



Instituto
de Tecnologia
& Sociedade
do Rio



Carlos Affonso Pereira de Souza,
Mario Viola & Ronaldo Lemos

Understanding Brazil's Internet Bill of Rights

Carlos Affonso Pereira de Souza, Mario Viola &
Ronaldo Lemos

UNDERSTANDING BRAZIL'S
INTERNET BILL OF RIGHTS

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Preface	5
Law 12.965 of 23 april 2014 (Marco Civil da Internet)	11
Feet on the Ground: Marco Civil as an Example of Multistakeholderism in Practice	25
A collaborative and open Internet Bill of Law : the policy making process of the Marco Civil da Internet	33
Data Protection & Privacy in the Internet era: the Brazilian Marco Civil	39
Internet Intermediaries Liability: An overview of the Marco Civil provisions	45
Internet Intermediaries Liability: A North American Perspective /or/ Perspectives from the United States	55
Transatlantic Perspectives on the Marco Civil	67





A Hallmark to the World

The day was joyous and thrilling. After an endless battle that demanded patience and tenacity, the Brazilian Internet Bill of Rights (“MARCO CIVIL”) came true on 23rd of April of 2014, sanctioned by President Dilma Rousseff on NETMundial Conference.

In spite of being restricted to our borders, the law was not awaited only here. The whole world would carefully and anxiously observe the law that was bound to be born in Brazil and granted rights such as net neutrality, privacy and freedom of expression. As a newborn who is officially introduced after loads of expectation, its birth was celebrated in Brazil and abroad.

“I am used to saying that I come from the internet. This is my struggle: for digital insertion, especially in Africa. This Internet development must come under principles, respecting democratic values, the human rights, privacy and freedom of expression. And all of these are in the MARCO CIVIL”, exulted the activist Nnenna Nwakanma, co-founder of the Free Software and Open Source Foundation for Africa and member of the World Wide Web Foundation, on the day the Law Nbr. 12.965 was sanctioned.

Nnenna joined voices from the most different parts of the Globe. The MARCO CIVIL was hailed as one of the most remarkable laws on the Internet around the world, going over the multiple issues through human rights’ view. For the first time a law tried to embrace a series

of rights and guarantees, without being restricted to specific interventions on specific topics. Due to that, the MARCO CIVIL was welcomed as some sort of a Constitution for the Internet in Brazil.

The inventor of the revolutionary World Wide Web (WWW) and an enthusiast of the Brazilian law, the British physician Tim Berners-Lee recognized the innovative and catchy character of what was being created in our country. The MARCO CIVIL “will help to enlighten a new era in which citizens’ rights will remain protected by digital laws in all the countries in the world”, prophesied Mr. Berners-Lee on NETMundial.

As a matter of fact, since its sanction, the MARCO CIVIL has boosted debates, helping to overcome stalemates all over the world. Issues which were about to be solved but in need of some legitimacy found their way. The MARCO CIVIL well-suited this purpose, especially when it comes to net neutrality.

A little while after being approved by the Brazilian House of Representatives, in March of 2014, the European Parliament endorsed this principle, considered by specialists the backbone of the Internet’s spirit.

In the meantime, an intense debate over net neutrality remained in the United States of America. The Federal Communications Commission (FCC), an American independent government agency that regulates interstate and international communications by radio, television, wire and cable and satellite, faced a tug of war for a long time.

A strong campaign, supported by the American President, has raised the pressure for a stronger protection of net neutrality. Over 4 million people as whole sent messages to the agency, asking for a regulation that would enable a free Internet, open to innovations and free competition. The pressure over it increased with the sanction of the MARCO CIVIL. The FCC announced in February/2015, after a narrow

score of 3-2, the adoption of rules which would secure net neutrality as a fundamental tool for a democratic and decentralized Internet.

The creation of a recognizably pioneering law was only made possible due to the intense commitment of civil society throughout the process. From an initial claim for a law which would assure the Internet users' rights to the texts compilation and further endorsement from the Congress, civil society's representatives were close without hesitating.

For the first time in the Brazilian House of Representatives' history, contributions sent even through social media were taken into account. Therefore, the population felt as the author of the MARCO CIVIL and, as a result, responsible for fighting for its success. The pressure over Congressmen, who would oppose the vast rights guaranteed to the Internet users on the text, preferring to envisage companies' interests, was essential to tear down the attacks which aimed to disfigure the project. The approval in the Brazilian House of Representatives without any change on the pillars of the bill was a result of collective endeavor, which clearly illustrates how the popular participation strengthens the representatives, and not the opposite, as some politicians might fear. The MARCO CIVIL is what it is today because it was created by many hands and clicks.

Beyond the technical advances, it is also this participative process which may inspire other nations. A little after the sanction of the MARCO CIVIL, in June/2014, the president of the Italian House of Representatives, Ms. Laura Boldrini, defined that the Parliament in that country would create a commission to elaborate a bill of law based on the experience of the MARCO CIVIL. As it has happened with the Brazilian law, civil society should be heard in every step of the way.

As I had been the Bill's rapporteur in the Brazilian House of Representatives, I was invited to share with the Italian politicians and specialists the Brazilian experience. Such has been an invaluable

interchange. In May/2015, it was the president of the Italian House of Representatives' turn to honor the Brazilian Congress with her visit, when she deepened the discussion about the Brazilian law and the developments in Italy. The aim is to propose the law elaborated in Italy to the whole European Union. The path is being solidly built.

Little by little, more nations all over the world realize the importance of assuring the Internet users' rights. The Internet as it is commonly known is in danger in several parts, either by commercial abuse or by restrictions imposed by governments. If there is no regulation, the lack of clear rules will lead to Internet's failure. After all, *a chain is only as strong as its weakest link*. In a couple of years, this completely vast and free universe might become only a memory from the past.

Hence, such recognition to the Brazilian initiative is not an overstatement. It goes without saying that we cannot be naïve to believe that all the countless issues in such vast universe were pointed out and that all the complaints were cleared out in 32 articles. The MARCO CIVIL presents principles from which more specific and deeper laws must be elaborated, such as the Personal Data Protection Law (also open to public consultation). Therefore, these points are crucial to the web's preservation and to its sustainable development, as without them we would not have the cornerstone for constant progressive work.

One of the biggest challenges is the clear discrepancy between the legislative authority and the speed of technological progress. The elaboration of a draft bill might take years, whereas silent revolutions are quickly carried out on the Internet. Innovations come up so fast that it would shake the structures of those who are not deeply used to digital life. However, we have to deal with what is presented to us. It's the lawmaker's job to face this drawback, and, with the available tools, persevere in defending an Internet that is free, democratic,

safe and open to innovation.

You will learn more about the Internet's MARCO CIVIL in the following chapters, from the point of view of those who closely kept track of the process of creating the law, and also from those who, in some cases, took part in it. You will, thus, deeply understand the reasons that make this law not only a hallmark for the Brazilian Internet, but also for the world's democratic process.

Deputy Alessandro Molon

Rapporteur of Marco Civil da Internet in the Brazilian House of Representatives





MARCO CIVIL DA INTERNET

Office of the President of the Republic Civil Chief of Staff Legal Affairs Department
LAW 12.965 OF 23 APRIL 2014
Sets forth principles, guarantees, rights and duties for the use of the internet in Brazil.
I, THE PRESIDENT OF THE REPUBLIC, make it known that the National Congress has decreed and I have sanctioned the following Law:
CHAPTER I PRELIMINARY PROVISIONS
Art. 1. This Law sets forth principles, guarantees, rights and duties for the use of the internet in Brazil and establishes guidelines for action by the Union, the States, the Federal District and the Municipalities in relation to the internet.
Art. 2. The foundation of internet governance in Brazil is respect for the freedom of expression and:
I – recognition of the global scale of the network;
II – human rights, individual development and the exercise of citizenship through digital media;
III – pluralism and diversity;
IV – openness and collaboration;
V – free enterprise, free competition and consumer protection; and
VI – the social purposes of the network.
Art. 3. The following principles underlie internet governance in Brazil:
I – freedom of expression, communication and thought, as provided for in the Federal Constitution;
II – protection of privacy;

III – protection of personal data, in the manner provided for by law;
IV – preserving and guaranteeing network neutrality;
V – ensuring network stability, security and functionality, by technical means consistent with international standards and by encouraging best practices;
VI – holding agents liable for their actions, as provided for by law;
VII – preserving the network’s participatory nature;
VIII – freedom to do business on the internet, as long as it does not conflict with other principles established in this Law.
§1. The principles set out in this Law do not exclude others related to the same subject matter under Brazilian law or international treaties to which Brazil is party.
Art. 4. The purpose of internet governance in Brazil is to promote:
I – access to the internet for all;
II – access to information, knowledge, and participation in cultural life and public affairs;
III – innovation and widespread availability of new technologies and models for use and access to the internet; and
IV – adherence to open technology standards that allow communication, accessibility and interoperability between applications and databases.
Art. 5. For the purposes of this Law, the following terms have the meaning ascribed to them below:
I – internet: a system formed by a set of logical protocols, structured on a worldwide scale for unrestricted public use, enabling data communication between terminals through different networks;
II – terminal: any computer or device that connects to the internet;
III – internet protocol address (IP address): a code defined according to international standards that is assigned to a terminal connected to a network, enabling it to be identified;

IV - autonomous system administrator: a person or legal entity that has the administration of specific blocks of IP addresses and the corresponding autonomous routing system, and that is duly registered with the national authority responsible for registration and distribution of IP addresses geographically allocated to the country;

V – internet connection: assignment or authentication of an IP address, enabling a terminal to send and receive data packets over the Internet;

VI – connection log: a record of information regarding the date and time that the Internet connection begins and ends, its duration and the IP address used by the terminal to send and receive data packets;

VII – internet applications: the set of functionalities that can be accessed by a terminal connected to the Internet, and

VIII – internet application access log: a record of information regarding the date and time when a given Internet application was accessed from a certain IP address.

Art. 6. In interpreting this Law, the nature of the Internet, its particular uses and traditions, and its importance in promoting human, economic, social and cultural development must be taken into account, in addition to the foundations, principles and objectives set forth herein.

CHAPTER II USERS' RIGHTS AND GUARANTEES

Art. 7. Access to the Internet is essential to the exercise of the rights and duties of citizenship, and users have the right to:

I – privacy and private life, to protection of privacy and private life, and to compensation for material and moral damage resulting from violation of the right to privacy and private life;

II – confidentiality of communications made by internet, which may only be disclosed by judicial order in the manner provided for by law;

III – confidentiality of stored private communications, which may only be disclosed by judicial order;

IV – maintenance of their internet connection, unless it is terminated for the user’s failure to pay for its use;
V – internet connection consistently of the quality contracted from the provider
VI – clear and complete information in contracts with internet service providers, including a detailed description of the measures taken to protect connection logs and internet application access logs, and of network management practices that could affect the quality of the service;
VII – non-disclosure of their personal data to third parties, including connection logs and internet application access logs, except with their free, express and informed consent or in the cases provided for by law;
VIII – clear and comprehensive information on the collection, use, storage and protection of users’ personal data, which may only be used for purposes that:
a) justify collecting the data;
b) are not prohibited by law; and
c) are specifically stated in internet service contracts or in terms and conditions for use of internet applications.
IX – express consent to collection, use, storage and processing of personal data, which must be presented in a way that distinguishes the consent clause from the other contractual clauses;
X – full removal of personal data supplied to internet applications, at the user’s request, at the end of the agreement between the parties, except when this Law requires records to be kept;
XI – policies on use that are clear and publicized, when such policies are adopted by providers of internet service or internet applications;
XII – accessibility, taking into account users’ physical, motor, perceptual, sensory, intellectual and mental abilities, as provided for by law; and
XIII – application of consumer protection rules to consumer relations that take place on the internet.

Art. 8. Protection of the right to privacy and to freedom of expression in communications is a necessary condition for full exercise of the right of access to the internet.
§1. Contractual clauses that violate the above provision are void, as are those that:
I – violate the right to privacy and confidentiality of private communications over the internet; or
II – do not offer users, in adhesion contracts, the option of adopting Brazilian jurisdiction for the resolution of disputes in connection with services provided in Brazil.
CHAPTER III INTERNET SERVICE AND APPLICATION PROVIDERS
Section I Net Neutrality
Art. 9. The agent in charge of transmission, switching and routing must give all data packets equal treatment, regardless of content, origin and destination, service, terminal or application.
§1. Traffic discrimination and degradation will be subject to regulations issued under the exclusive powers granted to the President of the Republic in article 84(iv) of the Federal Constitution, for the better implementation of this Law, after hearing the Brazilian Internet Steering Committee (CGI.br) and the National Telecommunications Agency (Anatel), and may only result from:
I – technical requirements essential to adequate provision of services and applications, or
II – prioritization of emergency services.
§2. In the event of traffic discrimination or degradation, as contemplated in §1, the agent in charge must:
I – refrain from causing damage to users, as provided for in article 927 of the Civil Code (Law 10.406 of 10 January 2002);
II – act in a fair, proportionate and transparent manner;
III – provide users, in advance, with clear and sufficiently descriptive information on its traffic management and mitigation practices, including network security measures; and

IV – provide services on non-discriminatory commercial terms and refrain from anti-competitive practices.

§3. Subject to the provisions of this article, the content of data packets may not be blocked, monitored, filtered or analyzed in internet connections, either paid or free of charge, or in transmission, switching and routing.

Section II
Protection of Logs, Personal Data and Private Communications

Art. 10. Maintenance and disclosure of internet connection logs and internet application access logs contemplated in this Law, of personal data, and of the content of private communications must respect the privacy, private life, honor and image of the parties directly or indirectly involved.

§1. The provider responsible for maintaining the logs may only be required to make those logs available, either alone or together with personal data or other information that could help to identify a user or terminal, by judicial order as contemplated for in Section IV of this Chapter, subject to the provisions of article 7

§2. The content of private communications may only be disclosed by a judicial order, in the cases and in the manner provided for by law, subject to the provisions of article 7(II) and (III).

§3. This article does not prevent access to users' identification information and address by administrative authorities holding powers under the law to requisition that information.

§4. Security and confidentiality measures and procedures must be clearly communicated by service provider and must meet regulatory standards, subject to the service provider's right to protect trade secrets.

Art. 11. All operations involving the collection, storage, retention or processing of records, personal data, or communications by internet service and applications providers must comply with Brazilian law and the rights to privacy, protection of personal data, and confidentiality of private communications and records, if any of those acts occurs in Brazilian territory.

<p>§1. The provisions of this article apply to all data collected in Brazilian territory and to the content of communications if at least one of the terminals is located in Brazil.</p>
<p>§2. The provisions of this article apply to activities conducted by foreign-based legal entities, if they offer services to the Brazilian public or at least one of the members of the legal entities' economic group has an establishment in Brazil.</p>
<p>§3. Internet connection and applications providers must provide, in the manner established by regulation, information needed to determine whether Brazilian law on collection, retention, storage and processing of data and on protection of privacy and confidentiality of communications has been complied with.</p>
<p>§4. Regulations on the procedure for determining whether infractions of this article have occurred will be issued by decree.</p>
<p>Art. 12. In addition to any civil, criminal or administrative sanctions that may apply, any infraction of the rules under articles 10 and 11 is subject to the following sanctions, applied singly or in conjunction, according to each case:</p>
<p>I – a warning, which will establish a deadline for any corrective measures;</p>
<p>II – a fine of up to 10% of the economic group's sales revenue in Brazil in its most recent financial year, excluding taxes, to be fixed in light of the offender's financial condition and the principle of proportionality between the seriousness of the offence and the severity of the penalty.</p>
<p>III – temporary suspension of activities that involve the acts referred to in article 11; and</p>
<p>IV – prohibition of activities that involve the acts referred to in article 11</p>
<p>§1. In the case of foreign companies, any subsidiary, branch, office or establishment located in Brazil will be jointly liable for payment of the fine referred to above.</p>
<p style="text-align: center;">Subsection I Maintenance of Internet Connection Logs</p>

Art. 13. In providing internet connection services, autonomous system administrators must keep connection logs for a period of one year, under strict confidentiality and in a controlled and secure environment, as provided for by regulation.

§1. Responsibility for keeping connection logs may not be transferred to third parties.

§2. The police or administrative authorities or the Public Prosecution Service may require, as a precaution, that connection logs be kept for longer than the period provided for in this article.

§3. In the event provided for in §2, the requesting authority will have a period of 60 days from the date the request is made to file an application for judicial authorization to access the logs referred to in this article.

§4. The provider responsible for keeping the logs must keep the request provided for in §2 confidential; the request will become void if the application for judicial authorization is rejected or is not filed within the time period established in §3.

§5. In all cases, judicial authorization must be obtained before logs are made available to the requesting authority, in compliance with Section IV of this Chapter.

§6. In applying sanctions for failure to comply with this article, the nature and severity of the infraction, the resulting damage, the potential benefit to the offender, the aggravating circumstances, and the offender's record and repeat offenses if any will be taken into consideration.

Subsection II
Maintenance of Internet Application Access Logs
in Providing Internet Connection

Art. 14. It is forbidden to keep logs of access to internet applications in providing internet connection services.

Subsection III
Maintenance of Internet Application Access Logs
in Providing Applications

Art. 15. Internet applications providers that are legal entities providing applications in an organized, professional manner, for profit, must keep logs of access to internet applications for a period

<p>of six months, under strict confidentiality and in a controlled and secure environment, in the manner provided for by regulation.</p>
<p>§1. Internet applications providers that are not subject to the above provisions may be required by judicial order to keep logs of access to internet applications in connection with specific facts for a defined period of time.</p>
<p>§2. The police or administrative authorities or the Public Prosecution Service may require any internet application provider, as a precaution, to keep internet application logs, and to keep them for a period longer than the period established in the head of this article, subject to the provisions of article 13§3 and §4.</p>
<p>§3. In all cases, judicial authorization must be obtained before logs are made available to the requesting authority, in compliance with Section IV of this Chapter.</p>
<p>§4. In applying sanctions for failure to comply with this article, the nature and severity of the infraction, the resulting damage, the potential benefit to the offender, the aggravating circumstances, and the offender’s record and repeat offenses if any will be taken into consideration.</p>
<p>Art. 16. In providing internet applications, either paid, or free of charge, it is forbidden to keep:</p>
<p>I – logs of access to other internet applications unless the data subject has given consent in advance, subject to the provisions of article 7; or</p>
<p>II – personal data that exceeds the purpose for which the data subject gave consent.</p>
<p>Art. 17. Except in the cases provided for in this Law, the choice not to keep logs of access to internet applications does not result in liability to third parties for damage suffered by reason of their use of those services.</p>
<p style="text-align: center;">Section III Liability for Damage Caused by Content Produced by Third Parties</p>
<p>Art. 18. Internet connection providers do not have civil liability for damage resulting from content produced by third parties.</p>

Art. 19. In order to ensure freedom of expression and to prevent censorship, internet application providers may only be held civilly liable for damage resulting from content generated by third parties if after specific judicial order the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary.

§1. On pain of nullity, the judicial order referred to above must clearly and specifically identify the offensive content, so that the material may be located unequivocally.

§2. This article will apply to violations of copyright and related rights only when specific legislation to that effect is adopted; the legislation, when adopted, must respect the freedom of expression and other guarantees provided for in article 5 of the Federal Constitution.

§3. Actions dealing with reparation for damage resulting from content related to the claimant's honor, reputation or personality rights made available on the internet, or with internet applications providers' removal of such content, may be brought before small claims courts.

§4. The court may grant the relief requested in the complaint on a preliminary basis, in whole or in part, if there is unmistakable proof of the facts and after considering the public's interest in making the content available on the internet, as long as the claimant shows that his claim is prima facie good and that there is reason to believe that irreparable harm, or harm that would be difficult to repair, would occur if the relief was not granted in advance.

Art. 20. If the internet application provider has contact information for the user who is directly responsible for the content referred to in article 19, the provider must notify the user of the reasons for removing the content and other information related to its removal, with sufficient detail to enable a full answer and defense in court, unless applicable legislation or a reasoned court order expressly stipulates otherwise.

§1. At the request of the user who posted the content that was removed, the internet applications provider, if it is a legal entity providing applications in an organized, professional manner, for profit, must replace the removed content with a statement of the reasons for removal or the judicial order to remove the content.

Art 21. Internet application providers that make available content created by third parties will be secondarily liable for violations of privacy resulting from the disclosure, without the participants' authorization, of images, videos and other material containing nudity or sexual acts of a private nature, if after receiving notice from the participant or the participant's legal representative, the internet application provider fails to take prompt action to remove the content from its service, subject to technical limitations of the service.

§1. On pain of nullity, the notice referred to in this article must contain elements that permit the internet application provider to identify the specific material alleged to violate the participant's right to privacy and to determine that the person making the request has a lawful interest to do so.

Section IV
Judicial Order for Disclosure of Records

Art. 22 In order to obtain evidence for use in civil or criminal proceedings, an interested party may apply to the court, as an incident to a main proceeding or in a separate proceeding, for an order compelling the party responsible keeping internet connection logs or internet applications access logs to produce them.

§1. In addition to other legal requirements, the application will not be admissible unless it contains the following:

I – good grounds to suggest that an unlawful act was committed;

II – good reason to believe that the requested logs will be useful as evidence or for purposes of investigation; and

III – the period to which the records relate.

Art. 23. The court has powers to impose measures to ensure the confidentiality of the information received and to preserve the privacy, private life, honor and public image of the user, and may order that public access to the information, including the application for production, be limited.

CHAPTER IV
THE ROLE OF PUBLIC AUTHORITIES

Art. 24. The following are guidelines for action by the Union, the States, the Federal District and the Municipalities in developing the internet in Brazil:

I – establishing multi-stakeholder, transparent, collaborative and democratic governance mechanisms, with the participation of government, the private sector, civil society and the academic community;

II – promoting rationalization in the management, expansion and use of the internet, with the participation of the Brazilian Internet Steering Committee.

III – promoting rationalization and technological interoperability of electronic government services among the different branches and levels of government, allowing exchange of information and expeditious procedures;

IV – promoting interoperability between different systems and terminals, including among the different levels of government and various sectors of society;

V – adopting, by preference, free and open technologies, standards and formats;

VI – promoting access to and dissemination of public data and information in an open and structured manner;

VII – optimizing infrastructure networks and encouraging the creation of data storage, management and dissemination centers in Brazil and promoting technical quality, innovation and widespread availability of internet applications, without detriment to the openness, neutrality and collaborative nature of the internet;

VIII – developing actions and training programs for internet use;

X – providing integrated, effective and simplified public services to citizens through multiple channels, including remote access.

Article 25. Government internet applications must promote:

I – compatibility of e-government services with different terminals, operating systems and access applications;

II – accessibility for all interested parties, regardless of their physical and motor skills, perceptual, cultural and social characteristics, while ensuring confidentiality and compliance with administrative and legal restrictions;
III – compatibility with both human reading and automated data processing;
IV – user friendliness of e-government services, and
V – strengthening social engagement in public policies.
Article 26. The government’s constitutional duty to provide education at all levels of learning includes training, in combination with other educational practices, for safe, aware, and responsible use of the Internet as a tool for exercising the rights and duties of citizenship, promoting culture and developing technology.
Article 27. Public initiatives to promote digital literacy and use of the internet as a social tool must:
I – promote digital inclusion;
II – seek to reduce inequalities in access to and use of information and communication technologies, particularly between different regions of the Brazil; and
III – foster production and dissemination of national content.
Article 28. The government must, at regular intervals, design and encourage studies, and establish goals, strategies, action plans and timelines, for the use and development of the internet in Brazil.
CHAPTER V
FINAL PROVISIONS
Art. 29. Users are free to use software of their choice to facilitate parental control over content that parents consider inappropriate for their minor children, subject to the principles under this Law and Law 8069 of 13 July 1990 – The Child and Adolescent Statute.
§1. Government, in conjunction with internet connection and applications providers and civil society, has the duty to promote education and provide information on use of the software referred to in this article, and to define best practices for digital inclusion of children and adolescents

Art. 30. The rights and interests established in this Law may be enforced through the courts, in individual or collective actions, in the manner provided for by law.

Art. 31. Until the specific legislation referred to in article 19§2 comes into force, the liability of internet applications providers for damage resulting from content generated by third parties, in the case of violations of copyright and related rights, will continue to be governed by the legislation on copyright in effect on the date this Law came into force.

Art. 32. This Law comes into force 60 days after its official publication.

Brasilia, 23 April 2014, the 193th year of Independence and the 126th of the Republic.

DILMA ROUSSEFF

José Eduardo Cardozo

Miriam Belchior

Paulo Bernardo Silva

Clélio Campolina Diniz

This text does not replace the text published in the Diário Oficial da União dated 24 April 2014.



Feet on the Ground: Marco Civil as an Example of Multistakeholderism in Practice


When the Snowden revelations hit Brazil, the government took an immediate interest. Wanting to respond quickly, the most comprehensive and feasible reaction was the so-called “Marco Civil da Internet,” a draft bill then under analysis in the Brazilian Congress.

What is the Marco Civil and What Rights does it Set Forth?

The difference between the Marco Civil and other pending draft bills was that it was a proposal created by civil society at large, rather than an initiative of the State itself. The Marco Civil building process began years before the Snowden case, and was the product of an open and collaborative effort--one that can be described as a multistakeholder process.

Passed into law in April 2014, Marco Civil sets forth a comprehensive “bill of rights” for the internet. The enactment of the new law follows closely on the heels of the web’s 25th anniversary and Sir Tim Berners-Lee’s call for a “Magna Carta” of the Internet, positioning Brazil as the first country to heed that call.

From a process standpoint, as soon as it became clear that Brazil needed a bill of rights for the internet, it also became clear that the internet itself should be involved in drafting it. An 18 month consultation process followed, including soliciting contributions from a variety of stakeholders in a truly hybrid and transparent forum:



internet users, civil society organizations, telecom companies, governmental agencies, and universities all provided comments publicly, so that all stakeholders were able to consider one another's contributions. Ultimately, this process led to successfully getting a draft law adopted by the government and proposed for consideration by the Brazilian Congress.

The final version protects rights such as net neutrality, privacy, and takes a strong stance against NSA-like practices. For instance, the use of Deep Packet Inspection at the physical layer of the connection is now illegal in Brazil. The Marco Civil also protects freedom of expression, creating safe harbors for online intermediaries in Brazil, and internet platforms have to take down content only when served with a valid court order.¹

Another important principle of the Marco Civil is that it actually embeds multistakeholderism as a principle for internet governance in Brazil.² This is important because it will influence the Brazilian position regarding internet governance at international fora, where Brazil is now, by law, on the side of initiatives promoting broader participation, and stands in opposition to the trend towards privileging the State's role in implementing internet governance.

In short, the Marco Civil translates the principles of the Brazilian Constitution to the online world. It is a victory for democracy, and stands in stark contrast to the direction of other laws that have been passed recently in countries such as Turkey or Russia, which expand governmental powers to interfere with the internet. Brazil's law

1 This safe harbor does not apply to infringement of copyright- related materials. Copyright has been excluded from the Marco Civil.

2 Article 24. The following are guidelines for action by the Union, the states the Federal District and municipalities endeavoring the internet Brazil: I- establishing multi- stakeholder, transparent, collaborative and democratic governance mechanisms, with the participation of government, the private sector, civil society and the academic community.

can serve as an example to countries willing to take seriously the importance of the net to facilitating both development and a rich and open public sphere.

The Marco Civil also includes a requirement that ISPs providing connectivity services and other internet services retain user data for a year and six months respectively. Although criticized by privacy activists, this is also significantly shorter than the five years that was previously proposed. It also creates a standard that improves on the current practices of data retention in Brazil, which were not defined by law, but by agreements between law enforcement authorities and service providers, and because of that, quite opaque.

From start to finish, the approval of Marco Civil took about seven years of intense debate with numerous stakeholders. The support of civil society and active participation on the part of the Brazilian public was crucial. One highlight is the role of the rapporteur of the project, Congress Member Alessandro Molon, who supported the bill from the very beginning and gathered the technical expertise necessary to defend it to its successful conclusion. His dedication to the cause should be an inspiration to politicians dealing with similar issues.

A Brief History of the Project

Marco Civil was not the product of spontaneous creation. It was created as part of a strong public reaction against the passing of a draconian cybercrime bill in Brazil in 2007, nicknamed “Azeredo Law,” in reference to a Senator called Eduardo Azeredo, rapporteur and lead proponent of the bill. If the bill had been passed, it would have established penalties of up to four years in jail for anyone “jailbreaking” a mobile phone, and four years in jail for anyone transferring songs from an iPod back into their computers.

With such a broad scope (presaging SOPA and PIPA discussions in the United States years later), the bill would have turned millions of internet users in Brazil into criminals. Moreover, it would have been detrimental

to innovation, rendering illegal numerous practices necessary to research and development.

The Azeredo Law sparked broad public criticism, first from academia (including the author of this chapter), followed by strong social mobilization, which included an online petition that quickly received 150,000 signatures online. Congress took notice of the reaction and postponed consideration of the bill, however, the question of regulation remained: If a criminal bill was not the best way to regulate the internet in Brazil, what should be the alternative? In May 2007, I wrote an article for *Folha de São Paulo*, the major newspaper in Brazil, claiming that rather than a criminal bill, Brazil should have a “civil rights framework” for the internet— in other words, a “Marco Civil.”³ That was the first time the term appeared in public.

The idea took off, and was picked up by the Ministry of Justice in Brasilia. In 2008, the Ministry invited the group of professors I was leading then at the Fundação Getulio Vargas, to create an open and multistakeholder process for drafting the bill. It was clear from the beginning that the internet should also be part of it.

Our team built and launched the platform for debate and collaboration of the bill, whose archives are still available at www.culturadigital.org/marcocivil. From the beginning, a list of principles was proposed: freedom of expression, privacy, net neutrality, rights of access to the internet, limits to the liability of intermediaries, openness, and promoting innovation, which were all supported in the public debate.

Each principle was then turned into law, leading to the creation of specific articles of the Marco Civil, which were then opened to new rounds of debate. The final draft was then embraced by the government, and with the support of the government, and with the support of

3 Cf. *Folha de São Paulo*, “Internet Brasileira Precisa de Marco Regulatório Civil”. <http://tecnologia.uol.com.br/ultnot/2007/05/22/ult4213u98.jhtm>, Maio 2007.

four ministries (Culture, Science and Technology, Communications, and the Ministry of Justice) was sent to Congress on August 24th, 2011. The law was finally passed on April 23rd, 2014.

The Importance of Multistakeholderism: Mapping the Controversies in the Project

The Marco Civil political negotiation took place over many years and was extremely complex. Ultimately, the success of the project can be attributed to the multistakeholder process that guided the discussions of the bill; the transparency of each party’s position helped reduce information asymmetry, and facilitated negotiations and some necessary compromises.

Below is a controversy map of the Marco Civil listing the main stakeholder interests and disputes during the negotiations. This is a rough and simplistic sketch of a much more complex reality. However, it helps to visualize the disputes and the ways in which the multistakeholder process rendered them visible and their negotiation feasible.

ISSUES/ACTORS	NET NEUTRALITY	HIGHLY ENHANCED PRIVACY	SAFE HARBOR FOR SPEECH	DATA RETENTION	FORCED DATA LOCALIZATION	SAFE HARBOR FOR COPYRIGHT	EXPRESS REMOVAL FOR REVENGE PORN
TELCOS	Against	Against	Neutral	Neutral	Neutral	Neutral	Neutral
CIVIL SOCIETY	For	For	For	Against	Against	For	Against
GLOBAL INTERNET COMPANIES	Neutral	Against	For	Neutral	Against	For	Neutral
BRAZILIAN INTERNET COMPANIES	For	Against	For	Against	Against	Against	Neutral
BROADCAST SECTOR	For	For	For	Neutral	Neutral	Against	Neutral
GOVERNMENT	For	Neutral	Neutral	For	For	Neutral	For
LAW ENFORCEMENT/LAWYERS/FEDERAL POLICE	Neutral	Against	Against	For	For	Against	For
RESULT	PASSED	PASSED ONLY PARTIALLY	PASSED	PASSED	NOT PASSED	NOT PASSED	PASSED

Conclusion

The chart attempts to illustrate the complexity of the Marco Civil negotiation, both in terms of the number of parties involved, and the variety of issues under debate. In terms of substance and process, the bill is a significant achievement for Brazil and the global community, and the bill represents symmetry between collaborative process and substantive results achieved. Similar efforts involving complex issues with multiple stakeholders can benefit from the Marco Civil lesson.

However, it is important to mention that “multistakeholderism,” a term nowadays more mantra than anything, is insufficient a concept to solve the contradictions and disputes involved in something like the Marco Civil, which required intense negotiation. Multistakeholderism is merely a helpful (and important) point from which to depart. In order to achieve effective results, a much bigger effort is necessary, building bridges between the different stakeholders, avoiding radicalism and polarization, and being prepared to reach compromises—one of the main lessons of the Marco Civil.

The Future of Marco Civil

The approval of Marco Civil is not the end. The bill will face at least two immediate challenges. The first is how the government will define the terms of its application by means of a presidential decree. Every law passed in Brazil is subject to further normative specification by means of an administrative decree. Even though the decree cannot change or go beyond the law itself, it can specify how the law is to be interpreted and applied.

The degree to which the decree will deal with net neutrality, privacy and other issues in practical terms is highly anticipated. The government stated that the decree itself will be subject to public consultation, and two rounds of online public consultation were opened

this year by the Ministry of Justice to discuss the future decree.

Marco Civil's influence is already spreading regionally and beyond: interested in following Brazil's path, other governments are launching their online consultation processes for writing their own version of Marco Civil. In Europe, members of the Italian parliament have contacted the Marco Civil's rapporteur and also the Institute for Technology & Society to explore a similar process as well.

In sum, in a context in which even democracies like Turkey and Russia have started passing laws that expand governmental control over the internet, the Marco Civil presents a viable alternative. It provides a model, both in process and in substance, on how to approach internet regulation in a way that takes democratic values seriously into account.

Ronaldo Lemos is director of the Rio Institute for Technology and Society (ITS Rio), professor at the Rio de Janeiro State University's Law School. He is member of the Mozilla Foundation Board, and the Access Now Board, among others. He was one of the architects of the "Marco Civil da Internet," a law establishing a bill of rights for the internet in Brazil. Ronaldo earned his LL.B. and LL.D. from the University of São Paulo, and his LL.M. from Harvard Law School. He is currently a non-resident visiting scholar with the MIT Media Lab. Ronaldo is one of the editors of this book.





A collaborative and open Internet Bill of Law : the policy making process of the Marco Civil da Internet

The Marco Civil is a unique bill for two main reasons: because it establishes principles, rights and duties to the use of internet in Brazil in accordance with the principles of democracy; and due to the policy making process involved to create, debate and approve it. This chapter reviews these two milestones, discussing how this piece of Internet regulation was created with the aid of the Internet itself.

Coining the terminology “Marco Civil”

The “Marco Civil da Internet” is a term coined in May 22nd 2007, by Ronaldo Lemos, in an article published in the national press venue *Folha de São Paulo*. The terminology was used as a response to a bill that intended to incriminate several citizens’ conducts in the online world, a cybercrime law nicknamed “Azeredo Law”. Although written in 1999, this law went for congressional hearing only in 2007, and amongst its provision were included penalties of up to 4 years in prison for jailbreaking phones, or transferring songs from one device to another.

The term “Marco Civil” was one of the many terms that were used in social media and newspapers to symbolize the opposition of the criminalization of Internet practices. It was used aside other terms such as the “Digital AI-5”, a reference to the most authoritarian law issued in Brazil by the Military Government of Brazil, in the 1960s.

Azeredo Law could have turned into criminals millions of internet users in Brazil, from one day to another. And many players, from inside and outside the government, were involved in supporting the fall of this law. A milestone for example was the launch of an online petition claiming for a veto on the Bill, an initiative that received over 160,000 signatures (Nolasco, 2014), and was done by think tanks and activists such as André Lemos, professor of Communication at the Federal University of Bahia (UFBA), João Caribé, a digital activist; and Sergio Amadeu, a sociologist and advocate of free software in Brazil.

The difference between the Marco Civil and the other terms used to mobilize stakeholders, however, is that “Marco Civil” suggested not only an opposition against criminalization of the Internet use, but also a propositional idea to define rights for the Internet use. As such, it mobilized not only those willing to oppose the Azeredo Law, but also to promote a bill of Internet rights.

In June 20th 2008, when the Azeredo Law passed the Constitutional and Legal Commission in the Lower Chamber, the Ministry of Justice, legislative representatives of the running political party, and academics such as Ronaldo Lemos and Sérgio Amadeu reorganized themselves along the term “Marco Civil” to find ways to design a new legislation to protect (not curfew) rights.

In May 2009 it was clear that without an alternative agenda, the plain opposition to the Azeredo Law would fail. Ronaldo Lemos, then, decided to propose a thematic discussion for a bill of Internet Rights, which was supported by the Ministry of Justice that suggested to use the internet to draft, collaboratively, the Bill.

Drafting the Bill of Internet Rights

In June, 2009, President Lula attended the 10th International Free Software Forum in Porto Alegre. In his opening speech, Lula recognized the discontentment of the social movement and acknowledged the role of cybercrime laws to promote online censorship.

Lula's speech provided a window of opportunity for the Ministry of Justice to partner with the academic institution where Ronaldo Lemos, Carlos Affonso and Sérgio Branco were based, to propose a new framework for Internet regulation in the country, to be run via online consultation.

During its duration the Marco Civil Consultation connected politics and technology in a way that it injected some new and different elements into the relationship between representatives and represented and governments and governed (Coleman and Blumler 2009).

The consultation went online from October 2009 to April 2010, and was run in two phases: one focused on the principles for an Internet Bill of Rights, and another based on the proposed draft law text to be sent to Congress. It used as technology a Wordpress website created by the Ministry of Culture (culturagital.br), and it was the first formal online consultation in the country. All together, it connected around 275 authors who submitted more than 1.500 comments on how and why to regulate right for the Internet (Steibel, 2015).

The consultation was carried online, open to all, making the debate truly inclusive for all Internet users. It succeeded in connecting four key elements to regulate the internet: (1) a government institution with a real interest in direct public participation; (2) an active online community with a strong interest in the topic under discussion; (3) an active research institution or think tank willing to bring its own expertise and influence to the project; and (4) a web 2.0 interface

capable of engaging policy makers and citizens in a coherent narrative structure for deliberation (Steibel and Beltramelli, 2012).

The consultation also explored the benefits of supporting an open multistakeholder processes, through which members of the public, government, global and local Internet companies, civil society, and others engaged in negotiations.

As a result, the Marco Civil Consultation was a transparent policy making process where participants, side-by-side, could see the others' contributions, and where all had to place their cards on the table to foster an open debate. This is how we know for example that on net neutrality, during the consultation those against it were the Telcos, law enforcement agents and global Internet companies; those neutral about it were the Brazilian Internet companies and the broadcast sector; and those in favour included the Executive branch and civil society (Lemos and Steibel, 2015).

The last straw

When the consultation was over the Ministry of Justice submitted it to the Presidency, who sent to Congress for appreciation in August 24, 2011. Over there the law struggled to pass until in April 23, 2014, during the NETmundial, legislators voted in favour of it.

Until it was passed, the Draft Law faced regulatory challenges, such as the controversy surrounding the leak of nude photos of famous Brazilian actress Carolina Dieckmann, in 2012. The story rapidly became a hot topic for public gossip, and in November of that year the Criminal Code of the country was updated to specify crimes committed in the digital environment. Another controversy involved the Snowden's revelations, confirming that Brazil was also a target of US surveillance. The evidence brought forward during the event energized the government's will to, vote the marco civil bill, and it determined, on September 11, 2013, a regime of constitutional

urgency to pass the bill, which prevented Congress from voting on any other issues until the Marco Civil vote was completed (Nolasco, 2014).

On March 25, 2014, the Marco Civil Draft bill went for a vote in the Lower Chamber. The event happened after several delays and re-scheduled agendas. Even so, when voted, the bill kept its most controversial articles, such as the support to net neutrality, data privacy and freedom of expression. When it reached the Senate days after, it received more than 40 amendment requests, being none of the major ones accepted when the Bill passed vote in April 22. Finally, the Law was published under the number 12.965/14 (Papp, 2014).

From Congress approval to permanent debate

The Marco Civil Law passed with grand political support, which was key to sustain the legislation challenges in the coming year. There were attempts to modify the law, and some of its tenets needs to be regulated.

Regarding the regulation of the Bill, from January to April 2015 the Ministry of Justice opened an online consultation in the portal “Pensando Direito”, on three thematic topics (i.e. net neutrality, Internet privacy, and retention of access logs) and one open for all topic. The consultation received 1843 contributions, and the government has not revealed by the publication of this chapter the results of the consultation (although a good summary of contributions was published by InternetLab, 2015).

A second challenge refers to the constant willing to specify Internet crimes. A Bill, supporting the “Right to be Forgotten”, for example, has been submitted to Congress for appreciation (PL-215/15), as well as legal reforms to reduce protection for political criticism online (PL-1589/15) and to create massive surveillance databases (PL-2390/15). All of those continue to face multistakeholder public scrutiny, most of

it using networks enhanced during the first consultation of the Bill.

Conclusion

Marco Civil was created at large by proposal of civil society at large, rather than an initiative of the State itself. As such, it was a product of an open government initiative, where the Ministry of Justice collaborated with civil society to promote an open and collaborative effort to draft the bill, which together, they got it approved.

On the year of the Web 25th Birthday, Tim Bernes-Lee argued that “through this concept of linking, the web has grown up significantly in 25 years, from a collection of interlinked static documents to a much richer environment of data, media and user interaction.”¹ In alignment with that, the Marco Civil is, as an Internet milestone, a product of collection of interlinking data and user interaction that supports precisely what originated itself. This is how the policy making process of the piece started, and how it continues to be true until today.

Fabro Steibel is the General Coordinator of Institute for Technology and Society (ITS Rio), professor of new technologies and innovation at ESPM Rio (Brazil), the Independent Researcher for the Open Government Partnership in Brazil, and the open government fellow at the Organization of the American States.

Celina M.A Bottino is a Brazilian lawyer, researcher and project lead at the Institute for Technology and Society (ITS Rio). She is a Harvard Law School graduate (LLM’10) with a focus on International Human Rights, and a former Kaufman fellow at Human Rights Watch.

1 Bernes-Lee, Tim. Wired, 06 Feb 2014, <http://www.wired.co.uk/magazine/archive/2014/03/web-at-25/tim-bernes-lee>



Data Protection & Privacy in the Internet era: the Brazilian Marco Civil

The “Marco Civil da Internet”, a Law approved in April 2014, following the Snowden Scandal,¹ despite not being a general data protection law, deals with privacy and data protection in different provisions. Actually, Brazil, unlike other countries (including its neighbors Argentina and Uruguay) does not have a general law on personal data protection, only presenting some constitutional provisions and sectoral rules, being one of those the Marco Civil. I will start the analysis by the other privacy and data protection rules contained in the Brazilian legal system.

The Brazilian Federal Constitution recognises in its article 5, X, private life, intimacy, honour and image as fundamental rights. The same article 5 guarantees the protection of other aspects of privacy (article 5, XI, XII, XIV),² creating in its clause LXXII a new judicial remedy,

1 See FARRELL e FINNEMORE. The End of Hypocrisy: American Foreign Policy in the Age of Leaks (2013). 92 Foreign Aff. 22

2 See Privacy and Human Rights 2006. An international survey of Privacy Laws and Developments. Electronic Privacy Information Center (Washington, DC, USA) and Privacy International (United States of America, 2006). “Article 5 of the 1988 Constitution of Brazil 1. provides that “the privacy, private life, honor and image of people are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.” 2. The Constitution also holds the home as “inviolable,” and “no one may enter therein without the consent of the dweller, except in the event of flagrante delicto or disaster, or to give help, or, during the day, by court order.” 3. Correspondence and electronic communication are also protected,

the Habeas data.³ The Brazilian Civil Code adopted a similar position, including in its article 21 the right to privacy as a ‘personality right’. Moreover, there are other laws dealing with some aspects of information privacy (data protection), besides the Habeas data writ contained in the Brazilian Federal Constitution, which are the Brazilian Consumer Code,⁴ the Positive Credit History Act,⁵ the Access to Public Information Act⁶ and the “Marco Civil da Internet”.⁷

Articles 43 and 44 of the Brazilian Consumer Code regulate the maintenance of databases and consumer files, establishing some rights for consumers.⁸ Amongst other provisions it recognises the

except by court order “for purposes of criminal investigation or criminal procedural finding of facts.”⁴ “Access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity.”⁵ Finally, the Constitution provides for habeas data, which guarantees the rights: a) to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character; and, b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.”

3 BESSA, Leonardo Roscoe. O Consumidor e os Limites dos Bancos de Dados de Crédito. Biblioteca de Direito do Consumidor V. 25. Revista dos Tribunais, São Paulo, 2003. P. 107.

4 The Complementary Law 105/01 (Lei Complementar nº 105/2001) regulates the exchange of negative information between financial institutions and the Brazilian Central Bank.

5 Law n. 12.414 of 2011.

6 Law n. 12.527 of 2011.

7 Law n. 12.965 of 2014.

8 The Consumer Code does not bring a definition of personal data, however, it applies to both natural and legal persons. See Article 2: “Consumer is any individual or body corporate who acquires or uses any product or service as an end user.” (Unofficial translation available at http://www.caxias.rs.gov.br/_uploads/procon/codigo_defesa_consumidor_ingles.pdf)

rights of access⁹ and rectification,¹⁰ giving to consumers the possibility to access any personal information stored and to rectify it if they find any inaccuracy (Article 43, caption and paragraph 3).¹¹

The other piece of legislation that deals with information privacy issues is Law n. 12.414 of 9 June 2011, which regulates the creation and access to databases of information about payments, regarding natural and legal persons, with the aim of creating credit history.¹² Within the data protection provisions of this Law are the definition of sensitive data, some data protection principles (such as purpose principle) and data subjects' rights.¹³

Moreover, the Law on Access of Public Information (Law 12.527/2011) also contains some data protection safeguards in its article 31, which restricts the access to personal information contained in governmental databases when it represents risks for intimacy, private life, honour, image or to other freedoms and individual rights.

The same can be said about the Brazilian Civil Rights Framework for the Internet, the so-called Marco Civil da Internet (Law 12.965/2014), which is the focus of this book. This law deals with three different groups of provisions regarding the protection of privacy and of personal data: i) principles and users' rights; ii) log's retention; and, iii) access and processing of personal data.¹⁴

9 Ibid. P. 413.

10 Ibid. P. 416.

11 The right of deletion is implicit, since in the case there is any information in the database which is wrong or where the storage limit is over, the consumer will be able to request the deletion of such information.

12 Available at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12414.htm. Accessed 20 June 2015.

13 See article 3, §3, II and article 5.

14 Danilo Doneda. Privacy and data protection in the Marco Civil da Internet

Following the approach adopted by the European Union in articles 7 and 8 of the Charter of Fundamental Rights of the European Union, Marco Civil da Internet recognizes the protection of privacy and data protection as different rights, despite of their similarities.¹⁵ This means that in some situations, although there will not be a violation of privacy, there will be possible to have a violation of the protection of personal data.

It also refers in its article 3 to privacy protection and personal data protection as principles that should be followed in the regulation of the Internet use. Article 8 considers the protection privacy in communications as “a prerequisite for the full enforcement of the right of access to the Internet.”

Moreover, it incorporates some data protection rights, principles and requirements in its article 7, such as the purpose principle, the requirement of express consent for data processing and also the possibility for the data subject to require the full removal of his/her personal data stored in connection with access to an application at the end of the agreement with the application provider.

Finally, there are some data retention provisions which pose a series of concerns regarding data protection and privacy. In that sense, a recent ruling from the São Paulo State Court of Appeal concluded that the data retention provisions of Marco Civil da Internet have no direct effect and need further implementing rules.¹⁶

The Brazilian Ministry of Justice, aware of the need to adopt implementing rules, launched an online public consultation on a Draft Regulatory Decree of the Marco Civil da Internet. No text was put on consultation, instead, the Ministry of Justice classified the

15 Ibid.

16 Tribunal de Justiça do Estado de São Paulo. Agravo de Instrumento n. 2168213-47.2014.8.26.0000, Rel. Rômulo Russo. 7ª Câmara de Direito Privado. Judgement on 10 March 2015.

provisions that need further implementation into four categories: i) net neutrality, ii) privacy, iii) data retention and iv) other issues.¹⁷ After this first round of consultation the Ministry of Justice launched a second round, asking society to present suggestions for a draft text based on the comments made in the first round.

This new regulatory regime brings new challenges to all sectors that rely on the internet for their activities and also brings some privacy concerns, as discussed above.

It is worth noting that the Brazilian Ministry of Justice put forward a public consultation on a draft general data protection bill¹⁸ that follows, in general terms, Directive 95/46/EC,¹⁹ aiming at filling the gap in this area.

Brazil is facing an evolving scenario in terms of both data protection and Internet regulation, which started with the Snowden scandal and ended up with the approval of Marco Civil da Internet and the appointment of a UN Special Rapporteur on the right to privacy,²⁰ following a proposal supported by Brazil and Germany.

Although Brazil has played an important role in fostering the debate on the protection of privacy in the international scenario, it still needs to adopt the necessary measures to create a national legal environment for the protection of privacy and personal data which is in line with the discourse adopted at the international level. The Marco Civil da Internet was the first move in that direction and the

17 More recently, in May this year, the Ministry of Justice launched another public consultation on the regulatory decree of Marco Civil da Internet, aiming at systematizing all contributions received in the first public consultation. See <http://participacao.mj.gov.br/marcocivil/sistematizacao/>. Accessed 14 July 2015.

18 <http://participacao.mj.gov.br/dadospeessoais/>. Accessed 20 June 2015.

19 There are also two bills of law under discussion in the Brazilian Senate aiming at regulating the processing of personal data: PLS 330 of 2013 and PLS 181 of 2014.

20 See <http://www.ohchr.org/EN/HRBodies/SP/Pages/HRC29.aspx>. Accessed 29 September 2015.

public consultation on the draft data protection bill is a good attempt to involve society in this debate and to define the future directions of privacy and data protection in the country.

Mario Viola is the research coordinator on privacy and data protection issues at the Institute for Technology and Society (ITS Rio). He holds a PhD in Law and a Master of Research Degree from the European University Institute (Italy), a Master Degree in Private Law and a postgraduate degree in Consumer Law from UERJ (Brazil), and a postgraduate degree in Private Law from UFF (Brazil). Mario is one of the editors of this book.



Internet Intermediaries Liability

An overview of the
Marco Civil provisions


The Brazilian Internet Bill of Rights (Law nr. 12965/2014) seeks to establish “*principles, guarantees, rights and obligations for the use of the internet in Brazil*” according to its Article 1st. In the online consultation that has led to the creation of such Law, the issue of Internet intermediaries’ liability was one of the most intensively debated by all participants highlighting how the design of a specific liability regime could impact the enjoyment of rights such as freedom of expression and privacy, as well as innovation and copyright protection.

Law nr. 12965/14 provides two different regimes depending on whether the intermediary falls into the category of *connection/access providers* or *application providers*.

Access Providers

To hold the access provider liable for the acts of its users is a practice rejected by national and international courts since the late nineties.¹ Two are the most common arguments to recognize the lack of responsibility of connection providers for the damages caused by third

1 See Religious Technology Center v. Netcom OnLine Communication Services, Inc, 21.11.1995. In Brazil, among many decisions, see: TJRS, Ap. Civ. nº 70001582444, Judge Antônio Correa Palmeiro da Fontoura, 29.05.2002.



parties that are simply using their services to connect to the Internet.

The first argument lies in the technical impossibility on the part of providers to avoid harmful behaviors of its users. It is noteworthy that this preventive conduct of connection providers is not only impossible but also undesirable, since it would result inevitably in an increase in mass surveillance practices of controversial legal compliance.

The second argument transcends the technological aspect by focusing on the rupture of any link (“*nexo causal*”) between the damage caused to a third party and the act of simply providing Internet access to the user. The simple act of providing Internet connection does not seem to be the direct and immediate cause of the damage suffered by a victim. The direct cause of damage would be the behavior specifically played out by the user that created the illegal content.

Law nr. 12965/14 echoes such arguments in Article 18, as it exempts connection providers from liability for the actions of its users:

Article 18. Internet connection providers shall not be held liable for civil damages resulting from content produced by third parties.

It is important to mention that the exemption set forth in Article 18 only applies to cases in which the provider would be held liable for a third party conduct. Connection providers are still liable for the damages they cause directly through their own activities, as provided by a large pool of cases decided in the national courts. Among those cases of liability of connection providers are situations involving damages to their own users, such as the failure to provide services dully contracted or rendered in different conditions than the ones previously established by contract or by the relevant sectorial regulation.

Application Providers

Article 19 of the Marco Civil establishes the regime for Internet application providers' liability. The article begins with a reference to freedom of expression and states that the chosen liability regime is set in force "to prevent censorship". Such choice of words highlight the importance of defining a liability regime that recognizes the role of intermediaries as vehicles to allow speech on the Internet at the same time that it avoids creating excessive burdens over intermediaries that could create incentives for private censorship.

Art. 19. In order to ensure freedom of expression and to prevent censorship, internet application providers may only be held civilly liable for damage resulting from content generated by third parties if after specific judicial order the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary.

The Marco Civil affirms that the general rule for intermediaries' liability in Brazil is based on the fault of the provider, denying attempts to hold them liable in typical strict liability standards, being either by the simple availability of harmful content based on the risk theory or based on the rendering of a defective service.

At the same time that the Marco Civil evades strict liability², the

² It is important to mention that the Supreme Court of Argentina decided that Internet application providers should not be held liable by a strict liability regime as well. The decision, which uses the Brazilian Marco Civil as one of its reference, concerned the claims brought by Maria Belen Rodriguez against Google over Plaintiff's photos displayed under Google search. The decision can be found here: <http://www.telam.com.ar/advf/documentos/2014/10/544fd356a1da8.pdf>. For commentaries

approach it provides for the liability based on fault is quite different from the usual liability arising out from the simple lack of action after being notified that damages are being caused by the availability of a certain material (a notice and *takedown* regime).

Here lies perhaps one of the most heated controversies of the Law, since the Marco Civil provides that intermediaries would only be liable if they fail to comply with a court order requesting the removal of certain content.

One of the most frequent criticisms to such provision states that the Marco Civil would only allow contents to be removed by a court order. However, that does not seem to be the best interpretation of the mentioned provision. What the Marco Civil sets forth is the safeguard of application providers in the sense that they will only be held liable if they do not comply with a court order requesting the removal of the offensive material. The provision does not prevent intermediaries to determine their own requirements for removing content once notified by the alleged victims for damages arising out from content made available through their platforms. Such requirements are usually contemplated in their respective Terms of Services and therefore content might be removed based on the fact that the provider recognizes that a specific photo, video or text is indeed infringing its own Terms.

However, in order to not create incentives for private censorship, providers are not obliged to do so not only because the infringing nature of a content might be a very subjective matter, but also because the Marco Civil recognizes that the Judiciary Power is the competent

on the decision, see Darian Pavli. "Case Watch: Top Argentine Court Blazes a Trail on Online Free Expression" <https://www.opensocietyfoundations.org/voices/case-watchtopargentinecourtblazes-trailonlinefreeexpression>

authority to determine whether a content is in fact illicit or not.

In this sense, the Marco Civil gives freedom of expression a high stance in this debate, guaranteeing to providers an immunity that neutralizes any concern that they would have on being held liable for the lack of content removal once notified³

Judicialization and its effects

Marco Civil fosters the understanding that an intermediary should not be compelled to remove a content simply because a notification has been received. The provision of Article 19 creates incentives for the claim to be brought to the Judiciary.⁴

One recurrent argument in this regard is the fact that the speed in which contents might be copied and shared through the Internet is not compatible with the time it takes for a lawsuit to be brought to the Judiciary. At the same time, it is important to stress that the Marco Civil expressly provides that a judge may order the removal by granting the victim an injunction in cases when it seems clear that the delay in taking the content down would worsen the victim's situation.⁵

3 As mentioned by André Zonaro Giacchetta, analyzing the text while on debate in the National Congress: "The text of the Draft Bill clearly favors the guarantee of the rights of Internet users, instead of restricting their liberties. This is a standard created for the user in good faith. There is a clear choice for ensuring freedom of thought and expression, as well as the privacy of Internet users and the protection of personal data" (in "A Responsabilidade Civil dos Provedores de Serviços de Internet e o Anteprojeto de Reforma da Lei n 9610/98", In Revista da Associação Brasileira da Propriedade Intelectual, n. 117; p. 39).

4 See Marcelo Thompson. "The Insensitive Internet – Brazil and the Judicialization of Pain" (<http://www.iposgoode.ca/wpcontent/uploads/2010/05/MarceloThompson-TheInsensitiveInternet.Final.pdf>).

5 See Marcel Leonardi. Responsabilidade Civil dos Provedores de Serviços na Internet. Brasília: Juarez de Oliveira; p.207.

In order to make this solution easier and faster to the victim of a damage, the Marco Civil states that such cases can be brought to the Special Small Claims Courts. The provision of the third paragraph of Article 19 makes reference to cases of *“compensation disputes for damages arising from content made available on the internet related to the honor, reputation or personality rights, as well as the removal of related contents by internet application providers”*.

The balance that the Marco Civil tries to achieve aims at accommodating the interests at stake in order to protect the freedom of expression by clearly defining the role of the provider and ensuring that they must play a prominent role in the prevention and elimination of damage, without such result being achieved through arbitrary judgments or mere fear of future liability.

If the situation is brought to a Court, the Marco Civil recognizes the Judiciary as the most appropriate forum for the resolution of such cases. At the same time, an interesting side effect of the Marco Civil is the fostering of continuous initiatives toward the capacity building of judges on the evolution of modern technologies for information and communication as such knowledge is crucial to the exercise of their functions.

In affirming that application providers must only be held liable in cases in which a fault is found, and not by simply failing to comply with a notification, the Marco Civil separates itself from the case law that has been construed in the last decade in Brazil, especially by the Superior Court of Justice (STJ).

After one year of being in force, one clear result of the Marco Civil is the debate in the Superior Court of Justice regarding the necessity of the Plaintiff to inform the URL under which the infringing content is displayed. Law nr. 12965/14, in its Article 19th, §1st, states that: *“On pain of nullity, the judicial order referred to above must clearly and specifically identify the offensive content, so that the material may*

be located unequivocally". Recent case law in the STJ confirmed the necessity of having the URL informed as to comply with the mentioned legal requirements.⁶

Two exceptions to the liability regime

Law nr. 12965/14 has two important exceptions to the general liability regime, as described in the article 19: *copyright infringement*, as provided by the second paragraph of such article, and cases of so-called *revenge porn*, provided by Article 21.

For both cases the general rule that intermediaries may only be held liable if they fail to comply with a court order demanding the removal of the content is not applicable. The two hypotheses, for very different reasons, could trigger the liability of the provider if it is notified and fails to remove a specific content.

Copyright

The exception concerning copyright was due to a continuous demand, especially by radio and television broadcasters, for the Marco Civil not to change the established practice of sending out notifications for the removal of copyrighted material made available without proper authorization or in circumstances not protected by the exceptions and limitations regime as set forth by the Copyright Act (Law 9.610/98). Brazilian courts have recognized several times the liability of the application provider when, once notified, it fails to remove the content.⁷

6 STJ, Special Appeal nr 1512647/MG, Justice Luis Felipe Salomão, 13/05/2015.

7 Even though a more recent decision (see note 6 above) replaced the usual notice and takedown standard for an analysis of an eventual contributory or vicarious liability of the provider (in similar terms to the Grokster case, decided by the US Supreme Court).

An additional circumstance that explains why such exception was inserted in the review process of the original text of the Marco Civil in the National Congress was the fact that the Federal Government, through the Ministry of Culture, has been developing in recent years a process of consultations for the reform of the Copyright Act, dealing with topics such as liability for copyright infringements carried out online. In this regard, the removal of further considerations on liability through copyright infringement would prevent the existence of two different regimes for the very same issue in Brazil: the one of the Marco Civil and the other as provided for an eventual reform of the Copyright Act.

It is worth noting that the Marco Civil has not simply deferred the treatment of such matter to the Copyright Act. The second paragraph of Article 19 of Law No. 12965/14 states that the regulation of online copyright infringement should be tackled by the Copyright Act, but at the same it conditions such treatment must *“respect the freedom of speech and other guarantees provided for in Article 5 of the Federal Constitution.”*

The final part of such provision is quite revealing since one of the guidelines of the reform of the Copyright Act is to achieve a better balance between copyright and other fundamental rights, such as access to knowledge and freedom of expression, at the same time hindering abusive conducts in copyright enforcement. In this sense the Marco Civil advances some of the concerns of the Copyright Act reform, as envisioned by the Ministry of Culture, already setting an interpretive clause to whichever the solution adopted in the reform of the specific law.

Revenge Porn

The second exception to the rule of Article 19 of the Marco Civil is the provision of Article 21 for cases of so-called revenge porn materials.

The provision was inserted in one of the last rounds of editing on the text of the Bill and it was clearly motivated by the suicide of two Brazilian girls after intimate adult videos end up being shared through WhatsApp. A number of Congressmen have referred to this case as the trigger for creating an exception to the general rule on intermediaries' liability.

Art 21. Internet application providers that make available content created by third parties will be secondarily liable for violations of privacy resulting from the disclosure, without the participants' authorization, of images, videos and other material containing nudity or sexual acts of a private nature, if after receiving notice from the participant or the participant's legal representative, the internet application provider fails to take prompt action to remove the content from its service, subject to technical limitations of the service.

§1. On pain of nullity, the notice referred to in this article must contain elements that permit the internet application provider to identify the specific material alleged to violate the participant's right to privacy and to determine that the person making the request has a lawful interest to do so.

Article 21 creates a different liability regime from the general rule of Article 19 for the cases in which the application provider fails to remove materials that falls into the category presented above. It is important to highlight that the final part of the provision conditions this exceptional liability to the evidence that the providers have not acted through in a diligent manner (“*take prompt action*”). That mentioning, together with the addition of the expression “*technical limitations of the service*” could provide an opportunity for discussion in the forthcoming lawsuits on what would the standards be for providers to act when they are given notice that an intimate material, such as the ones targeted by this provision, was made available through their applications.

Carlos Affonso Pereira de Souza is Director of the Institute for Technology and Society (ITS Rio) and professor of the Rio de Janeiro State University’s Law School. Carlos holds a doctorate and a master’s degree in civil law from the University of the State of Rio de Janeiro. Carlos is one of the editors of this book.



Internet Intermediaries Liability

A North American Perspective /or/
Perspectives from the United States
and Canada

The Marco civil da Internet establishes a brand new framework for liability of Internet intermediaries regarding third parties' contents and activities. Besides providing general immunity schemes for Internet access providers and Internet application providers, Section III frames two derogatory regimes regarding revenge porn and copyright. The latter still needs to be designed. This chapter compares this new piece of legislation with both Canadian and United States frameworks. The analysis suggests Brazil is not the first to set different frameworks for varying matters. Based on fact that it is the only one to be consistent with principles set by the Marco civil da Internet, this paper will argue that Brazil should frame the upcoming copyright scheme with regards to Canada's notice-and-notice framework.

1. General Framework for Intermediaries

According to Article 18, Internet access providers are not liable for content transiting through their networks. Similarly, Article 19

provides that, in order to ensure freedom of expression and prevent censorship, Internet application providers shall not be held liable for user-generated content; even after they have been noticed and so are aware of the illegality of such content. The only way to take down an illegal content is a court order, which, according to Article 22, shall point the exact material in question and its location. A provider who does not comply with the court order will then be held liable for the content.

With such safe harbour, Brazil tried to prevent abusing notifications to take down and avoid uncompetitive legal burden for providers, while not transferring judging power over issues involving freedom of expression to private operators. The idea of ensuring freedom of expression and preventing censorship pervades Section III of the Marco civil da Internet and exudes from provisions framing the implementation of the judicial take down. According to Article 20, the intermediary shall notify the user responsible for the content with the court order and/or of any legal challenges, to allow the third party to submit a defence within court. Also, under Article 20 §1, a notice explaining that the content has been taken down and/or displaying the court order shall replace the illicit material.

United States of America. – Section 19 of the Marco Civil da Internet is actually very similar to Section 230 of the federal Communication Decency Act of 1996 under which Internet service providers cannot be held liable for any third parties' content. Although its title and the fact its original purpose was to restrict speech, the CDA provides a general immunity framework to intermediaries. Under Section 230(c)(1), “[n]o 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.” However, intellectual property¹ and federal criminal prosecutions fall outside the scope of

1 See, below, part. III.

this safe harbour.² Additionally, intermediaries are not immune from content they authored.

Canada. – Oddly enough, the Canadian framework is still ambiguous. Neither court has established a strong and clear case law, nor has the federal legislator passed any statute on that matter; except in matters regarding revenge porn³ and copyright⁴. At the provincial level, legislators, while having competence regarding civil liability, did not design such framework; excluding Québec.

Notwithstanding, under Canadian common law, intermediaries could benefit of a notice-and-take-down safe harbour. The Supreme Court of Canada set the cornerstones of a common law framework in 2004⁵. Even though the case was regarding copyright, it should be considered as the common law framework⁶. The majority relied on the *Electric Despatch v. Bell*⁷ precedent from 1891 ruling for immunity of telecommunications operators regarding third parties' uses, and referred to the general notice-and-take-down scheme provided under the European Union's Directive on electronic commerce.⁸ In accordance, Intermediaries should not be held liable for contents made available or acts performed by third parties on their network if they have no control or input over it. They are not required to monitor

2 47 US Code § 230(e)(1) and § 230(e)(2).

3 See, below, part. II.

4 See, below, part. III.

6 *SOCAN v. Canadian Assn. of Internet Providers*, 2004 SCC 45.

7 See: *SOCAN v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (with general and specific languages); *Crookes v. Newton*, 2011 SCC 47; Reference re Broadcasting Act, 2012 SCC 4.

7 *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, (1891) 20 SCR 83.

8 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, [2000] O.J. L. 178/1, Preamble, clauses 17, 19, 22, 42, art. 3(1) and 13(1).

illicit contents and practices; however, after proper notification, hosting providers should take down illicit content or stop the pursuit of illicit activity. Failing to do so, they will fall outside the scope of the safe harbour.

Québec Exception. – As often in Canada, Québec is an exception. With An Act to Establish a Legal Framework for Information Technology (ALFIT) of 2011,⁹ the civil law province designed a unique framework to provide a statutory safe harbour for intermediaries. Under Section 22, intermediaries are not responsible for contents hosted or transmitted on their networks by third parties. Additionally, Section 36 immunises providers from the acts performed by third parties through their network or service. Also, under Section 27, they are not required to monitor illicit contents.

Contrary to the CDA, providers fall outside the scope of the safe harbour for not promptly blocking access to the content or preventing the pursuit of the illicit activity when they become aware of the illicitness. The mechanism differs from traditional notice-and-take-down as providers are not required to take down content upon notification, but rather solely when they are certain of the unlawfulness. They can also become aware by a given notice from individuals other than right holders or by circumstances that make the illicit use apparent.

2. Special Framework for Revenge Porn

While not criminalizing revenge porn, Brazil opted for a derogatory notice-and-take-down scheme regarding revenge porn materials. Under Article 21 of the Marco civil da Internet, intermediaries will be held liable for breach of privacy arising from the disclosure of materials containing nudity or sexual activities if, upon notification,

⁹ CQLR, c. C-1.1.

such content is not taken down in a diligent manner. The notice shall point the exact location and can only be issued by the victim or by his/her own legal representative.

Canada. – Canada also followed the path of notice-and-take-down, but criminalizes revenge porn. Indeed, the Protecting Canadians from Online Crime Act of 2014¹⁰, within Section 162.1(a) of the Criminal Code,¹¹ created a specific criminal offense for the publication of intimate image of a person without her consent. Under the new section, not only those who publish the material will be found guilty of the offence but also those “who knowingly [...] distributes, transmits, [...] makes available or advertises” such content. Arguably this provides intermediaries with a notice-and-take-down safe harbour for which knowledge is the threshold. Operators will not be liable as long as they are unaware of the offensive material. However, once alerted or given noticed by any means, the provider must comply with taking down the content or risk a criminal conviction.

United States of America. – More than 25 of the United States have followed the criminal path, at least as a misdemeanour, for the publication of revenge materials. Although, prevailing over any States’ legislation¹² Section 230 of the CDA still offers immunity for the intermediaries.

3. Specific Framework for Copyright

The Marco Civil da Internet set the framework for a second derogatory scheme regarding infringement of copyright and related rights that has yet to be designed. According to Article 19 §2, the general framework shall not apply; the relevant regime will be subject to

10 SC 2014, c. 31, s. 3.

11 RSC 1985, c. C-46.

12 47 US Code § 230(e)(3).

specific provisions within the upcoming copyright reform. Until then, Article 31 provides that liability of intermediaries for such matters will be governed under the current legislation; even though, current statutes provide no framework for that matter. As Brazilian courts have previously ruled for a notice-and-take-down mechanism,¹³ it should be applied in the meantime.

United States of America. – As an exception to the CDA, the Online Copyright Infringement Liability Limitation Act, Title II of the well-known Digital Millennium Copyright Act of 1998,¹⁴ establishes a strict notice-and-take-down safe harbour for intermediaries with respect to copyright and related rights. However, caching,¹⁵ network and access providers,¹⁶ remain immune from liability for infringement if they are not the authors and do not interfere with the content.

Under Section 512(c), hosting providers are not liable for copyright infringement by third parties' content if they do not have actual knowledge of the content and, upon notification, expeditiously remove or disable access to the content. A similar safe harbour for information location tools providers, as search engine is provided under Section 512(d). In both cases, the content shall be removed upon notice and intermediaries could not be held liable for those removable. Nevertheless, Section 512(g) provides that intermediaries shall promptly notify the user that its content has been taking down. The user can then send a counter notification of non-infringement. From that time the right holder have 10 days to file a lawsuit seeking

13 Carlos Affonso Pereira de Souza, « Responsabilidade civil dos provedores de acesso e de aplicações de Internet: evolução jurisprudencial e os impactos da lei no 12.695/2014 (Marco civil da Internet) in Geroge Salomao Letie and Ronaldo Lemos (eds.), Marco Civil da Internet (Atlas, 2014), 791.

14 Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860.

15 17 US Code § 512(b).

16 17 US Code § 512(b).

a court order against the user; if it fails to do so by 10 days, the intermediary shall reinstate the content before the fourteenth day following the receipt of the counter notification.

This “notice and put back” mechanism was established to protect users from abuses and unlawful claims. However, as Sections 512(c) and 512(d) state that providers shall take down content upon notification, frivolous notices could lead to the removal of legitimate content, notably under fair use or others exceptions. Most of the users would be afraid to challenge legal claims by right holders and will just drop the case.

Canada. – To avoid such abuses, Canada followed another path to ensure the protection of freedom of expression and copyright exceptions when updating its framework in 2012. Because of the uniqueness of the new provisions, the Copyright Modernization Act of 2012¹⁷ is often presented as the next-generation approach, striking a balance between all stakeholders’ interests, from right holders to users. Regarding intermediaries’ liability, the updated Copyright Act,¹⁸ which last provisions came into force January 1st 2015, designed a one of its kind framework to protect users from false claims of infringement, and attack to freedom of expression with needless takedowns of legitimate contents.

Section 31.1 provides a safe harbour for network, caching, and hosting providers from copyright infringement by third parties, except if the service is primarily for the purpose of copyright infringement¹⁹. Under Subsection 31.1(2), caching providers will fall outside the scope of the safe harbour if, other than for technical reasons, they modify the content or interfere in the transmitting. Regarding for hosting services, subsection 31.1(5) provides that the safe harbour will not

18 C 2012, c. 20.

19 RSC 1985, c. C-42.

apply if the intermediary is aware of a court order ruling the content or the use infringes rights. Contrary to Article 19 of the Marco Civil da Internet, the court order does not need to request for the removal of content. Finally, Section 41.27 states that if an Internet location service is used as a search engine, and is found to have infringed copyright by making a reproduction or a communication of a protected work, right holders are not entitled to any remedy other than an injunction to remove the content. The regime is, after all, quite similar to Article 19 of the Marco civil da Internet.

In addition to these safe harbours, Canada has come up with a notice-and-notice scheme, actually inspired of the voluntary system in place between music industry and intermediaries before the copyright reform. Under Sections 41.25 and 41.26, rights holders can send a notice of infringement to intermediaries, which shall forward it to the infringing third party. Providers shall also retain records that will allow the right holder to present in court evidence of the infringement and discover the infringer's identity. Supported costs can be billed to right holders for reimbursement. It is worth noting that an intermediary failing to comply with the notice-and-notice obligations will not fall outside Section 31.1's safe harbour but could be ordered to pay from \$5,000 to \$10,000 in damages to the right holder.²⁰

This unique framework was quite unexpected as the Supreme Court of Canada called the legislator to design a notice and take down framework in 2004.²¹ On the other hand, the Federal Government and the Parliament believe that notice-and-notice would have a sufficient deterrent effect while protecting legitimate uses and not denying right holders of any protection for copyright on the Internet. They can still

²⁰ Copyright Act, RSC 1985, c. C-42, s. 31.1(6) with s. 27(2.3).

²¹ Copyright Act, RSC 1985, c. C-42, s. 41.26(3).

file a lawsuit before competent courts.

Some doubts remain regarding overlaps with Québec’s ALFIT; confusion as to whether providers located in Québec or who are dealing with right holders from this province are subject to Section 22 of the ALFIT regarding copyright infringement. Under the federal paramountcy doctrine, the federal statute shall prevail over the provincial statute. Though both could coexist as provisions of the Copyright Act amount more to an exception than immunity: the ALFIT would not be inconsistent and incompatible with the federal safe harbour.²² However, Courts still need to rule on that matter, as the wording of the federal statute is quite unclear.

* * *

Brazil’s Upcoming Scheme. – With the upcoming copyright reform, Brazilian lawmakers will have to choose between a notice-and-take-down scheme like in the United States and European Union, or the Canadian innovative notice-and-notice framework. The latter exhibits the most consistency with the general philosophy underlying the Marco civil da Internet. Article 19 §2 refers to a specific implementation for copyright, and not to a new and different framework, like in the matter of revenge porn. We argue that a notice-and-notice framework would be this specific implementation very consistent with the general framework of Article 19. It will also meet the requirement of Article 19 §2 to establish a regime protecting freedom of speech, while protecting rights of the right holders. Notice-and-notice protects right holders through court decision, which could be ruled through expedited procedures, and freedom of speech while, if correctly framed, educating citizen to copyright protection and what they can or cannot do on the Internet. The first months of the system, in addition with the development of legal streaming offers, saw the

22 SOCAN v. Canadian Assn. of Internet Providers, 2004 SCC 45, at 127.

decrease of downloading and file sharing in Canada.²³

The Rule of Contract and Notice And Take Down. – On paper, intermediaries’ work seems complex, as legal frameworks appear to be as diverse as jurisdictions and type of content. The reality is quite the opposite. Legislations only set minimum requirements for Internet intermediaries: there remains opportunity to choose more stringent frameworks. In the United States, Canada or even in Brazil, most of the providers added self-designed notice-and-take-down frameworks within their Terms of use. Coupled with notice-and-notice, the framework may actually be the best deal protecting right holders, users and intermediaries. Providers will take down obvious illegal content; though will require court order to remove uncertain contents, and notably those who could be protected under fair use.

²³ A similar position was held by the Supreme Court of Canada in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, at 22-23 (regarding tobacco legislations).

²⁴ Internet Security Task Force, “Six Strikes And You’re (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System” (Press release), PR Newswire, May 12th, 2015, online: <http://prn.to/1SiyYiA>.

Figure. Summary of Internet Intermediaries' Liabilities

	Brazil	United States	Canada	Québec
Illegal Content (other than copyright infringement or revenge porn)	No liability until court order.	No liability until court order.	(Case law provides Safe Harbour through Notice-and-Take-Down.)	Safe Harbour through Notice-and-Take-Down.
Copyright Infringement	(Case law provides Safe Harbour through Notice-and-Take-Down.)	Safe Harbour through Notice-and-Take-Down.	No liability until court order	
Revenge Porn	Take-Down	Court order.	Take-Down.	

Florian Martin-Bariteau is an Internet Policy Global Fellow at the Institute for Technology and Society (ITS Rio) and a Lecturer at the Faculty of Law and Department of Computer Sciences of the Université de Montréal.





Transatlantic Perspectives on the Marco Civil

Since its passage in 2014, the Marco Civil da Internet is no longer a reference only within Brazil. The law has become an example of collaborative drafting to enshrine a set of rights and obligations for the online world. It is inspiring similar discussions in various contexts that are propagating connections throughout Europe, the United States and the world. Among its many effects, it created momentum for consolidating support for an Internet Magna Carta - proposed by Tim Berners-Lee, inventor of the World Wide Web - similar to the Great Charter of the Liberties, a law first passed in England in 1215 and finally transformed into statute law in 1297, guaranteeing basic rights and freedoms.

Starting as an experimental initiative, the Marco Civil reached the Brazilian Congress at a time of prolonged political crisis following massive protests in 2013. Mobilized in large part online, the crowds were initially spurred by exorbitant World Cup preparations, but the protests reflected a larger dissatisfaction in society over corruption, a lack of public services and rising prices, amongst other grievances. (Waldram 2013). Almost simultaneously, a contractor for the U.S. National Security Agency (NSA), Edward Snowden, leaked documents that showed the global reach of the American intelligence apparatus online (Welch 2013). Its programs especially targeted Brazil's networks, from the President's office to the state owned oil company Petrobras to the Internet Exchange Points that manage most of Latin America's traffic. With an election looming, President Rousseff responded by

making the Marco Civil her government's top priority.

In this context, the Marco Civil passed into law in April 2014 alongside of the inauguration of a new international initiative called the NetMundial. From the beginning, the government consciously linked the national and international structures of Internet governance. Domestically, this passage generated hopes of permeating the rather rigid political rule-making with civil society-driven, participatory initiatives. It was the first consultation conducted entirely online in Brazil, a country that had more than 1000 law proposals mentioning 'internet' between 1995-2014 (Steibel 2014).

Internationally, signing the Marco Civil collaborative outcome document into law - with a number of amendments - was celebrated publicly at the Global Multistakeholder Meeting on Internet Governance (NetMundial) event in Sao Paulo. The first of its kind, NetMundial added to a number of efforts to increase Brazil's visibility as a key actor in internet governance discussions, among which the UN General Assembly resolution introduced on 7 November 2013 (co-sponsored with Germany, adopted by consensus on 18 December 2014) on digital privacy. While the NetMundial has faced challenges to its legitimacy and organization (McCarthy 2015), there is no doubt that the Marco Civil provides principles for other countries to follow in both their own domestic systems and in organizing the governance of the Internet globally. What follows is an examination of how these principles have been reflected in the American and European contexts.

United States

In general, Americans are not familiar with the Marco Civil outside of Internet governance researchers in academia and foreign policymakers in Washington, DC, however there are two ways in which the Marco Civil relates to the U.S. The first is in terms of domestic policy connections; the U.S. is grappling with the same problems of

Internet governance as Brazil and on a similarly grand scale. The second is in terms of its foreign policy, and how the Brazil's position on Internet governance internationally, chiefly through the NetMundial initiative, connects with the goals of the U.S. It is worth examining both domestic and international linkages between Brazil and the birthplace of the Internet to understand how Internet governance operates in both contexts.

Domestic Linkages

Two central principles from the Marco Civil reverberate in the United States. The first is network neutrality, a central Internet governance concept that has struck a chord in both countries, as well as other contexts around the world. Originally coined by the American legal academic Tim Wu, network neutrality dictates that all traffic should be treated equally, from one end of the network to the other, and has historically been a central tenet of online architecture going back to the creation of the Internet. (Wu, 2003) People are rightly curious about the way that their Internet access is provided and would like it to be in a fair, open and transparent fashion, and while the Marco Civil has made this a right in Brazil, in the U.S. events have taken a different course.

There is no easy way to make a constitutional change that would ensure neutral access to the Internet as a right, as it is now in Brazil, where network neutrality is part of Marco Civil. A similar right would require a constitutional amendment process through the approval of two thirds of Congress as well as over 38 states. However, the US Federal Communications Commission (FCC), which is responsible for regulating telecommunications in the United States, recently made changes under its authority created by the 1934 Communications Act to regulate Internet Service Providers (ISPs) as they do telephone companies as "common carriers". This designation requires them to treat

ISPs more like utilities providing a service equally, and gives them an entry to enforce network neutrality and ensure equal access in the same way that a telephone company needs to provide the same connection to any phone number.

Public comments drove the FCC's authority to make unprecedented changes in the way it governs the U.S. Internet by switching ISPs from regulation under Title I of the Act as "information service providers" to "common carriers" under Title II. A request for comments about the proposal to change the regulation of ISPs to enforce net neutrality drew over four million responses on the FCC website, shut it down for a period, and eventually led the commissioner, a former telecom lobbyist, to change his position and vote in favor of reclassification. (Ruiz and Lohr 2015).

Online collaborative and democratic governance methods are the second major way in which Americans can relate to the Marco Civil, a law that the public edited and developed through an online and open source tool. The process created the law but also embedded the principles that created it within the constitution, and democratic and collaborative governance through the Internet is now a part of Brazilian federal law.

In Brazil, this mandate has helped to create further public commentary systems such as the Ministry of Justice's requests for comments on corruption or participa.br, a website maintained by the President's office to gain public input on issues, especially on network neutrality itself. In both the U.S. and Brazilian cases, net neutrality has become both the catalyst and the means of drawing online participation, and while we have different federal governance systems in place, it is important to note the role that this principle plays in driving larger changes in both process and policy.

International Movements

The second track of the American perspective is international, stemming from the Brazilian government's NetMundial initiative to encourage international dialogue about the Marco Civil and its multistakeholder Internet governance model, embodied by its Internet Steering Committee. The U.S. government originally developed and hosted the research network that became the Internet in partnership with universities and private companies, and its stewardship of the domain name system reflects this history. At first, the U.S. government directly managed these "Critical Information Resources" (Denardis 2012) and later controlled them indirectly through its designation and continued control of the International Corporation of Assigned Names and Numbers.

Governments, civil society organizations and some companies are pushing the U.S. to complete the transition of its authority over ICANN's Internet Assigned Numbers Authority (IANA), which allocates blocks of IP addresses to regional internet registries and manages the domain name systems that give countries, governments and organizations the .com suffix and a number of others. IANA and this system is part of a larger debate over the governance of international networks. This has traditionally been one dominated by the United States, but other countries have rightly questioned this arrangement as the size and importance of the Internet have grown and it has become a completely global network, which has put the U.S. on the defensive in terms of defending the status quo and resisting change.

The 2013 revelations of Edward Snowden also put the U.S. on the defensive about surveillance policy and added points to the argument that it should hand over greater control of the root level infrastructure to international bodies like the UN or its International Telecommunications Union. This eventually led to the U.S. announcing that it would give up control of the domain name system and support

the transition to an international multistakeholder system of governance (Farivar, 2014). Brazil, one of the key points in the international network infrastructure and an influential Latin American government, was one of the major targets of the NSA's online surveillance systems and a major part of the push to change the U.S. government's control of the system. In reaction to the revelations in 2013, President Dilma Rousseff cancelled a state dinner, gave a scathing anti-surveillance speech at the United Nations, and ordered her government to develop policies to encourage domestic technology development and build infrastructure to route traffic outside of the U.S. (Woodcock, 2013) The scandal also became a major catalyst in making the Marco Civil a priority and cornerstone of Brazilian domestic policy which brought it to a vote and passage in 2014. (Watts & Kaiser, 2013)

The result has been to insert Brazil into the global debate on Internet governance as it pushes to bring the principles of the law, as well as its multistakeholder model, to the world through its NetMundial initiative. American diplomats have been publicly supportive up to a point, happy that Brazil is taking a larger role in global affairs and providing cover for it to champion democratic Internet governance principles that do not come from the U.S., now widely mistrusted in the wake of Snowden's revelations. Paradoxically, the NetMundial, which the U.S. government now broadly supports, comes from a law that passed only thanks to policy shift in the Brazilian government spurred by an anti-American reaction.

Europe

Europe is currently in a 'digital' turmoil, trying to create a distinct regulatory space for Internet activity and business. With its recently launched Digital Single Market and the planned reform of the Data Protection Regulation, the European Union has taken a proactive stance to drive areas of global Internet regulations (Radu and Chenou

2015). At the same time, in the aftermath of the Snowden revelations, transatlantic relations were disrupted, as in the case of Brazil and the US. When President Rousseff called for domestic data centres during her response to the scandal and in her push for the Marco Civil, that idea also resonated among European leaders. German Chancellor Angela Merkel went as far as proposing the creation of a European communications network (BBC 2014), subsequently dropped.

At the domestic level, a number of parliamentary initiatives tackling rights and duties online have spurred recently, such as the report on Rights and Liberties in the Digital Age by the French Commission de réflexion sur le droit et les libertés à l'âge du numérique, the work of Bundestag's committee on the Digital Agenda in Germany, or the recently-launched 'Declaration of Internet Rights' in Italy. A similar initiative is currently discussed in the UK at the proposal of Liberal Democrat leader Nick Clegg.

On 28 July 2015, Italy became the first European country to introduce an Internet Bill of Rights, prepared and released by the Committee on Internet Rights and Duties of Italy's Chamber of Deputies, after public consultation. As with similar practices in the U.S. and Brazil, this is the outcome document of a process started in August 2014 by the Commission and opened to public consultation from 27 October 2014 to 27 February 2015. The draft declaration was opened for public consultation on the Civici platform, where the work of the country's Commission on Constitutional Reforms is also published, but it attracted only limited interest. In total, the draft was accessed 14,000 times and received 590 comments over four months.

Different from the Brazilian Marco Civil, the Italian initiative is not backed by a legislative process (Zingales, 2015). It thus remains a political statement that raises awareness - and hopefully shapes policies and behaviour - around a number of critical guarantees covered in 14 articles, among which right to Internet access, right to

online knowledge and education, protection of personal data, right to informational self-determination, and right to anonymous speech. It stresses a participative approach to governing the Internet (Belli, 2015), calling for the involvement of ‘all those concerned’ to be promoted by public institutions.

The document adopts an explicit European approach, making reference in its preamble to Article 8 of the EU Charter of Fundamental Rights as enshrining the ‘greatest constitutional protection of personal data’. It also sees the right to be forgotten in light of the 2014 EU Court of Justice decision against Google Spain as the right to delisting citizen data in search engine results. While Brazil is still grappling with the ‘right to be forgotten’ discussed in two recent legal initiatives (nº 7881/2014 and nº 1676/2015), in Italy there is disagreement that the scope of the article is not broad enough to cover removal from source sites (Bassini 2015). The Italian text also specifies that the ‘right to neutral access to Internet is a necessary condition for the effectiveness of the fundamental rights of the person’, thus essentially grounding net neutrality in the fulfilment of basic rights. This interpretation - though ambiguous - goes further than the (more specific) net neutrality rules adopted in the EU at the end of June, derived from a consumer approach.

Moving from the domestic to the supranational level, the different European initiatives in Italy, the UK, France and Germany coalesce through the collaboration of politicians and invited experts including academics, journalists, representatives of the telecoms industry and of consumers’ associations. In the Italian case, the jurist and politician Stefano Rodotà became a key figure behind the proposal, known for proposing a ‘constitution for the internet’ back in 2006 and for heading the Italian privacy authority. In Brazil, the Marco Civil consultation process started with a similar proposal the legal academic Ronaldo Lemos made in an editorial in 2007, (Lemos, 2007) but was ultimately

driven by civil society, government and private actors, while garnering strong support from different social movements, making its ultimate development organic rather than top-down. The process itself is important in terms of ownership and collaborative drive.

The original intention behind the work of the Italian Committee on Internet Rights and Duties with this Declaration is not confined to national boundaries, however. Its preamble suggests that it aimed to create a European framework, and provide the Italian people with 'the constitutional foundation for supranational principles and rights'. Welcomed at this stage, the Declaration will be further discussed at the 10th annual meeting of the Internet Governance Forum in Brazil in November, hoping to create international consensus around fundamental rights and obligations online.

Concluding remarks

The Magna Carta of 13th century England had a long-lasting impact on constitutional rights and guarantees. It was, at times, romanticized. This danger is there also for initiatives similar to Marco Civil that do not turn into law, and remain only political statements. It is too early to evaluate what these recent initiatives might lead to in Europe, but not too early to recognize that turning political declarations into timely pieces of legislation needs a stronger commitment. The value of Marco Civil rests as much in the process as in the outcomes and preserving some of that spirit in propagating this model may bring about legitimacy .

In the United States, there is no direct connection between the Marco Civil process and the efforts to reform domestic telecom regulation as in the nascent Italian law, but there are a number of important similarities between the symbiotic work to enforce net neutrality, and the online democratic systems that drive reforms in both countries. Internationally, the NetMundial movement has drawn both American

and European attention and created a new point of reference within global Internet governance debates with the model of the Marco Civil and Brazil's domestic system for others to follow.

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Daniel Arnaudo is an Internet Policy Global Fellow at the Institute for Technology and Society (ITS Rio) and a Senior Research Fellow at the University of Washington's Center for Global Studies where he has collaborated on projects in Seattle, Brazil and Myanmar. His research focuses on internet governance, cybersecurity, and information and communication technologies for development (ICT4D).

Roxana Radu is an Internet Policy Global Fellow at the Institute for Technology and Society (ITS Rio) and a PhD candidate in International Relations/Political Science at the Graduate Institute of International and Development Studies in Geneva (Switzerland). Her current research focuses on new modes of governance for global internet policy-making.



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Carlos Affonso Pereira de Souza,
Mario Viola & Ronaldo Lemos

Understanding Brazil's Internet Bill of Rights

“The MARCO CIVIL was hailed as one of the most remarkable laws about the Web around the world, going over the multiple issues through human rights’ view. For the first time a law tried to embrace a series of rights and guarantees, without being restricted to specific interventions on specific topics. Due to that, the MARCO CIVIL was welcomed as some sort of Brazilian Constitution for the Web. (...)”

For the first time in the Brazilian House of Representatives’ history, suggestions sent even through social media were taken into account. Therefore, the population felt as the author of the MARCO CIVIL and, as a result, responsible for fighting for its success. (...) The MARCO CIVIL is what it is today because it was constituted by many hands and clicks.”

Alessandro Molon

*Rapporteur of Marco Civil da Internet
in the Brazilian Chamber of Deputies*