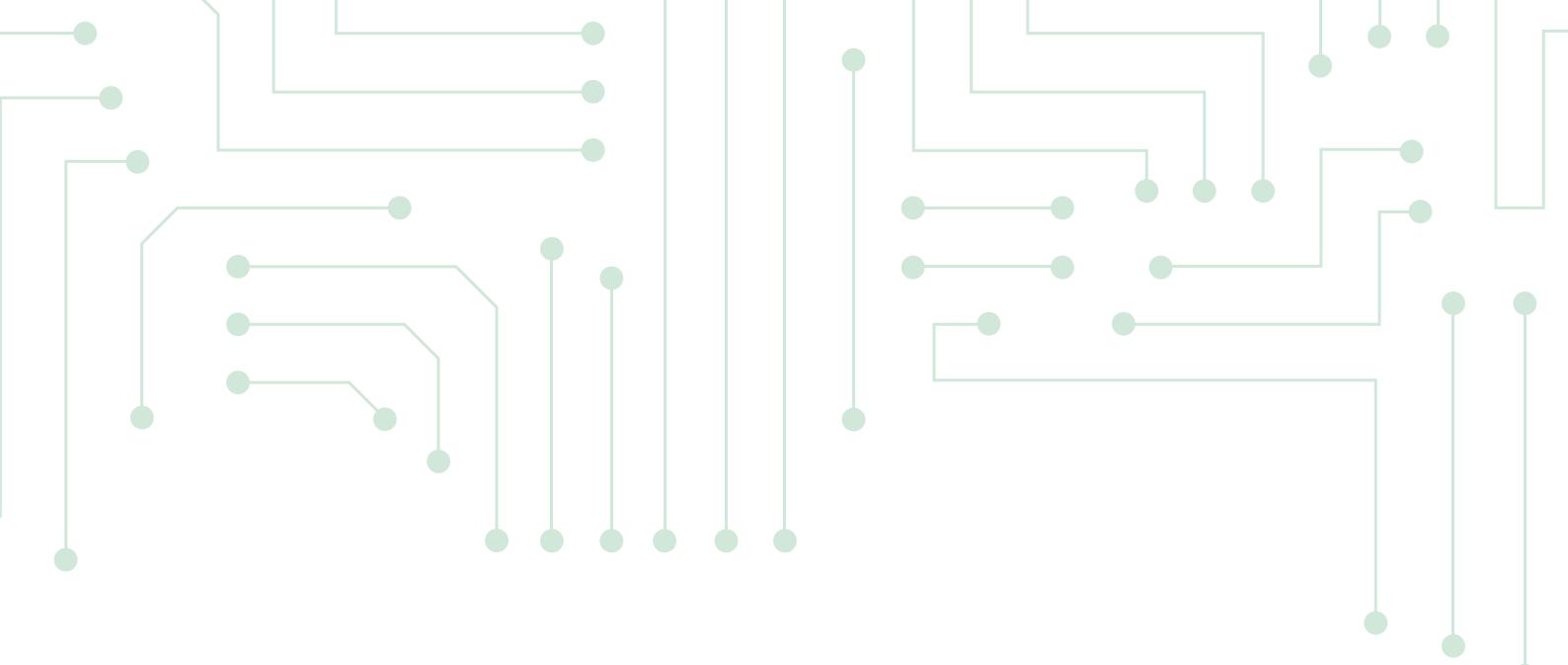
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EXECUTIVE SUMMARY

The Civil Rights Framework for the Internet or the Marco Civil da Internet (Marco Civil) was the first Brazilian law that established rights and protections for Internet users in Brazil, as well as obligations for the public sector and companies regarding access to and applications of the Internet in the country.

Adopted in 2014, during the **NETmundial**, a Global Multistakeholder Meeting on the Future of Internet Governance, this Brazilian legislative benchmark is one of the major examples of the importance of public engagement and participation in the drawing up of Internet policies. The final document was a product of the collaboration from a wide range of stakeholders in Brazil, championed by the Brazilian Internet Steering Committee (CGI.br), which has been actively engaged in Brazil's Internet policy since the 1990s.

Over three different public consultation phases, the process compiled more than three thousand comments and results of infinite hours of public debate involving all interested parties. The final result was a Law based on three pillars - Freedom of Expression, Net Neutrality, and intermediary liability including important discussions about the supply of online services and the importance of promoting Internet access in Brazil.

The aim of this study is to analyze provisions with respect to the intermediary liability regime introduced by the Marco Civil and its practical effects on the Brazilian digital ecosystem. Furthermore, the study assesses how the Marco Civil is applied beyond social media networks (which have ended up becoming the main focus of this law in the last five years) and the liability of Internet intermediaries which do not deal only with third-party generated content.

Finally, the issues presented in this study are also analyzed under the Internet's Society's Internet Impact Assessment toolkit, which describes critical properties that are key for a healthy Internet environment. Does Brazil's Internet legislation have any impact -- direct or indirect -- on the Internet Way of Networking? Does it affect the Internet's critical properties?

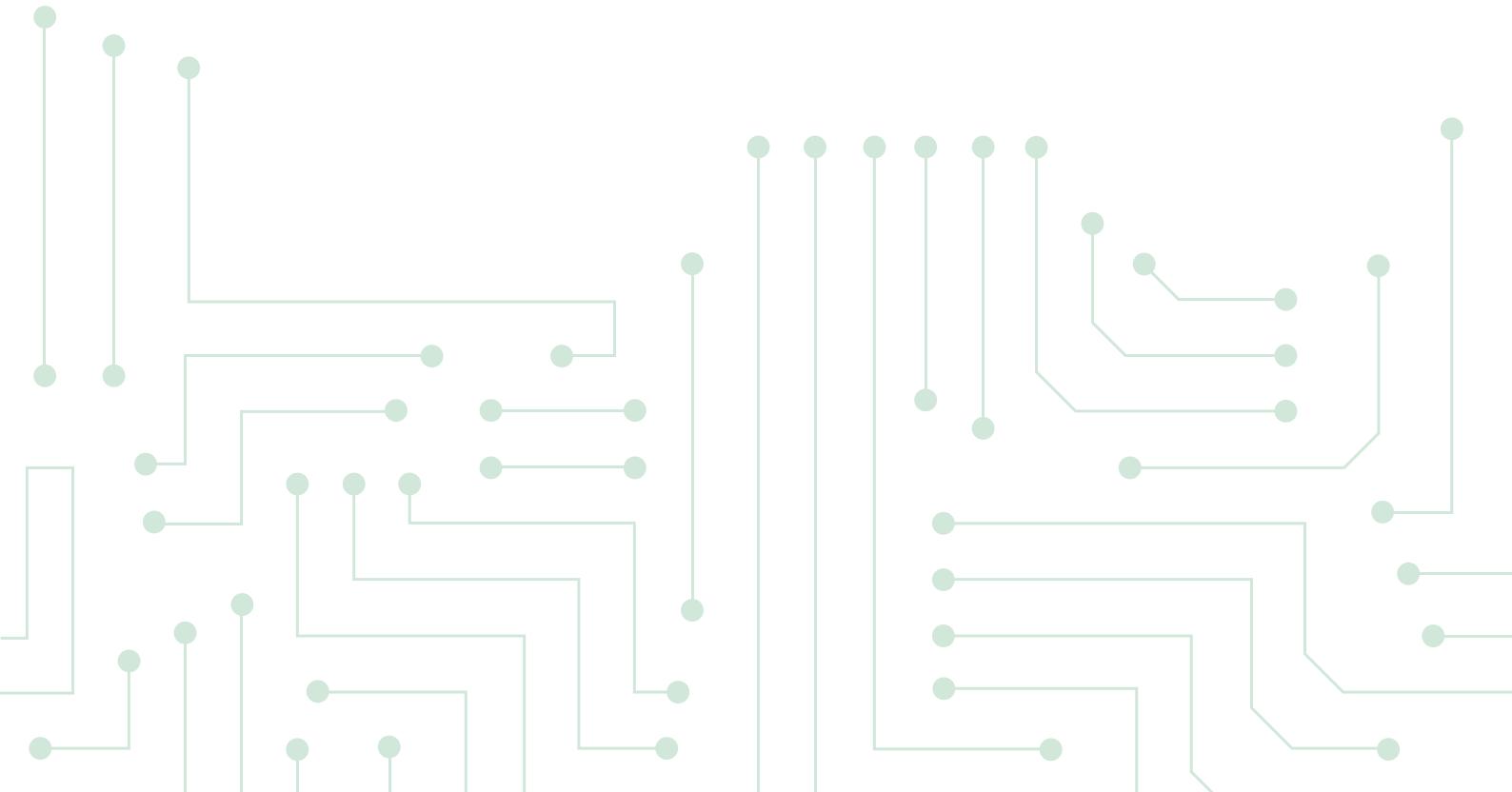


TABLE OF CONTENTS

03	EXECUTIVE SUMMARY
06	PART I: THE CIVIL RIGHTS FRAMEWORK FOR THE INTERNET IN BRAZIL
06	The Scope of the Brazilian Law
08	The effects of the Marco Civil for the Brazilian legal system
10	Similarities and differences between the intermediary liability regime of the Marco Civil and of section 230 of the CDA
12	Criticisms to the Brazilian intermediary liability regime
13	Beyond section 230 and the Civil Rights Framework for the Internet: liability exemption for intermediaries as the main guiding principle for Internet development
16	PART II - THE PERCEPTIONS OF SELECTED STAKEHOLDERS REGARDING THE CIVIL LIABILITY REGIME OF THE CIVIL RIGHTS FRAMEWORK
16	The Brazilian model for intermediary liability in the Civil Rights Framework through the eyes of subject matter experts
21	Additional opinions concerning the civil liability model of the Marco Civil from the point of view of representatives of the private sector
26	PART III - CURRENT CHALLENGES OF THE INTERMEDIARY LIABILITY REGIME OF THE CIVIL RIGHTS FRAMEWORK FOR THE INTERNET
26	The main challenge identified by this investigation: discussions around content moderation
29	Other challenges and outlook for the future
29	Constitutionality of Article 19 of the Marco Civil
29	Fake News
30	Dissemination of hate speech as a silencing tool
30	Financing of ads and sponsored content
30	Transparency of Algorithms
31	CONCLUSION

PART I: THE CIVIL RIGHTS FRAMEWORK FOR THE INTERNET IN BRAZIL

Elaborated between 2007 and 2014, the Brazilian Civil Rights Framework for the Internet (a.k.a. 'Marco Civil da Internet' or simply 'Marco Civil') was a direct response to what became known as the Azeredo Law¹, the draft bill no. 84/99, that aimed to curb "malicious use" of the Internet by establishing tough punishments that could result from certain types of user behavior. Setting aside the Azeredo Law's resemblance to the US failed legislative proposals of SOPA² and PIPA³, there is a valid argument that the Marco Civil was quasi-responsible for incorporating similar provisions of liability as enshrined in section 230 of the Communications Decency Act⁴ (with some remarkable differences as we explain below).

THE SCOPE OF THE BRAZILIAN LAW

The Brazilian liability regime for Internet intermediaries was developed based on three main assumptions: (a) the differentiation between Internet access/service providers and Internet application providers; (b) the need to safeguard activities relative to providing Internet connection and to distinguish those from users' practices that may cause harm, and (c) ensure that Internet applications providers are not held directly and immediately liable for the content posted by its users.

Therefore, the Brazilian Law deals with two kinds of stakeholders: (a) Internet connection/service providers, and (b) Internet application providers. In order to understand the nuances between the two, it is worth paying attention to the definitions of article 5 of the Marco Civil:

V - internet connection: the enabling of a terminal for sending and receiving data packets over the internet, by assigning or by authenticating an IP address;
(...)

1 Chamber of Deputies Bill no. 84/1999, which stipulates provisions for crimes committed in the information technology field, the respective penalties and other provisions (PL Azeredo). Available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=15028>

2 SOPA, Stop Online Piracy Act, is an American Congress Draft Law which deals with anti-piracy measures and protection of intellectual property - <https://web.archive.org/web/20111209080021/http://judiciary.house.gov/hearings/pdf/112%20HR%203261.pdf>

3 The Protect IP Act, is another Bill presented to Congress in the USA, which resembles the SOPA, and the aim of which is to fight websites that sell or distribute counterfeit products on the Internet and breach intellectual property rights - <https://www.govtrack.us/congress/bills/112/s968/text>

4 Section 230 is piece of US law that deals with "decency" (SIC) in communications and one of the bedrocks of the development of the Internet in the country. Approved in 1996, section 230 basically provides for the exemption from liability for providers of "interactive computer services" that publish content supplied by third parties. By understanding the role the US played in promoting the development of the Internet, preserving the competitive nature of the free market, and encouraging the development of technologies that allowed the user to control the information received, one can see that the US law ended up opting to grant immunity to Internet companies in relation to third-party content. <https://www.law.cornell.edu/uscode/text/47/230>.

*VII - internet applications: a set of functionalities that can be accessed through a terminal connected to the internet;*⁵

The Marco Civil, therefore, specified a clear division between the access infrastructure - i.e. the providers of Internet connection - and the applications, services, and content - i.e. the providers of Internet applications. In general, the text adopted a technologically neutral approach, insofar as it chose not to define specific types of providers beyond the two categories of Internet Connection and Internet Applications.

The categories of providers in the law are restricted to infrastructure and applications. When talking about the providers themselves, there are two kinds of exemptions from civil liability and their reasons (described in the explanatory box below):

Absolute exemption from liability given to Internet access/connection providers and aimed at preserving the general principle of non-liability of the network⁶ and preserving services which guarantee people have access to the Internet; and

Partial exemption from liability given to providers of Internet applications, which according to the Brazilian system should only be held accountable when they take no action regarding content that is recognized as harmful and object of legal action by the judicial system.

It is important to mention that the differentiation in the text of the law does not include all of the different types of providers, which is an issue that has been debated within the Brazilian legal framework. In a case concerning the right to de-indexation against Google, the Superior Court of Justice ruled that "on the Internet there are a multitude of actors supplying different kinds of services and utilities to users".⁷ This decision also highlights that certain types of providers may supply more than one type of Internet service and that the differences between them were relevant for the debate about liability. However, the text of the Marco Civil opted to be less specific in the description of the activities and ended up adopting only the two previously mentioned categories.

5 <http://pensando.mj.gov.br/marcocivil/wp-content/uploads/sites/2/2015/03/bill-12965.pdf>

6 Principle of non-liability of network intermediaries: "The fight against illicit content on the Internet should affect the individuals who are truly responsible for such content and not the means of access and transport of information, while always preserving the main principles of defending freedom, privacy, and respect for human rights." Internet Steering Committee. Principles for Governance and Use of the Internet in Brazil. Available at: <https://principios.cgi.br/>

7 AgInt in the SPECIAL APPEAL No. 1.593.873 - SP (2016/0079618-1). Available at: <https://www.internetlab.org.br/wp-content/uploads/2017/02/STJ-REsp-1.593.873.pdf>. As such, the judgment proffered by the Minister Nancy Andrighi highlighted the following extract of the ruling of the REsp 1.316.921/RJ (REsp 1.316.921/RJ (Third Session, ruled on 26/06/2012, DJe 29/06/2012): (i) providers of backbone, who have a network structure able to process large volumes of information. The following entities are responsible for Internet connectivity, offering their infrastructures to third parties, who in turn supply access to the Internet to end users; (ii) access providers, who acquire the infrastructure of the backbone providers and resell it to end users, making it possible for them to connect to the Internet; (iii) hosting providers, who store third-party data, granting them remote access; (iv) information providers, who produce the information disseminated on the Internet; and (v) content providers, who provide on the Internet the data created or developed by the information providers or by web users themselves.

It is also worth mentioning that in article 18 the law opted to safeguard Internet connection providers from any civil liability for general harm by third-party content. As such, the wording of the law consecrated the idea that connection providers shall be completely exempt from responding for actions carried out by third parties to whom they have provided access to the Internet, since the conduct liable to cause damages includes the transmitting of comments, texts, and content by third parties and not the activity of *"enabling of a terminal for sending and receiving data packets over the internet, by assigning or by authenticating an IP address."*⁸

Finally, Article 19 of the Brazilian Law establishes a liability rule for application providers. In that case, liability is residual and restricted. In other words, it is geared towards application providers in the event of failure to comply with a specific judicial order that requests certain content to be made unavailable.

THE EFFECTS OF THE MARCO CIVIL FOR THE BRAZILIAN LEGAL SYSTEM

The introduction of the Marco Civil into the Brazilian legal system has given rise to new interpretations about possible constraints to Internet application providers' activities. The new law made explicit that Internet access and connectivity providers shall not be considered responsible for damages resulting from content produced by their users online. Also, the Marco Civil limits the liability of Internet application providers. Accordingly, application providers are only liable in the exceptional circumstance whereby they do not comply with a judicial ruling that orders that the given content be removed. This means that they are not put in a position to judge whether a content is licit or illicit (a task that the law reserves for the Judiciary). It also means that the Brazilian regime deviates from a private "notice & take-down" regime.

Therefore, one of the main objectives of the liability regime as stipulated in the Marco Civil is to ensure freedom of expression. Under the Law, the Internet application provider shall only be liable for civil damages for the content generated by third parties, if, after a specific judicial order is issued to remove the content, the provider fails to act. Hence, Article 19 makes it clear that the judiciary is the legitimate authority to decide on litigation with respect to making certain content available, as well as the existence or not of damages for which the responsible party must pay compensation (releasing the application provider of such tasks). A good example of this new culture is the data found in a report by Dissenso.org⁹, which contained 152 decisions cataloged up until August 2018. The report showed that only 33.5% of the cases involving requests to remove content from the Internet were recognized or confirmed in appeals, with over 60% of the cases for removal deemed illegitimate, groundless, or abusive.

8 <http://pensando.mj.gov.br/marcocivil/wp-content/uploads/sites/2/2015/03/bill-12965.pdf>

9 Dissent. Casoteca: Learn about cases involving freedom of expression in the digital environment. Available at: <http://dissenso.org/casoteca/>

The absence of specific provisions with respect to the development of content moderation rules by the providers of Internet applications themselves also indicates that the removal of content is not restricted to the existence of a judicial order, and the provider may remove content that¹⁰ deliberately breaches its policies and terms of use. The introduction of the judicial system into this equation, with the requirement that application providers should only remove content if required by a court order turned out to be a good response to the abusive use of the notice and take down mechanism.

Before the Marco Civil, the absence of a system of liability specifically for Internet application providers paved the way for Brazilian courts to issue diverging decisions about the same issue, which ranged from making the providers directly liable for certain contents to obliging them to comply with private extrajudicial (out-of-court) notifications. This uncertainty about the liability regime held back the development of the Internet in this country, as any company could be held responsible for the behavior and content generated by third parties (which leads to enormous legal insecurity and provides disincentives to invest in the sector). Therefore, upon establishing a limited liability regime for Internet application providers, the Marco Civil also recognized that, in the case of illegal content, it is not up to the provider of the applications to decide whether to remove it or not, let alone pay compensation for the damages caused by such content¹¹. The role of courts in this process is to make the process less discretionary and random, freeing companies from having to deal with groundless requests (which provides legal certainty for them to operate).

The limited liability regime enshrined in Article 19 of the Marco Civil represents more legal certainty for Internet application providers (including those that are not involved with activities related to the dissemination of third-party content - something explored in sections 3 and 4 below).

Whilst the Marco Civil introduced very clear liability rules surrounding user generated content that is deemed offensive, the legislation did not address any sort of moderation practices adopted by application providers. Therefore, it is possible to say that the law's lack of reference to documents such as terms of use policies can be seen as recognizing the legitimacy of these rules for moderating content on applications. In any case, a provider's terms of service do not grant immunity from court orders from a competent court.

By holding application providers liable only if they fail to comply with a court order, the regime adopted in Brazil puts large and small application providers on an equal footing, as larger companies have more capabilities to handle extrajudicial notifications. If smaller providers were requested to cope with such a system, they would be at a disadvantage to explore the possibilities of the di-

10 De Teffé, Chiara Spadaccini and Moraes, Maria Celina Bodin de. Virtual social networks: privacy and civil liability Analysis based on the Civil Rights Framework for the Internet. *Pensar*, Fortaleza, v. 22, n. 1, p. 108-146, Jan/Apr 2017.

11 SOUZA, Carlos Affonso Pereira de. Civil liability of Internet access providers and Internet application providers: evolution of jurisprudence and impact on law 12.695/2014 (Civil Rights Framework for the Internet). In: Leite, G. S.; Lemos, R. (Coord). Civil Rights Framework for the Internet. São Paulo: Atlas, 2014. p. 791-816.

gital economy in the country bearing in mind the resources needed to moderate third party content and handle private notice and take-down requests.

SIMILARITIES AND DIFFERENCES BETWEEN THE INTERMEDIARY LIABILITY REGIME OF THE MARCO CIVIL AND OF SECTION 230 OF THE CDA

Section 230 of the US's Communications Decency Act (CDA) provides the framework regarding the roles and responsibilities of platforms and removes their liability for content created by their users¹². Furthermore, the law allows the development of specific rules for content moderation by platforms without the need for any intervention or penalty by the government.

One key difference between section 230 of the CDA and the law in Brazil relates to the provision of the Good Samaritan clause¹³. Under this provision, providers of applications are protected from any liability - whether a government intervention or penalty - relative to activities carried out when moderating obscene, violent or abject content, based in the good faith of the provider.

Article 19 of the Brazilian Marco Civil deals with the liability for third-party content and should not be confused with the Good Samaritan clause. The 'protection' provided by Article 19 does not cover content moderation practices and moderation measures Internet application providers chose to use (including the ones described in their terms of use)¹⁴.

In contrast to the American law, which safeguards the right to moderate, the Brazilian law stipulates nothing about the removal of content based on the terms of use and policies. Hence, the exemption from liability in the Marco Civil is restricted to "liability for third-party acts". The "acts of the providers themselves" (e.g. the individual and autonomous decision - even if based on the terms of use - of deleting certain online content) are subject to the general liability regime provided for in Brazil's Civil Code, according to which: "he who, by voluntary action or omission, negligence or recklessness, violates rights and harm others, even if exclusively moral damages occur, commits

12 Miers, Jess. A primer on Section 230 and Trump's executive order. Brookings. Available at: <https://www.brookings.edu/blog/techtank/2020/06/08/a-primer-on-section-230-and-trumps-executive-order/>

13 (c)Protection for "Good Samaritan" blocking and screening of offensive material

(1)Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2)Civil liability No provider or user of an interactive computer service shall be held liable on account of—

(A)any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B)any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

In: Legal Information Institute. 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material. Cornell Law School. Available at: <https://www.law.cornell.edu/uscode/text/47/230>

14 Souza, Carlos Affonso and Teffé , Chiara Spadaccini de. Liability of providers for third-party content on the Internet. Legal Consultant. Available at: <https://www.conjur.com.br/2017-jan-23/responsabilidade-provedor-conteudo-terceiro-Internet>

an unlawful act" (Article 186)¹⁵; and one "also commits an unlawful act the holder of a right in which exercise clearly exceeds the limits imposed by their economic or social order, the good faith or morals."¹⁶ (Article 187). Exemptions from liability in these cases are "acts carried out in legitimate defense or in the regular exercising of a recognized right" or whenever the act involves "the deterioration or destruction of something, or causes harm to a person, but is carried out to remove an imminent danger".¹⁷

In developing the so-called "Safe Harbors" provisions, which are aimed at safeguarding the activities of companies through "notice and takedown", section 230 stipulates that application providers should not be deemed editorially responsible for user-generated content, creating an immunity system. In comparison, in Brazil's Marco Civil, application providers can be held liable if they fail to comply with a judicial order requesting the removal of a certain user generated content. To this end, the Marco Civil only grants partial exemption from liability.

It is important to mention that according to Brazilian law, judicially ordered content removal requests are not the only possible case. Marco Civil also establishes the following two exceptions: Article 19, paragraph 2o states that copyrighted materials will follow a specialized regime (Law 9.610 of 1998 which as of today does not deal with Internet intermediaries). And Article 21 adopts a notice & take-down regime applicable to unauthorized disclosure of nudity.

Regarding the first, the text tries to preserve the provisions of copyright law, law no. 9.610/98, (which are similar to the CDA), but also ties intermediary liability to issues of non-compliance with a court order. According to Article 20, "*Whenever the contact information of the user directly responsible for the content, referred to in Art. 19, is available, the provider of internet applications shall have the obligation to inform the user about the execution of the court order with information that allows the user to legally contest and submit a defense in court, unless otherwise provided by law or in a court order.*"¹⁸ This means that, whenever certain content is taken down due to copyright claims, the application provider in Brazil must notify the user, so that the user can appeal such a decision before a competent judicial authority.

The non-consensual disclosure of intimate images, provided for in Article 21, is the only case where the provider may be held responsible for non-compliance.

15 Stanford CIS. World Intermediary Liability Map. Brazilian Federal Law no. 10.046, Brazilian Civil Code. Available at: <https://wilmap.law.stanford.edu/entries/brazilian-civil-code-federal-law-no-10406>

16 Stanford CIS. World Intermediary Liability Map. Brazilian Federal Law no. 10.046, Brazilian Civil Code. Available at: <https://wilmap.law.stanford.edu/entries/brazilian-civil-code-federal-law-no-10406>

17 Stanford CIS. World Intermediary Liability Map. Brazilian Federal Law no. 10.046, Brazilian Civil Code. Available at: <https://wilmap.law.stanford.edu/entries/brazilian-civil-code-federal-law-no-10406>. Our translation.

18 Brazilian Ministry of Justice. English Translation of the Civil Rights Framework for the Internet. Pensando o Direito. Available at: <http://pensando.mj.gov.br/marcocivil/wp-content/uploads/sites/2/2015/03/bill-12965.pdf>

CRITICISMS TO THE BRAZILIAN INTERMEDIARY LIABILITY REGIME

Despite the positive aspects of the Brazilian digital ecosystem pointed out earlier (and explored in detail in part II below), the Marco Civil has attracted criticism from different stakeholders. Some of them call for a stricter liability regime according to which application providers should always be held liable for the actions of its users. And some advocate subjective and joint liability, emphasizing the importance of extrajudicial notifications as a means of giving dynamism to online content removal claims. Accordingly, failure to comply with extrajudicial notifications would suffice to hold the provider liable.

Following this criticism, the constitutionality of Article 19 will be analyzed by the Brazilian Supreme Court, within the scope of Special Appeal no. 1037396. If the Supreme Court decides that the rule is unconstitutional and should be removed from the legal framework, the whole digital ecosystem (not restricted to the applications that provide a space for users to exercise their freedom of expression) may be obliged to monitor and inspect content produced/shared by users of their services (including activities in marketplaces, platforms, content portals, podcasts, etc.).¹⁹

The Marco Civil approach was essential to allow the development of online services and products while not having an impact on their business model. However, the wording of the Brazilian law did not define the kinds of services and companies that fall into the category of "application providers" in order to avoid obsolescence in a field characterized by constant innovation and evolution. Although the Marco Civil has filled a legislative gap in the Brazilian digital ecosystem and has generated gains in terms of the protection of the user's essential rights and freedoms, the dual scope of the Law ("connection providers" and "application providers") remains problematic in a sense. While the concept of a 'connection provider' (Internet Service Provider) is settled in doctrine, the concept of 'Internet application provider' still needs to be further defined, mainly because of its wide scope.

Furthermore, the context in which the Marco Civil was developed steered its focus and applicability to social networks. During the years that preceded the approval and discussion of Law 12.965/2014, some content-related cases posted on social network platforms such as YouTube became well known for having resulted in courts ordering services to be blocked due to the respective platform's inability to act preemptively upon some controversial content.²⁰

Assuming the benefits for innovation and for the digital environment in Brazil presented by the Marco Civil, Article 19 and its liability regime still need to be tested beyond web services and social networks to assess how the rule relates to the widest range of actors and activities in a complex ecosystem

19 De Luca, Cristina. Google and Twitter request postponement of the judgment on the Civil Rights Framework for the Internet in the Supreme Federal Court. Blog Porta 23, UOL. Available at: <https://porta23.blogosfera.uol.com.br/2019/11/24/google-e-twitter-pedem-que-julgamento-sobre-o-marco-civil-seja-adiado/>

20 Cândido, Fabiano. Justice rules in favor of YouTube in the Cicarelli case. Exame Magazine. Available at: <https://exame.com/tecnologia/justica-da-razao-ao-youtube-no-caso-cicarelli/>

comprising marketplaces, cloud computing services, and content delivery networks (CDNs) among others. Beyond the principled nature of Article 19, its practical importance goes beyond services and platforms generally associated with the production of third-party content. Its liability regime also is essential to guarantee competition, as well as innovation and technological development of the Brazilian digital ecosystem, especially when it comes to those services closer to the supply of infrastructure that are essential for the Internet to serve as an end-to-end network.

BEYOND SECTION 230 AND THE CIVIL RIGHTS FRAMEWORK FOR THE INTERNET: LIABILITY EXEMPTION FOR INTERMEDIARIES AS THE MAIN GUIDING PRINCIPLE FOR INTERNET DEVELOPMENT

Historically, the development of regimes related to Internet intermediary liability has been closely linked to the issue of online freedom of expression, as many of the Internet application providers work with third party generated content.

Throughout the development of the Internet, different models of intermediary liability have emerged either seeking a) to offer protection of guaranteed rights and protect users against the dissemination of abusive content or (b) to safeguard the digital ecosystem, market competition and development of the actors involved in it. In 2018, the then UN Special Rapporteur for Freedom of Expression, David Kaye, in a report for the Human Rights Council²¹, highlighted that the pressure to assign liability to Internet intermediaries usually leads to the over-removal of content which directly interferes with the protection of freedom of expression in the digital environment.

The use of extrajudicial notifications (, "Strategic Lawsuit Against Public Participation" or "SLAPP")²², commonly used in the U.S., has the ability to intimidate those who have the power to prevent certain content from circulating. These extreme models (based on private notification or direct liability for third party content) have shown that intermediaries often fail by being overly zealous and removing or blocking perfectly legitimate content without submitting their decision to the scrutiny of a court or independent body capable of assessing the legality of the content. This generates criticism in terms of transparency and accountability, as well as failures in due process and the right to appeal against content removal in "safe harbor" models.

In the Brazilian case, several stakeholders have advocated for a different model, based on arguments related to rights such as freedom of expression and access to information, legal certainty for innovation and technological development, so that intermediaries are not held responsible for the acts of their users until there is a court decision capable of assessing whether or

21 Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/HRC/38/35. Available at: <https://freedex.org/wp-content/blogs.dir/2015/files/2018/05/G1809672.pdf>

22 Public Participation Project. What is a SLAPP? Available at: <https://anti-slapp.org/what-is-a-slapp/>

not a person's (physical or legal) intention to remove content should prevail. This model would ensure that policies and terms of use that apply to the Internet include, as a matter of principle, broad and plural dissemination of content. With the regime adopted by the Marco Civil, the maintenance of online contents is ensured until a court decision declares them illicit. From that moment onwards, if the application providers fail to remove the content, they are considered responsible for its maintenance, and any harm generated by this content may be directly imputed to them. This system attacks the economic incentives that exist for the removal of content in a preventive manner in order to avoid unnecessary operational risks.

Although Marco Civil does not apply to content related to copyright (Art. 19, §2o19), it also establishes different rules for cases concerning non-consensual disclosure of intimate images (Art. 21), and in this way the law is very similar to section 230 of the CDA. In general, the Marco Civil has consolidated itself as an international example of how to protect freedom of expression and access to information on the network according to Frank LaRue²³, former UN Special Rapporteur. Moreover, in recent research, InternetLab found that (i) the judicial scrutiny contained in Art. 19 is essential to ensure that unjustified removal requests do not suppress legitimate content²⁴ and that (ii) the current regulatory model in Brazil prevents the use of extrajudicial notifications as a way to curtail expression²⁵.

The issue of intermediary' liability, however, transcends the fundamental issue of the freedom of expression of Internet users. It is also important as a driving force for the very development of Internet infrastructure across the planet because it "create[s] certainty and predictability: the rules of intermediary liability have allowed Internet providers (infrastructure and content) to develop compliance strategies based on a limited set of laws and their Terms of Service (ToS). Because of intermediary liability, companies can design businesses that meet their needs. (...) And, also, because it has put the responsibility for the content where it belongs: it claims that compliance with different types of laws that regulate the content belongs to those who produce the content and not those who host it.²⁶

In these terms, according to the Internet Society, the precise delimitation of cases and hypotheses of liability exemption of Internet intermediaries is essential for the Internet to remain an open, general purpose and technologically neutral network, capable of sustaining an ever-growing range of online services and applications, which can be developed on permissionless innovation.

23 Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

24 Dissent. Casoteca: Learn about cases involving freedom of expression in the digital environment. Available at: <http://dissentso.org/casoteca/>

25 Antonioli, Dennys. Indemnity for moral damages threaten freedom to produce comedy on the Internet. Legal Consultant. Available at: <https://www.conjur.com.br/2016-ago-31/dennys-antoniali-dano-moral-ameaca-liberdade-humor-Internet>

26 Komaitis, Konstantinos. Intermediary Liability: The Hidden Gem. Internet Society. Available at: <https://www.internetsociety.org/blog/2020/03/intermediary-liability-the-hidden-gem/>

vation basis, without the need to request authorization from any central point of control. Such characteristics, combined with some more specific ones, underlie the “Internet Way of Networking”, which is one of the main reasons for the success and global reach of the Internet as we know it.²⁷

With the evolution of the Internet, however, “Internet companies are bigger, engage in more activities and offer more services. The Internet itself has also changed. It is no longer a technology separated by discernible layers, but a web of dependencies with an increasing number of players.”²⁸ Over the time, and with the number and variety of services and applications available increasing, as well as a greater convergence and interdependence among the providers that operate in the different layers of the Internet, there have been rising tensions and numerous questions about the future of the issue of intermediary liability in Brazil and around the world.

Part of this derives from the natural split between the speed of technological development and its impact on society, and the speed in which the political and legal institutions are able to adapt to a society that is in constant transition. However, the principles that guide the exemption of Internet intermediaries from liability in certain situations are not necessarily generalizable to all situations without bumps in the road. Mainly because legal provisions tend to become obsolete as time goes by, while the principles of intermediary liability are of a more permanent nature due to their abstract character. In virtue of that, the following section gives voice to actors involved with intermediary liability in Brazil, to gather their views about the effects (positive and negative) generated by the enactment of the Marco Civil intermediary liability regime. By mapping past developments and the current gaps identified by key stakeholders in the law based on the present experience, we aim at projecting what lies ahead for intermediary liability in Brazil. Despite the focus on Brazil, we believe that the challenges and perspectives described below can help inform discussions around intermediary liability globally.

27 “The Internet Society has identified the critical properties that define the Internet Way of Networking and underpin the growth and adaptability of the Internet. The benefits of these properties have enabled the economic and technological development the Internet has brought around the globe”. The five critical properties are: (a) An accessible infrastructure with a common protocol that is open and has low barriers to entry; (b) open architecture of interoperable and reusable building blocks based on open standards development processes voluntarily adopted by a user community; decentralized management and a single distributed routing system which is scalable and agile; (d) common global identifiers which are unambiguous and universal; (e) a technology neutral, general-purpose network which is simple and adaptable. For additional information on the framework, see: <https://www.internetsociety.org/resources/doc/2020/internet-impact-assessment-toolkit/critical-properties-of-the-internet/>. Intermediary Liability, according to the organization, is directly related to the critical properties described in “b”, “c” and “e”. A use case that connects intermediary liability and the Internet Way of Networking Foundation can be accessed here: <https://www.internetsociety.org/resources/doc/2020/internet-way-of-networking-use-case-intermediary-liability/>.

28 Komaitis, Konstantinos. Intermediary Liability: The Hidden Gem. Internet Society. Available at: <https://www.internetsociety.org/blog/2020/03/intermediary-liability-the-hidden-gem/>

PART II - THE PERCEPTIONS OF SELECTED STAKEHOLDERS REGARDING THE CIVIL LIABILITY REGIME OF THE CIVIL RIGHTS FRAMEWORK

As noted in the previous section, the liability regime introduced by the Marco Civil attempted to interfere as little as possible with the business model of Internet application providers in Brazil. "As providers are exempt from liability unless there is a decision by a competent judicial authority, it becomes critical that they uphold freedom of expression, using filters, blocks, or removing content in exceptional cases²⁹".

However, Brazilian law does not prevent Internet applications providers from removing content that breaches their policies and terms of use³⁰. It may even be argued that the focus of the Marco Civil was not on the moderation of content per se, but rather on what providers were doing based on weak or false complaints - a common practice exercised until the introduction of the law.

In order to understand the practical effects of Marco Civil framework, the following section aims to take a deeper and clarifying look into the perspectives of selected interviewees.

THE BRAZILIAN MODEL FOR INTERMEDIARY LIABILITY IN THE CIVIL RIGHTS FRAMEWORK THROUGH THE EYES OF SUBJECT MATTER EXPERTS

In addition to literature reviews, between May and August, this study conducted interviews with four subject matter experts on "Internet and Society", "Internet and Public Policies", and "Internet Law" in Brazil, who were involved in the process of constructing the Marco Civil. The purpose of the interviews was to collect opinions about the Brazilian intermediary liability model, possible limitations imposed by having only the two categories of providers outlined in the Law and to what extent the model encourages innovation and development of the Internet in Brazil.

29 Souza, Carlos A. De Teffé, Chiara Spadaccini. Liability of providers for third-party content on the Internet. Legal Consultant. Available at: <https://www.conjur.com.br/2017-jan-23/responsabilidade-provedor-conteudo-terceiro-Internet#sdfootnote3sym>

30 Souza, Carlos Affonso. *The future has been reprogrammed: how technology is changing laws, policy and relationships*. Rio de Janeiro: Obliq Press, 2018.

In general, respondents recognized the value of Marco Civil as a public policy solution that had the aim of balancing the rights and responsibilities of individuals, businesses, and the public sector. On this first point, the interviewees unanimously pointed out that the law was an ambitious project ahead of its time, which opted to give voice to different actors - both visible and invisible. The role of the Executive branch, in giving an immediate response to society's demands, was key in producing a balanced law which was innovative in dealing with topics such as network neutrality, privacy and personal data protection, and intermediary liability in the Brazilian legal framework.

The Brazilian law was identified as being innovative as it was an early example of state regulation regarding the Internet with a principled and rights-based approach. And, in this scenario, CGI.br's Principles for the Governance and Use of the Internet in Brazil³¹ (also known as CGI.br's Ten Commandments), served as the initial text to build the debate and legitimize multi stakeholder participation.

"When the Civil Rights Framework was first discussed, our understanding of the Internet was not what it is today. Indeed, talking about the infrastructure of the Internet with ease as the Internet community in Brazil talks about it today was not common. (...) At that time, it was innovative and brought legal certainty thinking about details, such as how to regulate net neutrality, privacy and freedom of expression."

(Interview #3, Academic Sector, Female)

"(...) the Civil Rights Framework represented an initial phase that generated the opportunity to organize interests in relation to Internet's regulation in a clearer way and this was a new thing for many people. [From an academic perspective] we can look at this law as an example of speaking in a more organized manner about civil society with entities willing to find consensus and to learn to navigate within the scope of the National Congress. [For the private sector] the Civil Rights Framework also represented the challenge of thinking outside of the box which constrained the major international players and understanding how innovation needed to be stimulated in Brazil so that these businesses could understand what was at stake in the debate about the Brazilian law."

(Interview #2, Academic Sector/Civil Society, Male)

For policies regarding content moderation and freedom of expression, one of the interviewees also pointed out the importance of Article 21 of the law³² in particular with regard to the immediate removal of material that involves

31 Internet Steering Committee. Principles for Governance and Use of the Internet in Brazil. Available at: <https://principios.cgi.br/>

32 Article 21. The provider of Internet applications that supplies content generated by third parties shall be held accountable in a subsidiary manner for a breach of intimacy deriving from the disclosure, without permission of the participants, of images, videos or other material containing scenes of nudity or sexual acts of a private nature when, after receiving notification by the participant or his/her legal representative, it fails to diligently, within the scope and technical limitations of its service, make such content unavailable. Single paragraph. The notification in the introductory paragraph must contain items that allow the specific identification of the material that has been cited as breaching the intimacy of the participant and confirmation of the legitimacy to present the claim.

nudity or a sexual acts without the permission of the participants. This is the only exception where courts do not need to assess whether the content is legal, as it introduces a more protective approach to certain groups including women and non-binary people who are victims of online violence³³.

As for the possibility of the intermediary liability model to function as a catalyst for innovation in Brazil and the region, in contrast to what currently happens with section 230, one of the interviewees pointed out that the local model has not yet passed the stress test, nor has it been debated on a broader scale. Therefore, the Brazilian regime came up with a balanced model, which was possible at that time, with balanced powers, convenient for the stakeholders and written in such a way that it is concise enough neither to create legal uncertainty nor to be obsolete in a short time. It would be relevant, therefore, to recognize and understand Article 19 of the Marco Civil as a legal text that allows innovation to take place in the country.

Unlike the debate in North America, the discussions that resulted in the approval of the Marco Civil brought little convergence between various issues such as economic development or innovation and freedom of expression. Section 230 promotes a legal environment conducive to innovation, based on the understandings of the First Amendment of the United States Constitution; meanwhile the Brazilian and Latin American legal systems are less categorical in terms of protection and use of freedom of speech and non-intervention in the activities of the private sector. However, the Marco Civil is an important attempt to preserve existing business models, and the autonomy of the private sector for continuous innovation.

“When thinking about Article 19 of the Civil Rights Framework, inevitably we concentrate on the large American companies, and above all the major social networks. Therefore, we take a series of companies out of the framework, those who depend on this initial exemption from liability so that they are able to implement their business models and to innovate.”

(Interview #2, Academic Sector/Civil Society, Male)

One of the experts heard during the interviews phase of this research sees Article 19 as a measure that allows Internet application providers to develop business models that rely on dissemination of information and content created by their community of users (without having to be put in the position of assessing the legality of what those users do or share online). In his words:

33 With regard to the removal of content corresponding to the disclosure of intimate images for which permission has not been granted, the discussion has been approached by academics such as Danielle Citron given the need to find a legislative response to protect victims from abuse committed by partners by failing to consider that consent covers not only the moment the images are recorded but also the sharing of them. See: <https://slate.com/technology/2014/10/revenge-porn-laws-sample-text-for-state-lawmakers.html>

“The extended ecosystem of innovation on the Internet depends on some degree of protection that is granted by an article such as Article 19 of the Civil Rights Framework. However, it is important to discuss how we can calibrate between protection and innovation.”

(Interview #2, Academic Sector/Civil Society, Male)

From what is stated above, it is clear that the Marco Civil has a protective approach in terms of rights and guarantees for Internet users. However, the general provision for the promotion of “innovation and the stimulus to the broad diffusion of new technologies and models of use and access”³⁴ could also be seen as an attempt at balanced legislation that also establishes obligations for economic agents - Internet connection providers and Internet application providers.

“This law talks about incentives for public initiatives to promote digital culture and promote the Internet as a social tool (Article 27), but it would also be interesting to think about promoting an analysis of the social and economic impact of the model of intermediary liability. (...) better addressing issues of public law may be a way to overcome old battles and to work to foster the digital industry in an innovative country.”

(Interview #1, Public Sector, Male)

Something brought up by the four experts heard during this investigation were the new challenges generated by the current scenario of Internet application providers and the issues not actually covered by the Marco Civil.

The law, drafted between 2007 and 2014, does not directly deal with some of the phenomena under discussion today and their impact on the Internet - things like business models and the pricing of products and services supplied by the application providers, financing of advertising content and the promotion of content on social networks, strategies for spreading disinformation through applications and services accessible through the Internet, and other. Some of the experts interviewed even pointed out that there are risks inherent to the wider protection afforded to Internet application providers, which would result in the need to update the law to preserve its true original intent:

“This freedom to innovate may be fuel for the creation of a world diametrically opposed to the one we have built. Platforms work according to the law, but the point at which regulation comes into play will always arrive too late to contain some advances and possible abuses perpetrated by the application providers against people’s privacy.”

(Interview #3, Academic Sector, Female)

³⁴ Article 40, paragraph III of Law 12. 965/2014. <http://pensando.mj.gov.br/marcocivil/wp-content/uploads/sites/2/2015/03/bill-12965.pdf>

“Accountability should be enforced over the misuse of constituent elements of the Internet, but not in a way that halts the development of activities or entrepreneurship.”

(Interview #4, Executive Officer involved with IXPs and DNS services, Male)

In relation to the two categories covered by the law - providers of Internet access/connection and providers of Internet applications - it is important to think about the definition of the Internet to understand the relationship between exemptions from liability and development of innovation.

“The Internet is a set of building blocks to assemble things. Defending the Internet does not mean agreeing with the improper use of some of these building blocks. What is built over the Internet cannot be taken as the Internet itself.”

(Interview #4, Executive Officer involved with IXPs and DNS services, Male)

Discussion regarding the liability of intermediaries evolved quickly between 2010 and 2020. If a fair and balanced ecosystem model was an incentive for the digital economy 10 years ago, today much of the incentive for content-related discussions centers around the attempt to also tame platforms that have become too big and too global and are capable of manipulating the behavior of their users.

The Civil Rights Framework is a great tool when one considers the comments box available for users of a big Internet portal. Ideally, the owner of the portal will not be held liable for anything its users post on that space. The logic applies to social networks without significant change, but what we originally envisioned did not consider the notion of direct interaction among users. Perhaps it is the case that the Marco Civil overly protected the development of the dominant companies in the realm of social networks.

(Interview #1, Public Sector, Male)

The constant evolution of the Internet and the services that users might reach through it (whether on the infrastructure, or the applications layer) means that actors are in a constant state of innovation. Given this constant technical and social innovation, it becomes critical that the Internet is surrounded by policies that safeguard the evolution of the network. Although there are still today some examples of Internet application providers which are at the center of any Internet regulation debate, the innovation and services they offer extend throughout the Internet stack making their compartmentalization as content/application providers a simplistic yet dangerous task. In addition to a formal approach (based on a narrow reading of the law), it is necessary to adopt a more functional one (i.e. focused on the functions performed by each intermediary) to decide whether the specific regime outlined in the Marco Civil is applicable or not.

Obviously, one cannot expect that the Marco Civil will be applicable over and above what is provided for in its text, nor can its rules be expected to encompass all the activities carried out by Internet application providers today. However, it is necessary that one understands how the issue of intermediary liability (which goes beyond the normative scope of the Marco Civil) can be reconciled with the preservation of the general principle of attributing liability for content and behavior on the Internet to the entities truly responsible for said content and behavior.

ADDITIONAL OPINIONS CONCERNING THE CIVIL LIABILITY MODEL OF THE MARCO CIVIL FROM THE POINT OF VIEW OF REPRESENTATIVES OF THE PRIVATE SECTOR

This report also sought to talk to actors from the private sector, especially representatives that offer services and support Internet infrastructure. The aim was to collect additional information on how intermediary liability applies to them and the benefits they gain with the current regime. The individuals interviewed work in Brazilian companies and in one international company, and were selected as they represent services and products directly affected by the approval of the Marco Civil (even if they have not been directly targeted in the design of the legislative solution contained in Article 19).

The Marco Civil is undeniably important when discussing the Internet in Brazil. One of the first positive impacts of the law is the separation between network infrastructure and the services and products supplied over the Internet (content layer).

In terms of legislative innovation, the main pillars are Article 9 (net neutrality) and Article 19 (partial civil liability exemption for Internet application providers). The part regarding consolidating the rights of Internet users - is indeed relevant (but it can be said that it had already been reflected in the Constitution, in the Consumer Protection Code and even in the Civil Code). However, the separation between the infrastructure and content layers, as well as the attempt to protect net neutrality, are the most relevant factors of the Civil Rights Framework for the Internet. (...) The law is relevant to give an effective separation between the layers and the different level of liability applicable to different providers along the stack.

(Interview #9, Private Sector, Female)

As per what the law represents in practice, some actors have presented the law as an interesting effort insofar as it delimits the social function of the actors - connection providers, application providers, government and civil society. However, some of the views presented suggested the law could be more balanced in terms of the obligations established for the application and connection providers, as well as to the government.

The Civil Rights Framework could focus more on the public sector. It was the first attempt to regulate the Internet in Brazil and in reaction to the ongoing scandal at the time - Snowden. A point of imbalance of the law, therefore, is its exclusive focus on private companies and the fact that it does not look upon the public sector as an entity that can carry out activities similar to those of content providers in an indistinct way. Here, the actors should be able to be held responsible for abusive content, regardless of the medium in which the comment was posted.

(Interview #5, Private Sector, Male)

The Civil Rights Framework consolidated the guarantee of Internet users' rights, an issue which is one of the reasons for the existence of the law. With regard to private entities, the law is not balanced. Connection providers have more liability than the application providers. And the government was left with a list of very vague responsibilities which could have been stronger.

(Interview #6, Private Sector, Male)

The Civil Rights Framework for the Internet is a reasonably balanced solution between the rights and responsibilities of individual users, corporations and the public sector. However, a review of the liabilities imposed on Internet connection and Internet application providers is needed in order to smooth off the rough edges, e.g. absence of provisions about log keeping for transit providers.

(Interview #8, Private Sector, Male)

Regarding the partial exemption from civil liability introduced in article 19 of the Brazilian law, some of those stakeholders interviewed said the discussion was key for the development of certain platforms and services. Furthermore, the application of the principle of non-liability of network intermediaries - and its inclusion in the wording of the Marco Civil- should be discussed insofar as these aspects were introduced to guarantee the development of the Internet and not to grant total immunity to application providers.

Questions such as the immunity of intermediaries (in the case of section 230) or the partial exemption from civil liability (in the case of the Civil Rights Framework for the Internet) are critical factors for the existence of collective management platforms such as Wikipedia. In collective management models, which are based on community decisions especially, exemptions of liability are key in guaranteeing the production and dissemination of third-party content, as well as the sustainability of such platforms.

(Interview #7, Private Sector, Male)

Principles such as non-liability of network intermediaries function to keep the system running, i.e. the end-to-end flow of data and information (the network) in the physical or the logical layer. But the principle should not be applied to safeguard the services

themselves or to completely exempt the application providers from liability for content. In terms of liability, it is interesting to think about the accountability of intermediaries for advertised/paid content - the cash benefit received in exchange for content could be the hypothesis that allows for direct liability.

(Interview #6, Private Sector, Male)

Another factor that deserves attention is the legal certainty conferred to Internet application providers based on the implementation of the Brazilian model of intermediary liability. Before this law, the lack of a system relating to exemptions of Internet application providers liability was a factor that led to risk and uncertainty for the sector.

The operating cost of managing company operations and offering services in an uncertain scenario like the one that existed before the Civil Rights Framework was very expensive. At the time, acting as a curator for extrajudicial requests to remove content before possible legal action was a process that entailed many risks. The introduction of the liability model of the Civil Rights Framework, therefore, increased legal certainty, and companies' commitment to the Brazilian legal framework with investment in the country which paved the way for innovation.

(Interview #9, Private Sector, Female)

Despite reflecting the state of the Internet in Brazil, the Marco Civil adopted an intermediary liability regime which was able to facilitate the entry of new Internet application providers and has been a crucial condition for the development of an environment of innovation in Brazil. The partial exemption of liability provided for by article 19 of the Marco Civil was a key factor for that, as highlighted below:

The attempt to establish a model of liability for intermediaries by the Marco Civil sought to exercise minimal influence on companies. And the protections established by the partial exemption of civil liability for third-party content/behavior is what guarantees that smaller companies can operate in the Brazilian market. This model's importance is also seen in the intention to reconcile the need for the creation of a healthy competitive environment and not hinder new entrants - smaller companies and startups. As such, rendering application providers entirely liable for the action of third parties is a scenario that would have resulted in the adoption of damage mitigation measures and more restrictive moderation rules – leading to a conflict between 'liability of the carrier' versus 'liability of the author of the content'. (...)the promotion of competition in the market and innovation as outlined in the Civil Rights Framework - and the idea of minimum intervention in the development of products and services - is something that allowed the emergence of companies that occupy a large proportion of the Brazilian market.

(Interview #5, Private Sector, Male)

In the case of Brazil, the intermediary liability regime of the Marco Civil brings legal certainty to the application providers who work with content directly. However, for other Internet applications that supply services that are not exclusively content or information (e.g. Fintechs), the regime may not guarantee legal certainty to an extent that would encourage an innovative environment.

(Interview #10, Private Sector, Female)

However, in the opinion of one of the interviewees, this regime had to be reviewed to give rise to an environment that was even more conducive to innovation, and even to encompass issues such as the taxing of online services.

With regard to the possible protections for innovation and development in the ICT industry, the intermediary liability model acts in a protective way and may, indirectly, defend the economic power of large application providers. The law protects the providers, but has not been able to create an environment that encourages innovation while it does not deal with issues such as reducing the tax burden. The Brazilian law urgently needs to be reviewed, but it is an important law. When we think about the Internet and Value-Added Services, the text is relevant, but it still needs to be made more contemporary with issues such as the regulation of the telecoms infrastructure.

(Interview #8, Private Sector, Male)

In general, the Private Sector representatives agreed on the perception that the discussions on moderating online content and a higher responsibility of application providers in regulating/moderating communications flows within their platforms were not central at the time of the Internet Civil Framework debate, despite the fact they were of course relevant. Some of the comments highlighted the different methods of moderation, and policies that can be adopted by different actors and products/services. According to some people interviewed, those practices need to safeguard essential rights such as the freedom of expression, especially given the new challenges such as the dissemination of fake news or the intensification of political debate online.

The debate regarding content moderation is one of the most critical points of the discussion about the Internet - fake news, piracy, copyright, and the dissemination of life-threatening content are issues involved in content moderation policies and some of the problems we face today. However, the Internet can be seen as purely a space for information to flow, and so a reduction in the circulation of content equates to a reduction in the Internet as a tool. Anything which reduces circulation of content can affect all types of content - good and bad instinctively.

(Interview #5, Private Sector, Male)

Thinking of the purposes that guide some types of services and products is important to address the question of content moderation. On websites such as Reddit, TripAdvisor or Yelp forums, which are guided by a topic, moderation can be restricted to off-topic content or content considered spam. And community-based service models can pay greater attention to issues such as copyright or other legal issues, given that constant collective moderation by the users can help bring new aspects and interpretations to given content.

The creation of laws for the Internet cannot be guided exclusively by the activities of companies such as Google or Facebook and should encourage coordination among the various existing business models, not to run the risk of eliminating them.

(Interview #7, Private Sector, Male)

In view of the interviews, one can say that there is a certain consensus around the notion that the Brazilian law represents a balanced solution between the users' rights and the companies' duties. However, it primarily focuses on the activities of application providers that aim at offering a space for users to publish their own content, with little or no impact on the regulation and moderation of individual behavior and users' discourse. The evolution of Internet application services (moving towards a horizon where more and more providers intervene directly in the communication flow of their users) has given rise to new challenges and opened up new debates related to the future of the liability regime enshrined in the Brazilian law.

In any case, the partial exemptions from liability adopted for application providers by the Marco Civil were responsible for safeguarding their activity with regard to abusive content posted by their users; at the same time, it gave them an incentive to stop overblocking activities³⁵. As such, the Marco Civil, in its own way, contributed to the development of innovation and, thus, the Internet.

Based on the two preceding sections, the next section is intended to highlight some of the current challenges and perspectives which have been mapped out throughout the research for the future of intermediary liability in Brazil.

35 Clara Iglesias Keller (2020): Policy by judicialisation: the institutional framework for intermediary liability in Brazil, International Review of Law, Computers & Technology, DOI: 10.1080/13600869.2020.1792035

PART III - CURRENT CHALLENGES OF THE INTERMEDIARY LIABILITY REGIME OF THE CIVIL RIGHTS FRAMEWORK FOR THE INTERNET

The construction of the Marco Civil took into consideration aspects such as respect for free market competition and consumer protection; and freedom to implement of business models on the Internet (article 3), to create a partial civil liability exemption regime (for Internet application providers) that could allow the development of a complex and robust ecosystem, and at the same time, respect the peculiarities of the different business models.

As highlighted by some of the interviewees in the previous section, the legal certainty provided by article 19 and its regime served as the foundation to enable many application providers to develop their own content moderation policies.

The current situation in Brazil regarding Internet regulation presents challenges to the intermediary liability model on issues which were not originally addressed when the law was developed and adopted such as content moderation, dissemination of hate speech, disinformation, financing of advertisements and content promotion and even taxation of online services and competition law. Although these issues coincide with the challenges faced by Internet application providers nowadays, a substantial part of them is already covered in other pieces of the Brazilian legal system in general (and are not necessarily related to the issue of intermediary liability for third-parties' actions – which is the focus of the Marco Civil).

THE MAIN CHALLENGE IDENTIFIED BY THIS INVESTIGATION: DISCUSSIONS AROUND CONTENT MODERATION

The complexity of the Internet application providers landscape in Brazil is extremely relevant to understand the importance of an intermediary liability model that safeguards freedom of expression for Internet users and provides enough flexibility for providers to adopt their own policies. As explained above, the Brazilian law opted for a regime aimed specifically at third-party content/activities, applicable to Internet application providers³⁶ and in cases of failure to comply with a court order.

³⁶ Clara Iglesias Keller (2020): Policy by judicialization: the institutional framework for intermediary liability in Brazil, International Review of Law, Computers & Technology, DOI: 10.1080/13600869.2020.1792035

An overriding concern of the Marco Civil was the legislative effort to control discretionary content removal by application providers, while also ensuring the flow of information online. In this context, the Marco Civil has to be seen as an initial attempt to regulate intermediary liability by preserving the end-to-end nature of the Internet. Brazil opted for a balanced solution that allowed minimal level of state interference while preserving the role of the judiciary as the legitimate arbiter for disputes around content online. While, at the beginning, regulation related to the Internet was dedicated to establishing a minimal environment for the growth of the digital market, 30 years after the creation of the Web, application providers have started to adopt content moderation systems and policies to guarantee the stability of their services and promote user's safety.

Although the Marco Civil does not delve into content moderation rules adopted by a provider's terms of services, some application providers have been adopting different models for controlling user behavior and moderating content flows (depending on the nature of their services). As highlighted in one of the interviews transcribed above, Marco Civil's focus was on the issue of the moderation of third-party content and not on the autonomous decisions made by applications vis-à-vis such content or user behavior in general.(such as "the comment section on a news website or advertisements on a blog" – as one of the interviewees put it).

Platforms like marketplaces and e-commerce websites may have different interests from those services traditionally defined as social networks regarding the adoption and implementation of content moderation policies. For those platforms, policies are less geared towards speech and are instead more focused on customer experience. Therefore, to safeguard and protect their consumers (from fraud, sale of counterfeit products, circulation of products that are harmful to public health, etc.), they act on their own (or following mandatory requirements established by laws and regulations) to restrict the sale of articles that are classed as illegal/illicit.

The main issue that relates to practices of content moderation by e-commerce and online marketplace providers is related to intellectual property rights. Therefore, it is worth highlighting policies such as the Brand Protection Program (BPP)³⁷, adopted by Mercado Livre, which allows a community of rights holders to report advertisements of vendors who are supposedly infringing their rights in all the countries where the platform operates. In the case of BPP, a simple notification of breach of intellectual property results in for the suspension of a specific post, and if there is no response from the user in charge of the post, the content may be permanently deleted³⁸. Also, with regards to online marketplaces, it is worth highlighting that the Brazilian legal system has interpreted article 19 of the Marco Civil as a way of exempting such platforms from liability

37 Mercado Livre. Brand Protection Program. Available at: <https://www.mercadolivre.com.br/brandprotection/enforcement>

38 Mercado Livre. Brand Protection Program: what it is and how it can be used. Available at: <https://vendedores.mercadolivre.com.br/brand-protection-program-o-que-e-e-como-usar/>

for the transactions done by their users,³⁹ in recognition of the right of these platforms to adopt their own content moderation policies.

In cases such as streaming services or news portals, the moderation/control of content is also guided by the editorial freedom of the entity in charge and an attempt to enhance user's experience (beyond the traditional role of editorial control of content made available through the Internet). These services curate content based on their own standards and to their journalistic/editorial responsibility for the content they generate themselves – not third parties as in the case of social networks and other applications and services on the Internet.

Another interesting case is that of collaborative and crowdsourcing content platforms. Platforms such as Reddit, Chans and Wikipedia are examples that have community-based governance policies. A peculiar feature of this kind of application provider is that they are also strongly based on peer agreement between users and on a minimal interference of the provider itself in the development and adoption of terms of use and applicable policies.

Wikipedia, the free-access virtual encyclopedia created in 2001, is one of the most notable examples of collaborative platforms that uses a community-based moderation model. The tool, which is different from discussion forums, has the goal of disseminating content edited and reedited by volunteers. Wikipedia is not organized on a country-based level (rather by linguistic groups). There is no Wikipedia Brazil, but there is a Wikipedia in the Portuguese language that serves all Portuguese-speaking countries.

Platforms as Wikipedia and Reddit attribute to volunteers the decision-making processes related to content moderation⁴⁰. The use of social norms can be risky, but in the case of Wikipedia, it has been sustainable. With approximately 147,548 articles and **39,739,575** registered users in its English version, the decentralized administration of the platform gives space to users who are concerned about the type of content that circulates on it. And one of the overriding interests of the platform is to protect the independence of its community of volunteers.

While rules for content moderation in collaborative platforms such as Wikipedia have achieved a positive balance, other providers of Internet applications work in a very different way and have policies drawn up unilaterally. A recent case of content removal by Cloudflare reignited discussions around unilateralism and its limits. In August 2017, after many complaints about the hate speech propagated by the Daily Stormer website, Cloudflare decided to termi-

39 "Digital commerce – Punitive action (abstain from selling the product) – Rejection – Non-conformity – Non-Acceptance – Art. 132, III, of Law 9.279/96 – Principle of Brand Exhaustion – Appeal that aims to mediate the sale and purchase of products – Prior inspection of advertisements that are not imposed on it – Intelligence of Article 19, of the Civil Rights Framework for the Internet – Liability only attributed for failure to act – Counterfeit that was withdrawn as soon as it was pointed out – Precedents of this E. TJSP and C. STJ – Rejection agreed – Sentence maintained – Appeal rejected." (TJSP, Appeal No. 1053947-08.2017.8.26.0114; Rel. Min. Grava Brazil; 2nd Reserved Chamber of Business Law; DJe 17.7.2019)

40 Clark, Justin, Robert Faris, Urs Gasser, Adam Holland, Hilary Ross, and Casey Tilton. Content and Conduct: How English Wikipedia Moderates Harmful Speech. Berkman Klein Center for Internet & Society, Harvard University, 2019. Available at: <https://dash.harvard.edu/handle/1/41872342>

nate its contract with the Website forcing its owners to look for another hosting provider. The case gave rise to discussions in the Internet governance community and many considered the measure a dangerous precedent given that the CDNs are providers of technical infrastructure and should "be neutral" in relation to content distributed by the users of their services⁴¹. Bearing in mind the definitions of the Marco Civil, services such as the CDNs are seen as Internet application providers and are subject to the liability regime established by the Marco Civil.

The Daily Stormer case illustrates the issues faced by most application providers nowadays. With the growth of offensive content online, there has been an increase in policy and regulatory proposals asking for platforms to be more proactive and act preemptively against certain contents and content producers. In 2020, the traditional definition of "editors" versus "publishers" as well as the notion of liability exemption from application providers at-large have been growingly problematic.

OTHER CHALLENGES AND OUTLOOK FOR THE FUTURE

The issues highlighted below are the main axes of discussion and represent the main arenas in which the debate about intermediary liability is expected to unfold in Brazil⁴².

Constitutionality of Article 19 of the Marco Civil

Supreme Court case RE 1.037.396/SP⁴³. The Court is asked to assert whether or not article 19 is constitutional.⁴⁴ If such a provision is declared unconstitutional by the Supreme Court and considers that Internet applications can be directly held liable for third-party content available in their online environments, companies will be forced to adopt more restrictive and invasive practices regarding content moderation - leading to a chilling effect on freedom of expression.

Fake News

The Brazilian Congress has been investigating the role of all sorts of Internet application providers dissemination of misinformation, hate speech, and other sorts of harmful content. Although the debate has focused on platforms such as social networks and messaging apps, current investigations

41 Wilson, Catherine. Toeing the Line Between Censorship and Content Moderation. New America Foundation. Available at: <https://www.newamerica.org/weekly/toeing-line-between-censorship-and-content-moderation/>

42 The Internet Society has been monitoring the discussions in Brazil about the intermediary liability model of the Marco Civil since 2020. Quarterly reports were made available to ISOC Brazil as part of the activities of the Internet Way of Networking Project to support the Chapter's advocacy activities throughout the year. A list of those activities can be found here: <https://www.isoc.org.br/noticias>

43 Federal Supreme Court. General repercussion No. 987. <http://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987>

44 Laux, Francisco de Mesquita. The Federal Supreme Court debates Article 19 of the Civil Rights Framework for the Internet. Legal Consultant. Available at: <https://www.conjur.com.br/2019-nov-04/stf-debate-artigo-19-marco-civil-Internet>

carried out by the Joint Parliamentary Inquiry Commission on Fake News⁴⁵ have also targeted hosting and other infrastructure providers⁴⁶. Furthermore, the approval of Bill 2630/2020 in the Senate may result in a segmented liability model for intermediaries (social networks versus other providers), with imprecise conceptual contours and which may affect a wider set of actors than those intended by the bill.

Dissemination of hate speech as a silencing tool

Political polarization among party lines in different Internet applications has increased the spread of hate speech against minorities and lead to wider discrimination. This debate has brought up arguments in favor of making this type of content a crime and has put into question some business models that rely on paid advertising and sponsored content.⁴⁷

Financing of ads and sponsored content

Movements such as the Sleeping Giants⁴⁸ have raised questions regarding the accountability for financing disinformation and hate speech schemes. Another relevant factor for the debate in Brazil has been the Cambridge Analytica scandal and its direct effect in pushing forward the adoption of the Brazilian General Data Protection Law, with growing scrutiny on practices such as micro targeting advertising and the segmentation of users into specific categories for this sole purpose.

Transparency of Algorithms

The debate regarding more transparency about content moderation, the segmentation of users into specific groups of interest, and algorithmic discrimination is going forward at a fast pace in Brazil. As a result, there is increased discussion regarding ethical standards for the implementation of algorithmic systems and AI, which might feed into discussions related to intermediary liability.

One immediate challenge for intermediary liability in Brazil is raising awareness about what the Marco Civil is and what it is not. While it is important to preserve Marco Civil's approach to intermediary liability, discussions related to liability for platform's own actions have to avoid simplistic solutions that might be detrimental to the Internet.

45 National Congress. Joint Parliamentary Commission Inquiry on Fake News.

46 The Joint Parliamentary Commission on Fake News requested the transfer of confidentiality of the access records and content related to BulkService hosted in Cloudflare.

47 A relevant example is the growing Stop Hate for Profit movement, which has organized boycotts of platforms such as Facebook in response to its failure to remove hateful and racist content from its social network.

48 Ferreira, Yuri. Sleeping Giants: the fight against fake news that is making politicians in Brazil and around the world nervous. Available at: <https://www.hypeness.com.br/2020/05/sleeping-giants-a-luta-contra-as-fake-news-que-tira-o-sono-de-politicos-no-brasil-e-no-mundo/>

CONCLUSION

One can say that the importance of a law such as the Marco Civil lies in the balance between users' rights and the promotion of a clearer technical understanding of the Internet and the different layers along the Internet Protocol stack.

With regard to guaranteeing freedom of expression and encouraging innovation, the separation made by the Marco Civil between infrastructure providers and content providers is a factor that allowed the unrestricted development of new services and products at the upper layers. The legal certainty which was introduced with the Brazilian regime of intermediary liability allowed not only the protection of users' rights, but also helped reduce risks inherent to putting intermediaries in charge of content curation.

A general approach to "Internet application providers" without trying to differentiate among the different modalities of services comprised in such an was useful in the sense of providing flexibility for the judiciary to adopt a case-by-case assessment of the applicability of the Law bearing in mind the nature of the activities in question. The complexity and diversity of the activities undertaken by these companies – ranging from hosting websites to social networks, to the management of content delivery networks and even the telecommunications infrastructure associated with these services – are factors relevant to understanding the adaptable and constantly evolving nature of the services and products offered through the Internet. The Marco Civil is entirely aligned with that ever-changing nature of the Internet ecosystem.

Some of the demands brought forth by the challenges facing the intermediary liability regime of the Marco Civil should always bear in mind the ideas outlined at the outset of the law: the goal of preserving end-to-end connectivity and the assignment of responsibility for online content where it belongs. As highlighted by one of the interviewees in this research, "the creation of laws for the Internet cannot be steered exclusively by the activities of companies such as Google or Facebook and should involve the coordination of several existing business models."

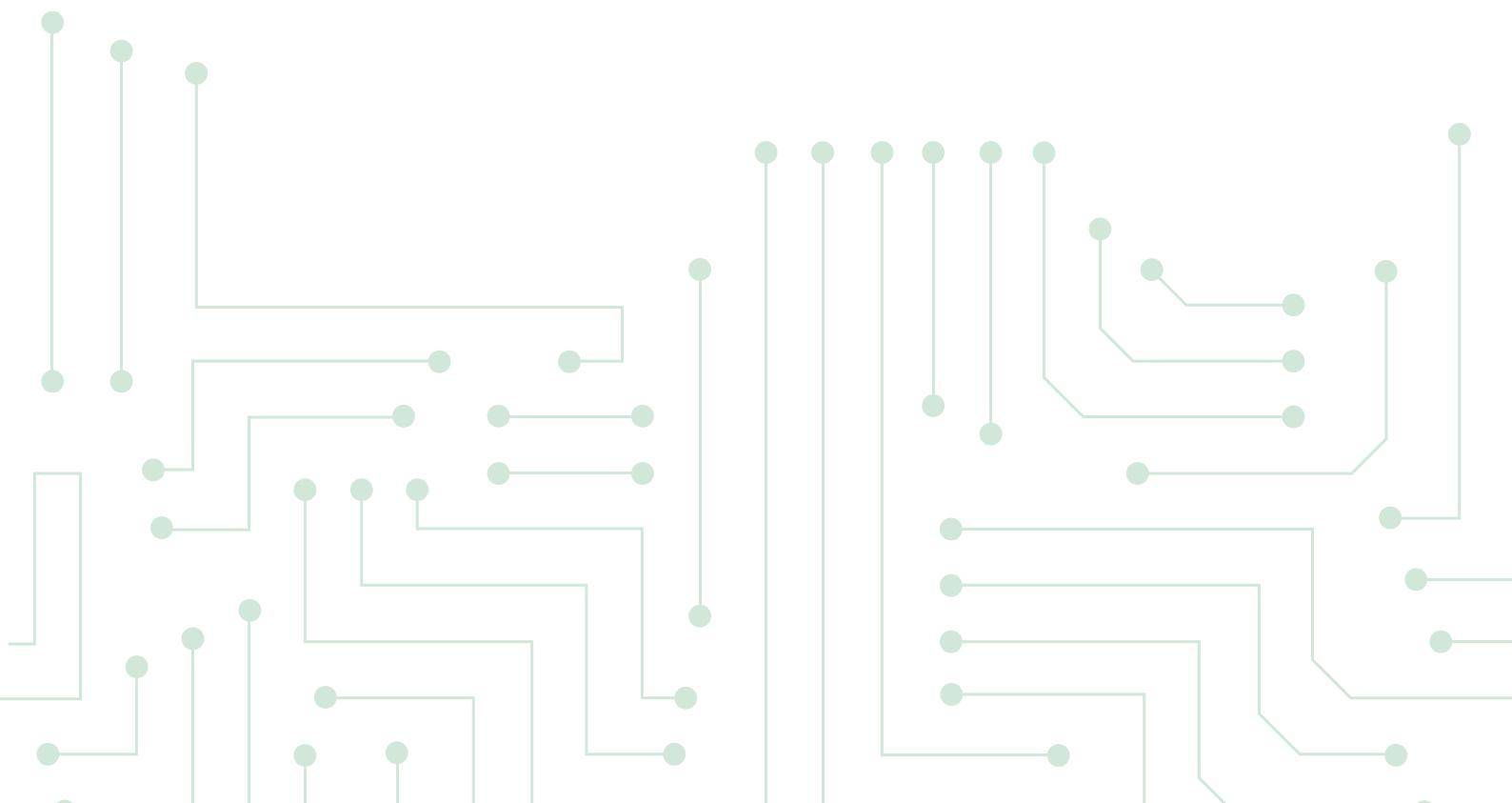
Understanding and respecting the differences between what the Internet is and what is working on/over the Internet is essential so that legislative measures aimed at a given segment of the ecosystem do not end up having unintended consequences on the critical properties that are absolutely crucial for the network to remain "open, global, secure, and reliable for everybody, everywhere" (citation needed).

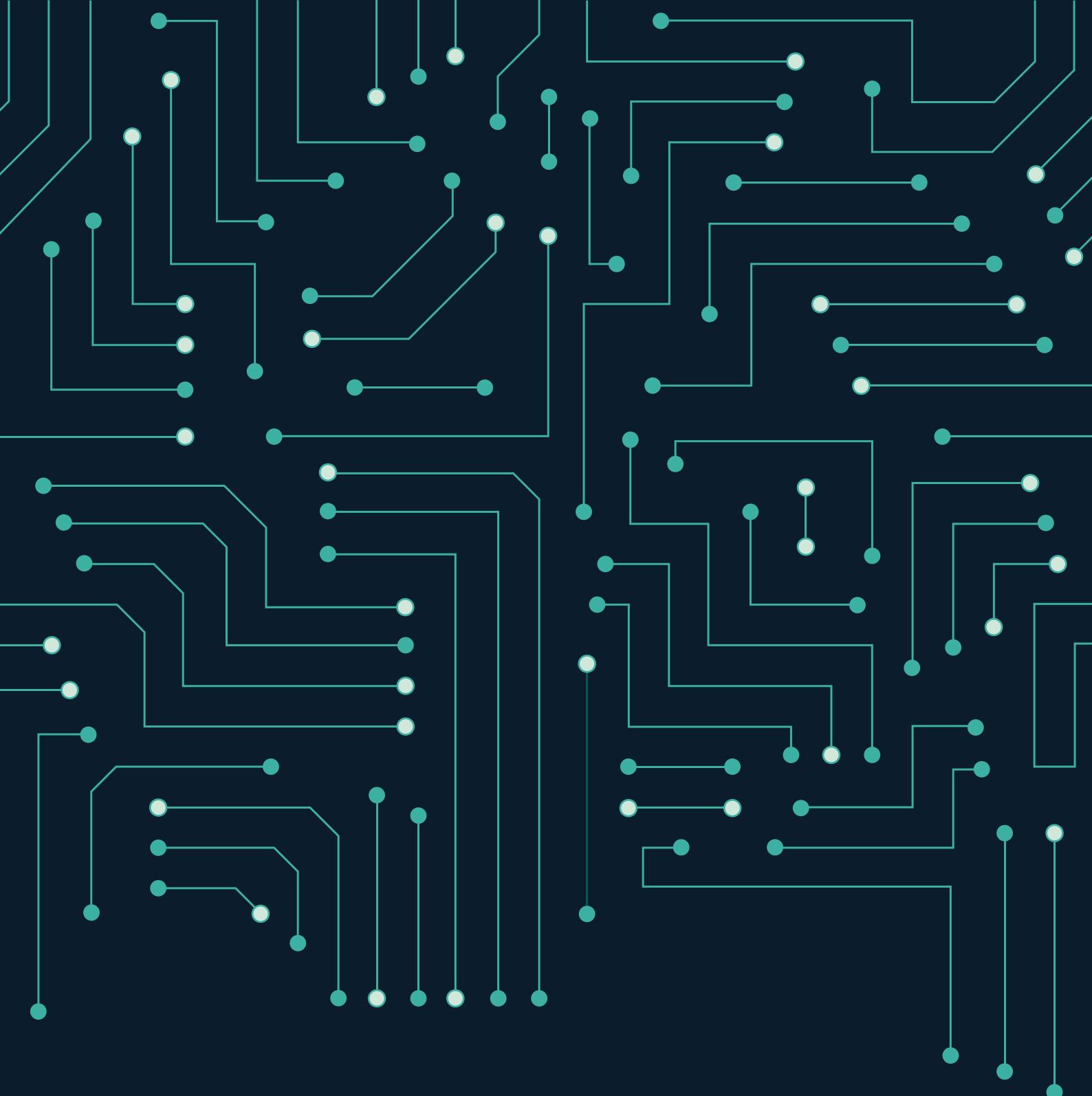
In 1995, or even in 2014, the regulatory environment that emerged was able to guarantee the exercise of freedom of speech and expression, and at the same time preserve the innovation brought by the Internet. However, one of the main challenges that the Marco Civil's regime faces in 2020 goes beyond

the binary discussion around total or partial immunity from liability. It stretches over the very nature of the types of legislative intervention that can enhance the benefits that the Internet can bring to socioeconomic and human development.

As well as Brazil, the USA, Europe and several other countries around the world are in the midst of legislative debates about the future liability of intermediaries, something that will certainly influence other Latin American countries in the future. Among the subjects discussed in all those contexts a central question revolves around what kind of services deserve to be safeguarded, what are the main threats, and even what the real effects of the new regulations on the Internet as we know it.

The responses to these questions are essential to know how public policies and regulations adopted henceforth will impact the Internet. In Brazil it is important to defend the liability model of the Marco Civil as a balanced solution between rights and duties that is in line with and helps facilitate "The Internet Way of Networking". It is extremely important, in this sense, to ensure that any future reforms in the Brazilian legal system keep this alignment and do not negatively impact what serves as the foundation for an open, global, secure and trustworthy Internet for all people everywhere.





Internet Society
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