

2010-2020

Regulatory issues in  
matters of freedom  
of expression and the  
**internet** *in Latin America*

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## Introduction

This research study is based on the analysis of the changes in legislative and jurisprudential matters at the higher court level in Latin America, with respect to a series of significant issues: the right to honor, intellectual property, responsibility of intermediaries, the right to be forgotten and the responsibility of search engine providers, internet neutrality, hate speech and other direct or indirect forms of censorship.

To this end, a series of databases were used, some of which have to be highlighted, such as Redlatam.org, the Observatory for the Civil Rights Framework for the Internet, Colombia University's Global Freedom of Expression project, the Legislative Observatory of the Freedom of Expression Center of the University of Palermo, in addition to the direct pursuit of legislation and jurisprudence at the repositories of the judiciaries and legislative authorities of each country, if they exist, as well as open search via the internet and the review of news from these countries from 2010-2020.

After the review of these sources and the implementation of a relevance filter, both in terms of the subject as well as of the time period, an analysis of the found sources was carried out with the aim of identifying regulatory tendencies, as specified in the project's goals. Furthermore, for a more detailed analysis of the laws and rulings in question, the documents attached in the appendix may be consulted.

## Executive summary

In matters of offences against honor, during the study period criminal codes were modified in Ecuador, the Dominican Republic and Honduras. Likewise, in the Dominican Republic some articles of law 6123 of 1962 related to offenses against public officials in the exercise of their duties, as well as the criminal responsibility of editors, journalists and distributors for such offenses, were declared unconstitutional.

In jurisprudential matters, there are several cases in which content removal was requested or compensation for content considered offensive with respect to internet publications between third parties, or between an individual and a public figure. In this context, the jurisprudence of the Chilean Supreme Court stands out, which has followed disparate criteria in multiple cases, as well as the jurisprudence of the Constitutional Court of Colombia, which unified its criteria in the Sentence of Unification of Guardianship SU-420/19. Moreover, relevant cases have been found in the jurisprudences of Mexico and Paraguay.

Finally, in the jurisprudence of the Supreme Court of Justice of Costa Rica, rulings have been discussed related to the honor of minors due to publications comprising their image in unauthorized publications.

Regarding copyright, several reforms have been developed in the region, especially in the area of liability of intermediaries and the implementation of technological protection measures in the context of the implementation of free-market treaties. Furthermore, a trend exists to reform the systems of exceptions, tending to incorporate greater numbers of exceptions and rules of closure in the style of fair or incidental uses, together with exceptions concerning people with disabilities in the implementation of the Marrakesh Treaty.

There are only a few judicial cases regarding this matter, in particular discussions on the constitutional validity of the implemented regulations.

As for the liability of intermediaries, there are countries that established these standards in the context of the implementation of free-market treaties, such as Chile, Paraguay, Costa Rica and Mexico, and countries that implemented them after a series of legal cases or in which there is no legal standard but a broad jurisprudence regarding this matter, such as Brazil, Argentina and Colombia.

With respect to jurisprudential development, it is important to highlight the Argentinean case of *Rodriguez vs. Google* in 2014, which influenced the debate on this issue in subsequent cases, such as ruling SU-420/19 of the Constitutional Court of Colombia and the *Botelho Case vs. Google Brazil* in the area of the liability of intermediaries for copyright viola-

tions in the absence of an express rule in said area.

Concerning the so-called right to be forgotten, there is no express regulation in almost any country of the region, except for Brazil and Costa Rica, in which regulations of a restrictive nature have been formulated for cases in which the final purpose of the judicial treatment has been mislaid.

In the judicial domain, cases with disparate criteria have been identified in Brazil, Chile, Colombia, Costa Rica, Mexico and Peru. In most countries, such a right has been considered nonexistent and, accordingly, it would be inappropriate for the search engine to de-index or to delete content, opting for measures that are less detrimental to the right of information, such as the updating of content or the modification of internet search metadata on the part of the website publishing the content. However, in Peru, Mexico and Brazil the possibility of ordering the de-indexation of content has been recognized.

As for network neutrality, this has been expressly recognized in Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru. These countries prohibit the discrimination or blocking of content and applications in general, alluding to the legality of content in Chilean, Colombian and Ecuadorian legislation, highlighting Colombian legislation and the existence of special laws blocking child pornography.

Regarding the possibility of establishing the positive discrimination of content through *zero-rating* offers in particular, this has been allowed in all countries with regulations for internet neutrality, either through express permission in the legislation, or due to the sheer tolerance of the supervisory authority.

Concerning hate speech, only Bolivia and Venezuela have established express laws during the study period. In both countries, criminal definitions have been introduced in relation to the spreading, incitement and broadcasting of hate speech, although the formulation of Bolivia's legislation is more in accordance with the standards of free speech, thanks to the proficient delimitation of the criminal definitions. Moreover, only those who committed such acts are sanctioned and not the media outlet. For its part, Venezuelan law does not accurately define the conduct to be sanctioned, while penalizing the media outlets or social media that spreads them on the basis of the liability of the administrators, and imposing sanctions against the media outlet through blocking or revoking concessions.

For its part and in the jurisprudential area, the Constitutional Chamber of the Supreme Court of Costa Rica ruled on a case in which the priority of freedom of expression over the sanction of hate speech was determined, establishing that only subsequent liabilities can be imposed.

Regarding other issues that may constitute violations of freedom of speech, it is important to mention the case of Decree Law 370 in Cuba, which sanctions the spreading of information contrary to social interest, morals and decency, as well as hosting content in foreign servers, among other damaging practices.

Another tendency in this respect is given by the formulation of rules on computer crimes, particularly concerning the ban on the publication of fake news and on identity theft, which, following public debate, have generally been moderated or declared unconstitutional. Only the criminal offense of spreading false information in the area of finance persists in this respect in Costa Rica.

Finally, we can mention the cases of content blocking that were detected extrajudicially in Cuba, Ecuador and Nicaragua. In Venezuela, such blocking has been legal according to the law issued in 2017 against hate speech, for peaceful coexistence and tolerance, although said law has been questioned for its vagueness, disproportionate sanctions and abusive use.

Furthermore, in Brazil there have been cases involving the blocking of websites and applications as a way of penalizing the non-compliance of court orders pertaining to Law 12.965, with the constitutional validity of the relevant articles in the Supreme Federal Court still pending.

Lastly, regulations exist for blocking or filtering illegal content in the context of child pornography in Colombia, which are applicable to internet providers in general, and for harmful content for minors in Paraguay, applicable to internet cafes and places of public access.

## *Offenses against honor*

### Legislation

Firstly, regarding this matter it is relevant to mention the amendments and renewals of the criminal codes which have tended to be comprehensive in nature, including amendments to the system of crimes against honor.

Thus, in 2014 the criminal codes of Ecuador and the Dominican Republic underwent reforms. In 2017 the criminal code of Honduras was also amended.

In the first case in Ecuador, slander was no longer considered an offense, becoming a mere violation, while the offense of libel was left as a privately actionable crime. In both cases, there is no special treatment based on the spread of expressions opposing honor, although they are punished with a custodial sentence.

For its part, in the Dominican Republic the criminal code was changed in 2014, introducing offenses of defamation and slander, both in principle only with penalties of a fine. However, in case of occurring in cyberspace, Law 53-07 on high-tech crimes applies, and in such cases jail sentences are considered. It is important to mention another problematic aspect of this regulation: the fact that what is sanctioned is the violation of the right to honor on the part of legal persons and that the criminal liability of legal persons is determined in the commission of criminal offenses.

Finally, in Honduras the criminal code was replaced in 2017, sanctioning slander, libel and slander, and indirect slander (that is, sharing or reproducing expressions of others), including their spreading in the analysis of the severity of crimes, especially if made via websites or social media, as well as considering the civil subsidiary liability of the medium in which the contents are published.

### Legal Cases

In the area of jurisprudence, the Rodriguez vs. Google case in Argentina is particularly relevant regarding infringements of the right to honor and self image, which will be analyzed in greater detail in the section on liability of intermediaries.

On the other hand, there are plenty of cases involving the application of constitutional protective actions when it comes to publications of individuals on social media that affect the



right to honor of third parties, through the accusation of offenses or bad practices without there being a judicial sentence in that respect.

In Chile, there has been a variety of such cases, going from a stage in which their review was not admitted, as the cases are of a civil or criminal jurisdiction, to later evolve to consider an analysis of balance between freedom of expression and the right to honor or other rights, in which the tendency is to order the elimination of content without considering in the analysis the liability of the site where they are hosted. In more recent cases, sentences have been issued stating that the content must be kept online because freedom of expression prevails, without there being a definite trend towards this aspect.

Jurisprudential development of the Supreme Court in cases of the right to honor due to publications by individuals	
Criterion of rulings	Cases
Action is not appropriate	<ul style="list-style-type: none"> <li>• Sobarzo vs. Federación de estudiantes Usach, rol 36753-2015</li> <li>• Zúñiga vs. Tobar, rol 22071-2016</li> <li>• Marabolí vs. Soto, rol 24351-2016</li> </ul>
Prevalence of the right to honor or others over the right to freedom of expression	<ul style="list-style-type: none"> <li>• Araya and Espinoza vs. Bernini and Cortés, rol 2536-2016</li> <li>• Salgado vs. Troncoso, rol 14998-2018</li> <li>• Sepúlveda vs. Inostroza, rol 14869-2018</li> <li>• Torres vs. Ánriquez, rol 29621-2018</li> <li>• Rioseco vs. Vildósola, rol 31539-2018</li> <li>• Silva vs. Vargas, rol 26599-2018</li> <li>• Moya vs. González, rol 2682-2019</li> <li>• Garrido vs. Saavedra, rol 2327-2019</li> <li>• Hlousek vs. Riquelme, rol 7707-2019</li> <li>• Agüero vs. Zúñiga, rol 27759-2019</li> </ul>
Prevalence of freedom of expression over the violation of other rights	<ul style="list-style-type: none"> <li>• Echeverría vs. Soto, rol 18725-2019</li> <li>• Paredes vs. Grondoña, rol 34095-2019</li> <li>• Molina vs. Stipo and others, rol 24258-2020</li> </ul>

In Colombia, the Constitutional Court ruled a series of similar cases, specifically, cases T-050/16 (“Esther vs. Lucía”), T-145/16 (“Pérez vs. Chamorro”) and the cases gathered in Protection Ruling SU-420/19. At first, it ruled in favor of the elimination or updating of the offending content, but the unification ruling is particularly relevant, as it establishes objective criteria of relevance for the analysis of these types of cases, determining review criteria based on the evaluation of the sender and receiver of the content, the medium and scope of the messages, and an evaluation based on the tripartite test of legality, legitimacy and proportionality, as well as subsequent liability.

In Mexico we can mention the case of “MEOP against DCO and APTO” of 2014, in which the appellant pursued a civil lawsuit for non-pecuniary damage for the statements made against

her, which were disclosed online and in the university context, and involving criticism of her actions as coordinator of applications for a doctoral program. The Supreme Court of Justice of the Nation maintained the criterion of the appealed judgment, which considered that no illicit acts that affected the right to honor were proven, therefore, the exercise of freedom of expression prevailed, and that in cases related to public officials the standard of protection is higher, requiring proof of actual malice.

In 2017, the Supreme Court of Paraguay, in the case of “Raúl Enrique Gómez vs. Karen Ovando”, reversed a judgment of constitutional protection of first instance in which the elimination of publications made by the respondent and by TEDIC, which consisted of the reproduction of conversations in a Facebook group chat in which the appellant mocked the feminist movement and the respondent’s sexual orientation, considering that her right to privacy and the inviolability of communications, as well as her right to self image were violated. The Supreme Court considered that the constitutional forum was not the appropriate way to try to redress the alleged damages to her rights, as there were substantive elements to be resolved, including weighing up between freedom of expression and the press with the eventual publicity of the message.

In 2016 in the Dominican Republic, the Constitutional Court resolved a direct action of unconstitutionality against the new penal code and Law 6132 on the Expression and Diffusion of Thought, issued in 1962. This determined the unconstitutionality of the articles that established criminal offenses related to insults and slander against public officials in the exercise of their duties, as well as the criminal liability of journalists, editors, distributors and printers for injurious publications, but maintaining the constitutionality of the established criminal offenses in the penal code, and the criminal definitions related to violations of the honor of government officials with respect to their private lives.

In other relevant matters, a series of cases relating to the unauthorized use of the image or personal data of minors was detected, both in the jurisprudence of the Constitutional Court of Colombia (in cases T-260/12 “AA on behalf of his youngest daughter XX against BB ”and T-453/13“ L and his son P against the Colombian Institute of Family Welfare and others”), as in the Constitutional Chamber of the Supreme Court of Costa Rica (Resolutions 04340-2018 “Name 001 against the Judiciary, Ministry of Public Security, La Prensa Libre newspaper and the journalist Edgar Chinchilla” and 01208-2019 “Name 001 in favor of Name 002 against Diario Extra”). In all these cases, it was considered that the rights to honor, good name, and privacy of minors should prevail over freedom of expression, ordering the removal of content or its updating to avoid the identification of children and adolescents.

## Intellectual Property and Copyrights

### Legislation

In this matter, we find a series of legislative reforms, motivated to a large extent by the signing of free trade agreements between Latin American countries and the United States, and in other cases within the framework of internal debates on updating these types of laws.

Country	Reform	Year	Subject areas	Agreement with USA
Argentina	Civil and Commercial Code	2015	Right to self image.	No
Brazil	Law 12.965 "Civil Framework of Internet"	2014	Liability of intermediaries.	No
Bolivia	-	-	-	No
Chile	Law 20.435	2010	Liability of intermediaries, term of protection, system of exceptions, system of actions.	Yes
Colombia	Law 1520	2012	Comprehensive reform (declared unconstitutional by the Constitutional Court).	Yes
	Law 1680	2013	Exceptions for the visually impaired.	
	Law 1915	2018	Technological protection measures, exhaustion of rights, system of exceptions.	
Costa Rica	Regulation 36880-COMEX	2011	Liability of intermediaries.	Yes
	Law 9054	2012	Exceptions system (vetoed by the executive branch).	
Cuba	Political Constitution of the Republic	2019	Right to artistic creation.	No
Ecuador	Organic Code of the social economy of knowledge	2016	Integral reform.	No
El Salvador	-	-	-	Yes
Guatemala	Decree 21-2018	2018	Exceptions for the visually impaired.	Yes

Honduras	-	-	-	Yes
Mexico	Reform of the Federal Copyright Law <sup>1</sup>	2020	Technological protection measures, liability of intermediaries.	Yes
Panama	Law 64 on Copyright and Related Rights	2012	Exceptions system, technological protection measures.	Yes
Paraguay	Law 5653 on Electronic Commerce	2013	Liability of intermediaries.	No
Peru	-	-	-	Yes
Dominican Republic	-	-	-	Yes
Uruguay	Law 19.857	2019	Term of protection.	No
Venezuela	-	-	-	-

In the countries that carried out reforms to copyright autonomously, and not within the framework of the implementation of free trade agreements, —that is to say, Argentina, Brazil, Cuba, Ecuador, Paraguay and Uruguay— there is a greater variety of modified areas. Thus, in Argentina the Civil and Commercial Code was reformed, introducing a right to self image and voice that operates in a similar way to copyright, albeit *ad-hoc* in nature.

In this area, the comprehensive reform carried out in Ecuador is significant, and which was carried out in an attempt to enhance the dimension of access over the dimension of control in matters of copyright. Thus, for example, it regulates matters which are in principle problematic for freedom of expression, as is the case of technological measures for the protection and management of rights, but at the same time it establishes an open system of exceptions and sanctions of an administrative and civil nature, but not criminal acts.

In Cuba, the Constitution was changed in 2019, including the right to artistic creation, without making express reference to intellectual property rights or having updated its law.

Uruguay, in turn, increased the term of copyright protection to 70 years, as did Chile (2010), Panama (2012), Ecuador (2017), and Colombia (2018).

Furthermore, several countries established reforms to the system of exceptions, among which we find Chile, Ecuador, Panama and Colombia; those that established systems of fair uses

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1 It is relevant to mention that the reform of the Federal Copyright Law has been questioned by civil society, in relation to the excessively restrictive nature of its provisions, which could affect the right to freedom of expression. Given this circumstance, on August 3, 2020, the National Human Rights Commission filed a demand for unconstitutionality against this regulation, “for possible violations of freedom of expression, the right to property, freedom of trade or work and cultural rights, among other prerogatives”. To date, the demand is in the admissibility process before the Supreme Court of Justice of the Nation. See (Comisión Nacional de los Derechos Humanos, 2020).

(Ecuador), incidental uses (Chile) and domestic uses (Panama), for library uses and archives, for people with visual disabilities, parody and educational uses, among others. Moreover, in 2013 Guatemala introduced exceptions for people with disabilities within the framework of the implementation of the Marrakesh Treaty.

Finally, the regulation of technological protection measures for the protection and management of rights is also relevant. In addition to Ecuador, these were established in Colombia, Mexico and Panama. In general, all these laws regulate the prohibition of circumventive measures, and the distribution and sale of products and services predominantly or exclusively dedicated to circumvention, while also establishing a series of exceptions in matters of reverse engineering, investigation of vulnerabilities, compatibility, protection of minors against harmful content, prevention of unauthorized data collection, use by libraries, archives and non-profit educational institutions, and in cases involving national security.

Only in Panama and Mexico do sanctions for the circumvention of technological measures or the distribution of products or services to circumvent them entail criminal sanction. In Ecuador and Colombia these are sanctioned through civil or administrative liability.

## Jurisprudence

In Colombia, an attempt was made to implement the provisions of the free trade agreement with the U.S. for the first time in 2012, through Law 1520 of 2012, referred to as Lleras Law 2. This first reform was declared unenforceable (unconstitutional) in 2013 by Sentence C-011/13 of the Constitutional Court for reasons of form.

For its part, in Costa Rica a legislative reform was attempted in 2012 that included broad exceptions to the unauthorized uses of protected works insofar as they were non-profit, through Law 9054. This norm was vetoed by the government of the time, which considered that it destabilized the copyright system, excessively weakening the protection of copyright.

It is relevant to mention a judicial decision of the Supreme Court of Justice of the Nation of Mexico of 2017 (Amparo in Review 1/2017, against the Mexican Institute of Industrial Property), which determined that the blocking of a website for the publication of works protected by copyright was a disproportionate measure against freedom of expression, ordering that the withdrawal of content be limited only to the infringing works indicated in the specific case.

## *Liability of intermediaries*

### Legislation

There are countries that have legally regulated this matter, such as Chile, Mexico, Costa Rica and Panama, and others that have been building standards in a jurisprudential manner, to later regulate through a law in some cases, while in others, jurisprudence has simply been established, as is the case of Argentina, Brazil and Colombia.

The first country to regulate the matter was Chile in 2010, through Law 20,435, which established a system of responsibility for internet service providers in copyright matters. In this respect, a distinction was made between providers of transmission, routing and connection, temporary storage, content storage, and search and linking services. In general, a system of exemption from liability was established, following judicial notification.

We then come to Costa Rica and Paraguay, which regulated the regime of exemptions from liability of intermediaries for copyright infringements committed by third parties, the first, through regulation 36880-COMEX-JP of 2011, which establishes a procedure of private notification and a judicial procedure; and the second, through Law 4,868 of 2013, which establishes an administrative notification and off-lining procedure, as well as the possibility for service providers to establish a private notification and deletion mechanism. To date, there are no legal cases related to the application or challenge of the use of these notification and content removal mechanisms in Chile, Costa Rica and Paraguay.

Then, in 2014, Brazil introduced a system of exemption from liability of intermediaries for the illegal content of third parties, under a mechanism of judicial notification and off-lining, in articles 19 and following of Law 12,965, with the exception of cases of publication of content related to private sexual acts, which are subject to a private notification system, and content that infringes copyright, which must be the subject of specific legislation, and which has not been enacted to date.

Finally, we have the case of Mexico, which on July 1, 2020 reformed the Federal Copyright Law, which established a system of exemption from liability of mixed intermediaries, both by private notice of the rights holders and by order from the competent authority, or in case technological measures to identify material protected by the Law have been established, although it does not make it mandatory to establish content filters.

## Jurisprudence

In Brazil and since 2010, there have been a multitude of cases that have sought to determine the existence of the liability of intermediaries. This was due to the existence of the Orkut social network, which is very popular in the country. There was a first wave of cases in which strict liability for third-party content was considered, given the risk created by the service, according to consumer law.

This was followed by a second stage, in which the lack of strict liability of the intermediary was determined, stating that they cannot respond due to lack of prior control of illegal content, because these are not part of the risks inherent to the activity, and the possibility of establishing personal liability for omission.

With the discussion and the subsequent entry into force of the Civil Framework in 2014, a new stage began in which personal liability was established for omission of the obligation to remove content and identify the offender, but only after prior judicial notification, according to Article 19 of the law.

Summary: Jurisprudence on liability of intermediaries in Brazil		
STJ Cases	Date	Criteria
Google Brasil vs. Ministério Público do Estado de Rondonia, REsp 1.117.633 - RO	03/26/2010	Strict liability.
Google Brasil vs. Valenti, REsp. 1.175.675 - RS	09/20/2011	Strict liability.
I P da S B vs. Google Brasil, REsp. 1.193.764 - SP	12/14/2010	Personal liability on private notification, responsible for not identifying the person responsible.
Google Brasil vs. Bresolin, REsp 1.308.830 - RS	06/19/2012	Personal liability on private notification, responsible for not immediately removing content.
Google Brasil vs. Salme Leal e outros (REsp. 1.323.754 - RJ	12/28/2012	Personal liability on private notification, given 24 hours to remove.
Santos Amorim vs. Costa Martins, REsp. 1.381.610 - RS	09/12/2013	Personal liability on private notification, defines types of providers.
Google Brasil vs. Geraldo do Carmo da Costa Limas Junior, REsp. 1.406.448 - RJ	10/21/2013	Personal liability on private notification, URL must be precisely identified.
Google Brasil vs. Sassaki, REsp. 1.338.214 - MT	12/02/2013	Personal liability on private notification, judicial order prevails.
Google Brasil vs. de Oliveira Pereira, REsp. 1.403.749 Personal liability on - GO	03/25/2014	Personal liability on private notification, duty of subsequent monitoring.

Pajucara Editora, Internet e Eventos Ltda. vs. Monteiro Cavalcanti, REsp. 1.352.053 - AL	03/30/2015	Personal liability on private notification, greater newspaper editorial duty due to comments from readers.
Gonçalves Barrichello vs. Google Brasil, REsp. 1.337.990 - SP	09/30/2014	Personal liability on private notification, not responsible for subsequent filtering.
Google Brasil vs. Menegaz, REsp. 1.274.971 - RS	03/26/2015	Personal liability on private notification, not responsible for subsequent filtering.
Google Brasil vs. R.H DA C.L.F., REsp. 1.568.935 - RJ	04/13/2016	Personal liability on judicial notification.
Facebook Serviços Online do Brasil Ltda. vs. Marques, REsp. 1.641.155 - SP	06/22/2017	Personal liability on judicial notification, prohibits the obligation to refrain from publishing new offensive content.
Facebook Serviços Online do Brasil Ltda. vs. Roselly Soares, REsp . 1.629.255 - MG	08/25/2017	Personal liability on judicial notification, eliminates undetermined obligations to remove “all offensive content”.
Google Brasil vs. Ministério Público do Estado de São Paulo, REsp. 1.679.465 - SP	03/19/2018	Personal liability on judicial notification, interprets art. 21 on disclosure of private sexual material.

The other exception to the regime of Law 12,965 corresponds to the case of copyright, which is exempt from the rule of article 19, as long as no express law is provided. In the case “Google Brasil v. Botelho” (REsp 1,512,647 - MG), the responsibility for infringing content published on Orkut was discussed, deciding the possibility of liability in cases of failure to act after a clear notification that indicates the infringing content and requesting information to identify the authors, discarding strict liability.

At present, an appeal is pending before the Federal Supreme Court regarding the constitutionality of article 19 of the Civil Framework initiated by Facebook, considering the case as a constitutional matter of general interest and calling other interested parties to public hearings.

Another country with jurisprudential discussions on the matter is Argentina which, in the ruling in the Rodríguez vs. Google case in 2014, determined the lack of strict liability of search engine providers for the content of third parties, establishing that they are in principle irresponsible, as they do not have an obligation to monitor the content of third parties, and being able to be held responsible in cases in which they have effective knowledge of the content, which may be with a communication from the user in cases classified as evident, and with judicial notification in cases where it is difficult to determine the illegality. This criterion was followed in two subsequent cases (Gimbutas vs. Google, from 2017, and Páquez vs. Google, from 2019).

Another country that established rules for the responsibility of intermediaries through jur-



isprudential means was Colombia, which in the Sentence of Unification of Guardianship SU-420/19 opted for the thesis of lack of responsibility, without prejudice to the fact that it may be ordered to remove content after a court order if it is necessary to effectively guarantee the rights affected.

Jurisprudential definitions of the liability of intermediaries	
Case	Citation
Argentina "Rodriguez vs. Google Inc." (2014)	"Freedom of expression would be impaired if strict liability is admitted that —by definition— dispenses with any idea of guilt and, consequently, with judgment of reproach to the one to whom responsibility is assigned. However, there are cases in which the "search engine provider" can get to answer for a content that is alien to him or her: this will happen when he or she has taken effective knowledge of the illegality of that content, if such knowledge was not followed by a diligent act and in this case it would correspond to the application of Article 1109 of the Civil Code".
Brazil REsp 1.641.155-SP "Facebook vs. Marques" (2017)	"(Internet application providers) '(i) are not objectively responsible for the publication on their site of illegal information by third parties; (ii) cannot be forced to exercise prior control of the content of the information posted on their site by their users; (iii) have the duty, as soon as they have unequivocal knowledge of the existence of illegal data on their site, to remove such data immediately, under penalty of being liable for the respective damages; (iv) must maintain a minimally effective system for identifying their users, the effectiveness of which will be evaluated on a case-by-case basis.'".
Colombia Sentence of Unification of Guardianship SU-420/19 (2019)	"The Constitutional Court has ruled that Internet intermediaries are not responsible for the content published by their users, given that establishing this responsibility would limit the dissemination of ideas and would give them the power to regulate the flow of information on the network. Consequently, the responsibility lies with the person who directly uses the offensive or slanderous expressions (...) Although these platforms are not called to respond to the content published by their users, in the event that a judicial authority finds that a content violates the fundamental rights of a person, it can directly order their removal by the internet intermediaries, in order to generate an effective guarantee of the prerogatives of the affected person, because the offender does not want or cannot comply with what is ordered by a judge."

## *Right to be forgotten*

In the region, there have been a series of cases in which the responsibility of search service providers for the processing of personal data has been pursued, through the exercise of the right of erasure, in the form of the request for de-indexing of content displayed by search engines, which has become known as the “right to be forgotten”. These discussions precede the case of the Court of Justice of the European Union “Google Spain and Google Inc vs. the Spanish Agency for Data Protection and Mario Costeja”, of 2014, and in the judicial field they do not always coincide perfectly with the usual definition, pursuing in some cases the responsibility of traditional press media for digital and even analog publications, and requesting the de-indexing, elimination or updating of publications, more closely resembling the exercise of the right to rectification present in traditional press laws in many of these cases.

### Legislation

The matter of the right to be forgotten is scarcely regulated in regional legislation in an express manner. As we will see in the analysis of regional jurisprudence, it is usually derived from the laws on data protection and press laws and the exercise of the right to rectification, on the one hand, and through the protection of constitutional rights to honor, privacy, good name, and the right to rectification, on the other. There are also some cases where other laws are mentioned, such as statutes of limitations or expungement regulations.

In Brazil, the entry into force of Law 12,965 in 2014 provided for the exemption of liability of internet service providers for the content of third parties, if they eliminate the content indicated after judicial notification, as well as the mechanism of Art. 7 letter X of the law that allows the “definitive exclusion of the personal data that had been provided to a certain internet application, at the user’s request, at the end of the relationship between the parties, without prejudice to the hypothesis of mandatory record keeping stated by the law”.

Subsequently, in 2018, Law 13,188 was approved, which regulated the right to rectification or response, expressly providing for content published in digital media. Here, it is provided that comments made by users in its article 2 § 2 are excluded from the scope of the law, and the possibility of eliminating content is not provided, thus there is no regulation of the right to be forgotten expressly in legislation.

On the other hand, in Costa Rican legislation there is a so-called “right to be forgotten” in Article 11 of the regulations of the Law on the protection of the person against the processing of personal data of 2016, which refers to a right to cancel data after the loss of purpose in its treatment.

## Jurisprudence

One of the first countries to have had cases leading to the discussion on the right to be forgotten was Brazil. Prior to the entry into force of the Civil Framework, the hypothesis of liability for a “defective product” was tried in order to request the removal of search results. This thesis was rejected in the court case of Google Brazil vs. Xuxa Meneghel (REsp. 1.316.921 – RJ).

Relating to traditional media, we can mention two examples of TV reports on criminal cases: “Nelson Curí and others vs. Globo Comunicações e Participações S.A.,” known as the Aída Curí case (REsp. 1.334.097 – RJ) and “Globo Comunicações e Participações S.A. vs. Jurandir Gomes de França,” known as the Chacinha da Candelária case (REsp. 1.335.153 – RJ), which served as precedent in later decisions, establishing a kind of right to be forgotten regarding criminal cases, but with prevalence of public or historical interest in the news.

With the entry into force of the Civil Framework, in 2014, supplier responsibility standards were regulated, as well as a right to exclude the processing of personal data upon termination of the relationship with the provider, with disparate jurisprudence existing on the matter.

Summary: The right to be forgotten in Brazil		
STJ Cases	Date	Criteria
Google Brasil vs. Xuxa Meneghel, REsp. 1.316.921 – RJ	06/29/2012	Search engine providers are not responsible for content removal.
Globo Comunicações e Participações S.A. vs. Jurandir Gomes de França, REsp. 1.334.097 – RJ	09/10/2013	A kind of right to be forgotten in cases of served sentences, acquitted cases and victims, except for information of public interest.
Nelson Curí and others vs. Globo Comunicações e Participações S.A., REsp. 1.335.153 – RJ	09/10/2013	A kind of right to be forgotten in cases of served sentences, acquitted cases and victims, except for information of public interest.
Google Brasil vs. SMS, REsp. 1.593.873 – SP	11/17/2016	There is no legal basis for the right to be forgotten under Law 12.965.
Yahoo! do Brasil and Google Brasil vs. DPN, REsp. 1.660.168 – RJ	06/05/2018	In exceptional cases, the right to be forgotten may be applied by eliminating search results while maintaining the content.

In Mexico, the right to be forgotten is not explicitly regulated. In 2015, resolution PPD.0094 / 14 ordered Google to revoke a response denying the exercise of the right to erasure and objection, ordering the de-indexing of search results that associate the name of the appellant with the URLs indicated by him or her. An appeal for protection was issued in this case and protection was granted, but because the right to a hearing of all parties was not considered, without considering freedom of expression in the analysis. To date, there is no explicit reg-

ulation on the right to be forgotten or judicial decisions at the level of the Supreme Court of Justice of the Nation that deal with the underlying issue.

In Peru there are two resolutions of the General Directorate for the Protection of Personal Data (DGPDP) related to the matter: In the first of these, resolution 045-2015-JUS / DGPDP, an individual requested the elimination of search results referring to a criminal case in which he was dismissed, in the exercise of his right to data erasure. The body considers itself competent, taking into consideration that the activities of Google Peru and Google Inc. are linked, and that personal data are processed in the indexing activity. It considers that the right to erasure cannot be limited only by the fact that Google has not established valid communication mechanisms for the direct exercise of this right, ordering the de-indexing only with respect to a search using the names and surnames of the recurring party, and maintaining access to information in other cases.

Subsequently, in resolution 026-2016-JUS / DGPDP, de-indexation is also decided, but taking also into account that search engines are responsible for data processing and that a balance must be maintained between data protection and freedom of expression in each specific case.

In the jurisprudence of the Supreme Court of Chile there are multiple cases related to the right to be forgotten, while no consistent position has yet been consolidated, tending not to recognize the existence of a right to be forgotten or a responsibility of search engine providers, and to order updating of the news by the media that published it, seeking a balance between the right to honor, freedom of expression and public interest.

Summary: The right to be forgotten in Chile		
Supreme Court Cases	Date	Criteria
Riveros vs. Bravo and Pagano, rol 21607-2014	10/29/2014	These are public facts, erasure is not applicable. Google does not form part, responsibility is not discussed.
Graziani vs. El Mercurio, rol 22243-2015	01/21/2016	The right to be forgotten prevails over freedom of expression, it is applied by analogy to institutions such as expungement.
Feliú vs. YoutubeCl and other, rol 40591-2016	08/09/2016	There is no responsibility of search engine providers, freedom of expression is being exercised.
Covarrubias vs. Copesa S.A., rol 65341-2016	07/24/2017	Public interest prevails because it is information about a crime, it is not appropriate to delete or de-index.
Vila Gacitúa vs. Google and others, rol 11746-2017	08/09/2017	There is no right to be forgotten, there is public interest in crime news. It is not appropriate to delete or de-index.
Ramírez vs. Markmonitor inc., rol 39972-2017	12/04/2017	There is a responsibility of search engine providers who amplify information, orders to delete content and de-index.

Abudoj vs. Radio BioBio and others, rol 8543-2018	07/09/2018	Reiterates criterion from judgment 11746-2017. There is no responsibility by search engine providers. Orders to update.
Martí vs. Empresa Periodística La Tercera S.A., rol 25154-2018	01/15/2019	Reiterates criterion from judgment 11746-2017. The short period of time passed does not allow freedom of expression to be limited.
Espina vs. El Mercurio S.A.P, Copesa S.A. and BioBio comunicaciones, rol 25259-2018	01/21/2019	Reiterates criterion from judgment 11746-2017.
Castelletto vs. Google Chile, rol 19134-2018	01/22/2019	Reiterates criterion from judgment 11746-2017. There is no responsibility by specific search engine provider.
Moyano contra Ministerio Público Los Ángeles, rol 4317-2019	04/22/2019	There is a right to be forgotten due to loss of purpose in processing the information, due to the passage of time and loss of relevance. Ruling to delete content.
Pardo vs. Copesa S.A., rol 1729-2019	07/02/2019	There is no right to be forgotten, but honor and freedom of expression must be considered. Ruling to update.
Alveal vs. El Mercurio S.A.P and others, rol 18818-2019	12/27/2019	Reiterates criterion of the previous decision.
Ramos vs. Sociedad Periodística Araucanía S.A., rol 41260-2019	05/19/2020	Reiterates criterion of the previous decision.
Campos vs. La Plaza S.A., rol 31815-2019	05/13/2020	The right to freedom of expression prevails over eventual damage to honor, considering public interest.
Castillo vs. Google Inc., rol 54-2020	06/10/2020	There is no right to be forgotten or responsibility of the search engine provider. It is not appropriate to de-index.

The jurisprudence of the Constitutional Chamber of the Supreme Court of Costa Rica, in exercise of the constitutional right to rectification and response, has ruled on two relevant cases, limiting the exercise of the right to rectification, not granting the claims of de-indexation of content within the framework of the exercise of constitutional actions, but allowing their discussion in the administrative field.

The general principle, established in resolution 02395-2018 (“Name 001 vs. ameliarueda.com”), provides that an indemnification claim is appropriate for not allowing the exercise of the right to rectification, ruling that content be updated and not deleted. Eventually, the elimination of content regarding data whose dissemination is not necessary may be attempted, recurring to the Data Protection Agency, as was ruled in Resolution 025318-2019 (“Name

001 in favor of Name 002 vs. Public Ministry”).

In Colombia, there are three relevant cases regarding the right to be forgotten. In the first of these, the case “Martínez Trujillo vs. Casa Editorial el Tiempo and Google”, ruling T-040/13, it was determined that search engine providers are not responsible for the rectification of third-party content and that, in the specific case, the media had to grant the right of clarification in the news.

Then, in case T-277/15, referred to as “Gloria vs. Casa Editorial el Tiempo”, it was again considered that search engines are not responsible and, in the exercise of the three-part test of legality, legitimacy and necessity, it was considered that there are less harmful ways of maintaining the rights to good name and privacy than eliminating content, ordering the media to implement technological measures to exclude content from indexing. This criterion was again implemented in the decision of judgment T-693-16 (“Plata Gómez vs. El Espectador and Galán Pachón”).

In a related matter, in the Sentence of Unification of Guardianship SU-458/12, the Constitutional Court ruled in 2012 that the publication of the criminal records by the Administrative Department of Security violated the right to *habeas data*, after a series of guardianship actions. The Court considered that the publication on the internet of criminal records of people who have already served their sentence, in a registry to which any person, even without a legitimate interest, had access, violated the principle of purpose, necessity and usefulness in data processing. Although by definition it is not a case of the right to be forgotten, it is important to mention it due to the consideration of the principle of purpose in data processing, in relation to the publication of these on the internet.

## Net neutrality

Net neutrality in Latin America			
Country	Law	Regulation	Zero rating
Argentina	Yes	Yes	Expressly prohibited, permitted in fact.
Bolivia	No	No	There was a presence of freebasics.org, but it withdrew from the country in 2016.
Brazil	Yes	Yes	Not expressly prohibited, allowed after administrative investigation by the administrative body on competition matters. Presence of freebasics.org.
Chile	Yes	Yes	Partially prohibited by circular 40 SUBTEL, there is no <i>enforcement</i> regarding discrimination obligations, only transparency. Tolerated in practice.
Colombia	Yes	Yes	Expressly permitted. Presence of freebasics.org.
Costa Rica	No	No	-
Cuba	No	No	-
Ecuador	Yes	Yes	Not prohibited, permitted in fact.
El Salvador	No	No	Presence of freebasics.org.
Guatemala	No	No	Presence of freebasics.org.
Honduras	No	No	-
Mexico	Yes	No	Pending net neutrality guidelines as of the date of the report. Zero rating positive discrimination practices are currently allowed. Presence of freebasics.org.
Nicaragua	No	No	-
Panama	No	No	Presence of freebasics.org.
Paraguay	No	No	-
Peru	Yes	Yes	Not prohibited, allowed with prior authorization from OSIPTEL, presence of Facebook Discover.
Dominican Republic	No	No	Presence of freebasics.org.
Uruguay	No	No	Bill on the matter.
Venezuela	No	No	-

Sources: Review of national laws.  
<https://info.internet.org/en/story/where-weve-launched/> <https://www.hacklab.org.bo/noticias-del-hacklab/article/alegria-internet-org-freebasics-de-facebook-se-fue-de-bolivia>  
<https://connectivity.fb.com/news/facebook-introduces-discover-exploring-new-ways-to-support-connectivity/>

## Legislation

Chile was the first country in the world to regulate the matter, through Law 20,453 of 2010, which enshrined the principle of neutrality through the obligation not to “block, interfere, discriminate, hinder or restrict the right of any internet user to use, send, receive or offer any content, application or legal service over the Internet”, with the exception of traffic management and network administration measures. The supervision of compliance with this duty was made the responsibility of the Under-secretariat of Telecommunications (SUBTEL).

The regulations of this law were published in 2011, under decree 368/2011, according to which the breach of the obligations of access providers can be prosecuted by users according to the complaint procedure established in article 28 bis of the General Telecommunications Law. However, the detailed regulation of the law and the regulations - and the fact that there is abundant administrative jurisprudence regarding the breach of network neutrality obligations – has meant that law *enforcement* has focused on the fulfillment of technical obligations, leaving aside the conduct contrary to commercial neutrality (Triviño, Franco, & Ochoa, 2019, p. 20).

After the regulation of net neutrality in Chile, laws emerged in Colombia (Law 1450, 2011), Peru (Law 29.902, 2012), Brazil (Law 12.965, 2014), Argentina (Law 27.078, 2014), Mexico (Federal Law of Telecommunications and Broadcasting, 2014) and Ecuador (Organic Law of Telecommunications, 2015).

In Colombia, net neutrality was established in article 56 of Law 1450 of 2011, which issued the 2010-2014 National Development Plan, prohibiting the blocking, interference, discrimination or restriction of internet users’ access to legal content. In addition, it refers to Law 1336 of 2009, which establishes measures relating to the blocking of child pornography content by internet service providers, as well as cybercafes and places with public internet access.

However, the law allows offers to be made according to the needs of the market segments or their users, without considering this as discrimination. In resolution 3502 of 2011, the institution of neutrality is regulated in more detail, prohibiting the blocking and prioritization of traffic, but making it possible to offer plans that distinguish according to type of content in its art. 9, expressly allowing *zero-rating* plans, to the extent that they offer alternative plans that do not include service limitations.

Finally, in March 2020, and in the context of the COVID-19 pandemic, Decree 464 was issued, which allows telecommunications service providers, in accordance with the provisions of the Communications Regulation Commission, to prioritize access to content or applications related to health services, government and public sector pages, work activities and education, and the exercise of fundamental rights, for any pandemic event declared by the World Health Organization.



In Peru, Law 29.904 on the Promotion of Broadband and Construction of the National Fiber Optic Backbone Network, of 2012, in Article 6, provides that “Internet access providers shall respect the neutrality of the network by which they shall not arbitrarily block, interfere, discriminate or restrict the right of any user to use an application or protocol, regardless of its origin, destination, nature or property”. The supervision of compliance with this duty was tasked to OSIPTEL. The regulation of the law under Supreme Decree 014-2013-MTC, establishes the possibility of implementing traffic management, network administration or other measures that may block, interfere, discriminate or degrade traffic, subject to authorization by OSIPTEL, which assesses arbitrariness.

This regulation was updated in 2016, through resolution 165-206-CD / OSIPTEL, which approves a regulation of network neutrality, establishing a regime of authorized and prohibited measures. Among the prohibited measures, there is arbitrary traffic management, arbitrary filtering or blocking of legal services or applications, and arbitrary differentiation in the offer. Regarding the latter, it considers the differentiation in the offer arbitrary if it involves restriction of access, prioritization, quality limitation or an additional charge, allowing *zero-rating* practices in case they do not violate said conditions.

It is also relevant to mention article 18 of the internet neutrality regulation, which considers the possibility of filtering or blocking services and / or applications in compliance with contractual obligations with the State, or due to a specific and explicit regulation.

In Brazil, this matter was regulated in title III section I of the Civil Framework, where article 9 speaks of the duty of the person responsible for the transmission, commutation or routing of data to treat them in an isonomic manner, without discrimination based on content, origin, destination, terminal or application. The regulation of the permitted hypotheses of discrimination is provided in Decree 8771 of 2016, which states that discrimination and degradation of traffic are exceptional measures, which can only occur if the technical requirements essential for the adequate provision of services or applications are met, for network security matters and for the treatment of exceptional situations of network congestion, as well as for the prioritization of emergency services.

In addition, the regulation expressly prohibits unilateral conduct or agreements between transmission, switching or routing providers and application providers that compromise the public and unrestricted nature of internet access, prioritize data packages due to commercial agreements, privilege applications offered by the suppliers themselves or by members of their economic group.

In Argentina, the neutrality of the network was established through Law 27.078 Argentina Digital, which in its article 57 letter b) expressly prohibits “setting the price of Internet access by virtue of the contents, services, protocols or applications that are going to be used or offered through the respective contracts”. The inspection was centralized in the National Communications Entity (ENACOM), through Emergency Decree 267/2015. Notwithstand-

ing the express prohibition, in practice it has not been audited, there are *zero-rating* practices reported since 2017 and a claim by Telefónica against Telecom for the practice of offering free football broadcasts, keeping the case file open to date, without firm resolutions against the accused company (Lufrano, 2019).

In Mexico, net neutrality was introduced under the Federal Telecommunications Law of 2014, in its chapter VI, articles 145 and 146, which establishes the principles of free choice, non-discrimination, privacy, transparency, quality and sustained development, and allowing traffic management limited to the policies authorized by the Federal Institute of Telecommunications, which must respect free competition. To date, the regulations on the matter have not been promulgated. A public consultation process was carried out on the Traffic Management Guidelines, which was closed on July 15 of this year. These guidelines were harshly criticized by civil society organizations,<sup>2</sup> inasmuch as they would allow paid prioritization of services and applications, as well as the possibility of blocking applications, services and content due to emergency or national security situations, and in-depth inspection of packages, which would affect the right to privacy.

Finally, in Ecuador, the right of users to make use of internet services free of arbitrary distinctions or prioritization was introduced, allowing the management of traffic by providers in order to guarantee the service, both being regulations in Article 15.6 of Resolution TEL-477-16-CONATEL-2012. In 2015, the Organic Telecommunications Law was enacted, which established the goal of promoting net neutrality (Art. 3 number 13), the right of users to access any application or service available without the providers being able to limit, block, interfere, discriminate, hinder or restrict their right, except at the request of the user, and in cases of technical network administration measures to guarantee the service (Art. 22 number 18), with the correlative duty of the providers to guarantee equal and non-discriminatory access, and to respect the neutrality of the network (Art. 24 number 1 and number 17). There is no express prohibition of *zero-rating* practices, which are tolerated by the regulator, and it has even been promoted for access to emergency applications in the context of the pandemic.<sup>3</sup>

## Jurisprudence

In Brazil, there was a discussion regarding whether *zero-rating* practices were prohibited, as they were contrary to the regulation of the Civil Framework and Decree 8,771, which is why an administrative investigation was initiated by the Economic Defense Administration Council (CADE), which concluded that such practices are not expressly prohibited and that

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2 In this regard, see the Save the Internet campaign <https://salvemosinternet.mx/>.

3 <https://digitalpolicylaw.com/provedores-telecom-en-ecuador-no-suspenderan-servicios-y-daran-zero-rating-para-apps-de-emergencia-por-covid-19/>

they are not discriminatory, as they do not provide better traffic conditions, nor do they block or degrade traffic, but only provide free access under the same conditions. Likewise, it considered that they did not find anti-competitive effects in these plans, for which the investigation was closed.

In Colombia, the rules on prioritizing access to content within the framework of emergency measures for the Covid-19 pandemic, as provided in decree number 464 of 2020, were subject to constitutional control before the Constitutional Court in judgment C -151/20, considering that the rules of prioritization, with the prohibitions, precautions and limits provided in said rules, are sufficient to respect the principle of net neutrality.

## *Hate speech and incitement to violence*

### Legislation

In 2010, Law 45 against racism and all forms of discrimination was enacted in Bolivia. This norm introduced a new chapter in the Criminal Code, by introducing the criminal types of racism, discrimination, dissemination and incitement of such behavior by speeches, participation in organizations, as well as insults and other verbal attacks for racist or discriminatory reasons.

Regarding the criminal type of dissemination or incitement, this includes more serious penalties if committed by public servants or government officials, or by media workers, as well as the crime of insults or verbal attacks if made by print, manuscript or media, considering the greater diffusion of the content considered illegal. Likewise, the law imposes obligations for the adaptation of the internal regulations of the media, including the digital media, in order to promote respect for differences and eliminate racist and discriminatory behaviors, while also establishing administrative offenses in the face of deliberate and systematic failures to comply with said obligations.

In 2016, Law 807 on gender identity added transsexual or transgender people to the categories protected by Law 45.

In 2017 in Venezuela, the National Constituent Assembly approved the “Constitutional Law against hatred, for peaceful coexistence and tolerance”. This law generally prohibits speeches “that promote war or incite national, racial, ethnic, religious, political, social, ideological, gender, sexual orientation, gender identity and any other nature that constitutes incitement to discrimination, intolerance or violence”.

In its article 14, it deals with the responsibility for said prohibited hate speech when disseminated through social networks or digital media, including the responsibility of the legal entities that administer these channels, who must immediately stop such messages from being disseminated.

In chapter V of this law, criminal sanctions punishing the crime of promoting or inciting hatred are regulated, the aggravating nature of existing crimes for reasons of hate and sanctions for broadcasting such messages, which includes the revocation of the telecommunications concession in the case of radio or television services, and the blocking of websites that do not remove these contents within a period of 6 hours.

## Jurisprudence

It is relevant to mention the Costa Rican jurisprudence on hate speech. Specifically, the Judgment of the Constitutional Chamber of the Supreme Court in resolution 08396-2018 (“Name 001 and 002 in favor of name 003, 004, 005 and 006 vs. the National Radio and Television System”). In this case, without denying the reprehensible nature of the censored expressions, it nevertheless ruled in favor of freedom of expression, insofar as they did not correspond to speeches prohibited by law, and even if they were, subsequent responsibilities should be imposed.

## *Other direct or indirect forms of censorship*

### Legislation

First of all, it is relevant to mention Decree Law 370 on the computerization of society in Cuba, of 2018. This standard provides a series of directives for the development of ICT, electronic commerce, cybersecurity and other matters, but at the same time introduces sanctions related to the use of ICT in article 68, several of which may constitute restrictions on the freedom of expression. Among these prohibitions are those from letter a) to commercialize computer programs, applications and services without authorization from the competent body; letter b) to manufacture, market, transfer and install equipment and devices to access ICT without authorization; letter f), which prohibits hosting sites on servers located in foreign countries; letter h), which prohibits vulnerability checks on computer systems without authorization; and letter i), which prohibits the dissemination through public data networks of information “contrary to social interest, morals, good customs and the integrity of people”.

Another recurring phenomenon in Latin American countries during this period is the updating of criminal codes, or the enactment of specific laws on crime in computer contexts, with consequences contrary to freedom of expression, especially in matters related to the sanction of false news.

In Costa Rica, the Criminal Code was amended in 2012, through Law 9048. In this law, there are two criminal offenses which are problematic in terms of freedom of expression. The first corresponds to article 230, on identity theft. The other is article 236, on the dissemination of false information that may harm the financial system.

In 2016, Decree 260 was issued in El Salvador, which created a Computer Crime Law. During the processing of the preliminary draft, there were concerns regarding the criminal type of “dissemination of harmful information” of a very broad nature (FUSADES, 2015). However, a problematic criminal type persists, consisting of identity theft in Article 22, which does not take parody as an exception.

Another relevant phenomenon of censorship in the technological context is the blocking of websites as a sanction in legal proceedings.

This is provided by the Venezuelan law against hatred, for peaceful coexistence and tolerance of 2017, in its article 22 second paragraph, notwithstanding other civil and criminal sanctions that may exist, in case the messages indicated in the item are not withdrawn within 6

hours. This case is particularly worrying, since the procedure for removing content is not clearly specified, nor is any judicial control established.

This content blocking is part of the legal possibilities established by the Organic Law of Telecommunications of 2011, which considers telecommunication services to be of public interest, allowing in its article 5 the restriction of content and communications based on this interest, as provided by the constitution or laws.

The manner in which this law is applied is in addition to an arbitrary and illegal use of blocking websites and social networks and even access to the internet,<sup>4</sup> and the criminal prosecution of people for expressing opinions critical of the government on social networks.

The blocking of the internet as a measure of repression against protests has also been reported in Ecuador and Nicaragua, in the years 2018 and 2019 (Díaz, 2019), as well as in Cuba, with respect to certain websites, including independent media (Pérez Pujol, 2019).

Finally, regarding the duties of monitoring and filtering illegal content, it is relevant to mention the case of Paraguay, through Law 5653 on the protection of children and adolescents against harmful internet content. This law provides for the mandatory installation of filters against harmful content for minors in educational and commercial establishments and places of public access to the internet in general.

## Jurisprudence

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The Constitutional Chamber of the Supreme Court of Costa Rica has resolved a series of cases related to content published on the internet or social networks in the area of responsibility of public officials, tending to protect the right to freedom of expression of whoever published them. In all cases (Resolutions 07500-2015, 10630-2015, 13890-2017 and 11188-2019), it was considered that these measures did not pass a reasonability test, ordering the end of administrative procedures and / or the restoration of contents.

In Mexico, the Supreme Court of Justice of the Nation declared unconstitutional a regulation of the Criminal Code of the State of Veracruz, which sanctioned those who falsely affirmed, through any media, information related to the existence of explosives, firearms, chemical substances or toxic or other material, that disturb public order. This, based on the fact that the lack of determination of the regulation resulted in disproportionate effects in relation to freedom of expression due to a series of arguments, which included not distinguishing erroneous statements from fraudulent ones, sanctioning any means of dissemination, including social networks and the internet, as well as the possibility of sanctioning the mere dissemina-

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4 We can identify a compilation of reports of blocking practices, beyond the provisions of the Law against Hate and for peaceful coexistence and tolerance, on the [www.vesinfiltro.com](http://www.vesinfiltro.com) website of Venezuela Inteligente. In the same sense please see (Espacio Público, 2020).

tion of news through these media.

In Brazil, cases of complete blocking of websites and social networks are reported,<sup>5</sup> in the application of articles 10, 11 and 12 of Law 12,965 which, in their joint application, may involve sanctions consisting of the temporary suspension of applications and even the prohibition of exercising their activities, for companies that keep records or data of their users and that fail to comply with court orders. In practice, this has led to several cases of blocking websites or applications, in some cases, because it is impossible to comply with the order as it involves encrypted information, as is the case of the blockages of the WhatsApp messaging application. To date, two appeals are pending before the Federal Supreme Court on the constitutionality of article 12, the Ação Direta de Inconstitucionalidade 5,527, and the Arguição de Descumprimento de Preceito Fundamental 403.

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5 The first case of blocking of an application in the entire Brazilian territory corresponds to the blocking of WhatsApp by a criminal judge in the state of Piauí in 2015 (G1 PI, 2015). For a compilation of the blocking of sites and applications as a sanction in the application of Law 12.965, see (Antonialli, 2019)



## Conclusions

One of the trends noted in this review is the great influence of free trade agreements on the implementation of new legislation on copyright matters. In fact, the vast majority of the countries that had reforms did so in the context of the implementation of free trade agreements with the United States.

However, in general this has not meant an increase in restrictions on freedom of expression without checks, since, although restrictive institutions such as technological protection measures have been regulated, they have been reformed together with updates to the exception systems, introducing exceptions to the general prohibition to circumvent them, as well as fair, incidental or minimal uses, and a series of other exceptions to copyright to make access to works more flexible in general.

This has led to the legal introduction of mechanisms to exempt intermediaries on the internet from liability for copyright infringements in Chile, Mexico, Costa Rica, and Paraguay (which did so outside the context of a free trade agreement), which has resulted in systems with problems from the point of view of freedom of expression, generally due to the establishment of administrative or internal procedures, rather than judicial review, which occurs only in the case of Chile. The situation in Mexico is particularly problematic, where the possibility of voluntarily filtering content was included. However, in these countries the application of these notification and content removal systems has not been detected.

On the other hand, in countries where this matter was discussed in a jurisprudential manner first, as was the case of Argentina, Brazil and Colombia, more balanced solutions for judicial notification have been reached, which in the case of Brazil were codified in Law 12,965.

In other areas, there has been a tendency to update criminal laws, either through criminal codes or through specific laws on computer crimes, which have included reforms to crimes of libel and slander, and hate crimes, on the one hand, and computer crimes, including some phishing and fake news crimes. In this sense, there are some higher quality regulations that offer safeguards for freedom of expression, and others of poorer quality, which introduce measures such as the right to honor of legal persons, criminal liability of intermediaries or even the blocking of sites for not carrying out orders not determined by law.

On the other hand, in Chile, Colombia and Costa Rica a large amount of jurisprudence has been detected regarding the use of actions for the protection of constitutional rights in cases of publications by private parties on social networks, for the protection of the right to honor, privacy and good name, with jurisprudence tending to improve the quality of the analysis of balancing these rights with freedom of expression. The Sentence of Unification of Guardian-

ship SU-420/19 of Colombia is an exemplary case of this analysis.

As for the right to be forgotten, this has been interpreted based on the laws in force on data protection matters, tending to deny the existence of such a right in general and ordering the update of news instead of its elimination or de-indexing, with some exceptions in the recent jurisprudence of Brazil and the administrative interpretation of Peru.

Finally, in relation to the neutrality of the network, although the region was a pioneer in its legal establishment, Chile being the first country in the world to enact a law on the matter, in fact the scope of the service providers obligation not to discriminate has been weakened, tending to limit only negative discrimination, allowing positive discrimination practices such as *zero-rating*, either because the regulations expressly allow it or due to a lack of *enforcement* in the matter.

In an area close to that of net neutrality, the existence of regulations that stipulate the legal blocking of internet sites is an emerging issue, both due to the Venezuelan law of hate speech, as well as the application of article 12 of the Civil Framework of Internet in Brazil, and the provisions of Law 5653 of Paraguay regarding cybercafes and places of public access to the internet, in relation to the limitation of access to harmful content by minors.

In the laws on net neutrality in general there are no explicit regulations for this possibility, usually mentioning the general prohibition of restrictions on access to content or to legal or lawful applications, the exception being Colombian legislation, which establishes special rules regarding the blocking of child pornography content.

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