INTERNET ON TRIAL: CASELAW EVOLVED

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The Industrial Revolution in centuries XVIII and XIX was undoubtedly one of the great landmarks in human history pulling paradigms and borders down, creating a new world arrangement. The historic period of such occurrence is usually determined as that between 1760 and 1840. However, the truth is that such revolution has never ceased; over and over new industrial methods and technologies continue to appear.

Amidst technological progress ever since the 1980's in the twentieth century we have been living a new revolution, the digital revolution, which has been hurtling, creating new virtual environments, shortening distances and radically changing the access to information and countless forms of content.

However, the overwhelming progress of digital technologies does not keep the same pace as the advancement of the law governing technological relations, especially involving the national caselaw.

[1] The nomenclature Internet Application Providers was included by the Brazilian Civil Rights Framework for the Internet. There is certain difficulty as to the concept when analyzing the so-called Internet Application Providers. The Marco Civil of Internet, in its article 5, brought some definitions, but it failed to conceptualize the categories of providers. Overall, such providers are similar to the Internet Access Providers (IAPs) and Online Service Providers (OSPs). The first (IAPs) are related to Internet access or connection providers. The Online Service Providers (OSPs), in turn, may comprise hosting providers, electronic mail providers and content providers, depending on the practical situation presented.

Although some operators work hard in the struggle for developing the positions in our courts, matters such as liability of Internet application providers for third-party content have caused, and still cause, discrepancies in the Brazilian courts. Even after the enactment of Act no. 12.965, dated April 23, 2014 (Marco Civil of Internet), regulating aspects concerning the topic, some decisions are still far from the norm.

Nowadays, the marco civil in its art. 19 determines objective criteria for removal and liability for third-party content, as follows:

> "Art. 19. For the purpose of assuring free speech and preventing censure, the Internet application provider may only be held liable, at the civil sphere, for damages resulting from third party-generated content if, after a specific court order, the respective measures are not taken, within the scope and technical limits of their service and within the term specified, to make the infringing content unavailable, except as legally provided otherwise.
> § 1. The court order mentioned in the header shall contain, under penalty of nullity, clear and specific identification of the infringing content, enabling the material to be unequivocally located.
> § 3. The claims which provide for the refund for damages resulting from contents published on the Internet related to honor, reputation or personality rights, as well as for unavailability of such contents by Internet application providers, may be filed at small-claim courts".

Thus, removal of third-party content only occurs if it causes damage, such as crime to the honor, reputation or the personality rights; in addition, if it is unequivocally pointed as the URL presentation in which it is located. The provider is only held liable if the court order determining content removal is not complied with.

The only exception to the required appreciation by the judiciary on the content occurs in cases where the content is related to "nudity scenes or private sexual intercourse scenes". Such provision is contained in art. 21 of the law:

> "Art. 21. The Internet application provider which furnishes third party-generated content shall be held liable secondarily for violating the privacy as a result of disclosure, not authorized by the participants, of images, videos or any other materials containing nudity scenes or private sexual intercourse scenes when, after receiving a notice submitted by the participant or their legal representatives, failing to conduct, promptly within the scope and technical limits of its service, the unavailability of such content."

The caselaw concerning the matter went through some significant modifications that should be approached. Out of such changes, three stages are possible for mention: (1) discrepancy in criteria for holding liable; (2) positioning by the Superior Court of Justice concerning the matter, by establishing limitations for the issue - *Notice and takedown*; and, finally, (3) the stage after the Marco Civil of Internet.

Discrepant Stage

Liability of the providers for third-party content, in most of the cases, derives from the immaterial damages caused. Immaterial damages are those resulting from crimes to the personality rights, present in the Civil Code, from art. 11 to 21 and in the Federal Constitution, under art. 5, items V and X.[2]

Many decisions are specifically based on the damage caused by violation of the victim's private life and honor. However, such argument is proven insufficient when not followed by a more

[2] According to Pontes de Miranda, "Personality is the possibility of fitting to factual supports, which, by incidence of the legal standards, become legal facts; therefore, the possibility of being subject of right" (*in* Tratado de direito privado. Rio de Janeiro: Borsói, 1972).

accurate analysis of the facts, which does not consider the Internet specificities.

Although not being specific to content liability-holding, the Cicarelli case is a good example of uncontextualized application of liability for pain and suffering. The event went public due to the fact that such was the reason for the Youtube blocking in 2006. Such anachronic analysis can be noticed in this segment of the vote rendered by rapporteur Judge Ênio Zuliani, from the 4th Private Law Chamber of the Court of Justice of São Paulo:

> "Plaintiffs assert that they did not authorize the photographs and videos, and that is plausible, a conclusion drawn in view of the circumstances under which Plaintiffs were photographed and recorded (..) Being truth is not important; the Plaintiffs hereto want to protect rights assured by the Federal Constitution, such that the scenes of their private lives cannot be disclosed. The public interest is not any more important than the evolution of the privacy Law and privacy itself which are being seriously and highly affected by image exploitation."[3]

In the case concerned, the judge focused on the party responsible for recording and upon the lack of consent to capture the images of the couple's privacy. Notwithstanding, the provider was the one held liable with "[...] the forbearance order, under penalty of a daily fine in the amount of BRL 250,000.00 (...) in the event of infringement."

On the same claim, the judge provides, in dissent, considerations on the specificities of the personality right applied to the Internet complexity:

> "Ignoring this reality could lead, not rarely, to an absolutely innocuous court sentence, virtually surreal, because, while the whole world has seen the

[3] Appeal 472.738-4 from 4th Private Law Chamber of the Court of Justice of São Paulo – Privacy invasion and undue image exploitation.

> images and read the news (even storing them in their personal computers, for those who collected them), and which continue to exist in countless other websites around the globe, accessible to any Brazilian citizen, a Brazilian provider is prevented from maintaining in its electronic page the contents that everyone has already seen and that the whole world keeps on showing. (...) elementary constitutional rights can no longer be accepted in such a simple manner, at a wish of 'I do not want it anymore', having no relation to the previous conduct which resulted into the fact claimed herein."

The vote by the reviewing judge tries to analyze constitutional rights to the extent of the Internet, representing certain progress in the discussion.

As mentioned, the breach to the personality rights was, and still is, the core element of many liability sentences suffered by providers. Notwithstanding, other arguments were applied at this Discrepant Stage, to wit: confusion in the quality of provider, denial by the provider to remove the content, no removal after notification and reassurance of the judiciary to the required consideration so that there could be removal obligation and liability sentence.

Confusion in the quality of provider is seen in application of the strict liability caused by the business risk. Art. 927 of the Civil Code in its sole paragraph states: "the damage shall be required to be redressed, regardless of the fault, in the cases specified in law, or when the activity usually developed by the damage plaintiff implies, for its nature, risk to the rights of third parties.". Other legal provisions follow the principle of the strict liability due to the business risk, especially in the consumer defense law.

Application of the strict liability, i.e., regardless of fault, would be burdensome to providers and could render their commercial activity unfeasible. Confusion between the content provider and information provider concepts is seen as the major reason for

application of such understanding. The mistake consists of the idea that the content provider is aimed at disclosing the information included therein and, therefore, would have a risk that is inherent to its activity. Such confusion is clarified by Marcel Leonardi:

> "(...) the use of the expressions information provider and content provider as synonyms is common, although such equivalence is not accurate. Information provider is every individual or legal entity in charge of creating the information disclosed through the Internet. It is the effective author of the information made available by a content provider. The content provider is every individual or legal entity publishing on the Internet the information created or developed by the information providers, using for their storage, private servers or services of a hosting provider."[4]

In non-compliance with the distinction of authority, the Court of Justice of São Paulo has previously applied this mistaken understanding:

> "[...] it is clear that the activity developed by the defendant shall be considered risky, considering that it intends profit with facilitation of content disclosure which, in seconds, can be accessed by every Internet community, even being possible to easily cause loss to consumers [...] ".[5]

Under this same judgment, another liability-tending argument was applied, the *notice and takedown*. It consists of the duty of the provider to remove the content after the extrajudicial pleading for removal.

[4] LEONARDI, Marcel. Civil liability of Internet service providers. Available at (http://leonardi.adv.br/wp-content/uploads/2011/04/mlrcpsi.pdf), accessed on 08.12.2016.

Finally, the Court of Justice of São Paulo asserted that "...defendant is not being punished by the statements of the Internet users, but due to its conduct to keep the content on the Internet, in spite of plaintiff's pleading for removal, characterizing clear causal relationship between the conduct of maintaining the information on the website and the resulting damages...". Thus, the judge chooses the extrajudicial *notice and takedown* as the core argument of the liability, beginning a new landmark in the evolution of the caselaw upon the Internet on trial.

Superior Court of Justice and quest for standardization – Notice and Takedown

Considering the great discrepancies in the precedents concerning the topic, it was evident the need for standardization of the caselaw to create legal security in the sector.

The *Notice and takedown* was previously outlined in the US-law[6] since 1998 for cases involving providers. After a *court notice*, the provider would be forced to remove the content claimed as damaging and offensive in its platform. In Brazil, nevertheless, the prevailing understanding was that *extrajudicial notice* would be sufficient to hold the provider liable, if it maintained inert and did not remove the content.

Such understanding was consolidated by the Superior Court of Justice, in many precedents rendered by the Third Panel. The claim pointed as paradigmatic[7] had as reporter the Minister Nancy Andrighy, which took down application of the business risk for content providers:

> " [...] GOOGLE service is required to ensure secrecy, safety and inviolability of the registered information of its users, as well as operation and maintenance of the Internet pages containing the individual blogs of

[6] Online Copyright Infringement Liability Limitation Act.

[7] *(SUPERIOR COURT OF JUSTICE - REsp: 1192208 MG 2010/0079120-5, Reporter: Minister NANCY ANDRIGHI, Date of Sentence: 12/06/2012, T3 – THIRD PANEL, Date of Publication: DJe 02/08/2012), which may be accessed through* http://Superior Court of Justice.jusbrasil.com.br/jurisprudencia/22209374/recurso-especial-resp-1192208-mg-2010-0079120-5-Superior Court of Justice/inteiro-teor-22209375?ref=juris-tabs

such users (..) the I Journey of Civil Law held by the Center for Judiciary Studies of CJF, approved the Title 38, which points to interesting criterion for definition of the risks which would give rise to the strict liability, stating that it is characterized when the activity usually developed by the causer of the damage causes a burden greater to certain person than to the remaining members of the society. (...) Inserting the standard to the virtual scenario, pain and suffering cannot be considered as a risk inherent to the activity of the content providers. In such regard, Erica Brandini Barbagalo notes that the activities developed by the service providers on the Internet are not risky in nature, they will not imply risks to third-party rights greater than the risks of any commercial activity [...]"

Thus, strict liability is relieved from providers which publish posts of third-party content. Their activity is not related to reviewing the disclosed content, as with information providers. However, if the provider fails to remove the content as ordered, it will be jointly and severally liable for the damage caused.

The Minister also speaks about the alleged duty of the provider to provide the IP numbers of the user responsible for the offensive content, "[...], therefore, from the average diligence perspective expected from the provider, it should adopt the measures which, under the specific circumstances of each case, are at its reach for individualization of the website users, under penalty of fault liability by omission. [...]"

Such court positioning was repeated by several precedents of the Third Panel from the Superior Court of Justice[8] and greatly impacted the domestic caselaw concerning the matter.

[8] *(Superior Court of Justice - REsp: 1306066 MT 2011/0127121-0, Reporter: Minister SIDNEI BENETI, Date of Sentence: 17/04/2012, T3 - THIRD PANEL, Date of Publication: DJe 02/05/2012)*

Superior Court of Justice – REsp: 1.337.990 - SP from Superior Court of Justice, Reporter: Minister Paulo de Tarso Severino, Date of Sentence 21.08.2015, T3- Third Panel)

Marco Civil of Internet

As approached in the introduction of this article, the MCI (Marco Civil of Internet) inserted into the national legal system a requirement of non-compliance with the **court** *notice and takedown* for removal of content produced by third parties. A theory that goes against the previous court-solidified understanding.

Many courts have been applying the criteria of the MCI in their decisions [9] ; however, many precedents end up using it incorrectly or relieve application thereof.

The establishment of the court *notice and takedown* served the recurring movement of providers restlessly defending the required court appraisal of the content, since they considered that a grey zone was between violation to the personality rights and free speech. Such conflict between essential rights, in the view of the providers could only be settled by the Judiciary Branch, under penalty of transferring to the providers the role of censors without the appropriate capacity for the right judgment.

Notwithstanding clarity of the MCI provisions, including as regards exceptions not requiring court appraisal, in 2015, the Superior Court of Justice rendered, after MCI enactment, a problematic decision [10], using the same definition of types of providers used by justice Nancy Andrighy in the paradigmatic caselaw and, based on such decision, returns to the application of the theory of risk to information providers.

> "[...] (iv) information providers, producing the information disclosed on the Internet and

[9] CIVIL APPEAL. INTERNET PROVIDER. OFFENSES INSERTED BY THIRD PARTIES. ARTS. 18, 19, § 1, 21, OF THE ACT No. 12.965/2014. CIVIL LIABILITY. JOINT AND SEVERAL LIABILITY. INEXISTENCE.

Action no. 1003266-82.2016.8.26.0271, Civil and Criminal Small-Claim Court - Itapevi – SP

CIVIL APPEAL. INTERNET PROVIDER. OFFENSES INSERTED BY THIRD PARTIES. ARTS. 18, 19, § 1, 21, OF THE ACT No. 12.965/2014. CIVIL LIABILITY. JOINT AND SEVERAL LIABILITY. INEXISTENCE.

[10] (Superior Court of Justice - REsp: 1352053 AL 2012/0231836-9, Reporter: Minister PAULO DE TARSO SANSEVERINO, Date of Sentence: 24/03/2015, T3 – THIRD PANEL, Date of Publication: DJe 30/03/2015)

> (v) content providers, which publish on the web the information created or developed by information providers.”.

At a first glance, we should mention that segregating information and content providers is reserved to the jurists. The MCI does not define information provider and its differences from content provider. However, another controversial issue is evidenced by seeing things in practice, in which internet information production and publication assignments are conducted by the same provider.

In case, considering that the provider was a news agency, the court applied the theory of risk due to non-compliance of the content posted on web. However, the offensive content was not informational, but a third-party comment to some news.

> "It should be pointed out that, in case of a journalistic agency, one cannot admit the lack of any control over the messages and comments disclosed, since these are mixed with information itself, which is the core of their economic activity, and it must provide safety legally expected from it (see art. 14, §1, of CDC)".

Such consumer article resumes the business risk concept and, therefore, application of strict liability for providers. Thus, the concerned precedent is a regress in liability of providers.

Application of the MCI by the courts is not consolidated yet, since the time-related criterion of non-retroactivity of the law still does not reach all facts of the procedures ongoing with the Courts. A real concerning fact in the matter is noticed by the jurist discrepancies found in the pre-MCI period, still impacting the decisions on liability.

Therefore, such understanding must be changed, and the courts must effectively apply the MCI. The expansion of digital inclusion in Brazil requires a mature stance from the Judiciary Branch

concerning the matter, so as not to impair the legal security of the providers in the country.