# The Internet Service Provider Secondary Liability: A Comparative Analysis of Brazilian and United States Legislation and Case Law

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## INTRODUCTION

According to the International Telecommunication Union (ITU), in 2015 about 3.2 billion people around the world were using the internet every day.[1] This considerable number, which corresponds to 40% of the world's population, demonstrates that the internet is imperative in this globalized world. It facilitates innumerous activities, but at the same time raises social conflicts that require proper rules. With this background in mind, this paper reviews current Brazilian rules and regulations as well as case law regarding defamatory and copyright infringement on the internet, including most notably the *Marco Civil da Internet* [Internet Bill of Rights], which was enacted in 2014. This paper also compares the Brazilian and the United States' experiences, focusing on the potential liability of internet service providers (ISPs).

This article proceeds in four parts. The first part explains the definition and origin of the internet and the Brazilian Internet Bill of Rights' purpose, process, main features, principles, central disputes, and influences. The second part analyzes potential ISP liability in Brazil for defamatory content. This section explains the exceptions under the Internet Bill of Rights (IBR) and reviews the Brazilian highest courts' understandings before and after the adoption of the act. The third part examines ISP liability in Brazil for copyright infringement, one of the explicit exceptions to the application of

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1. *ITU Releases 2015 ICT Figures*, ITU, https://www.itu.int/net/pressoffice/press_releases/2015/17.aspx (last visited May 9, 2016).

the IBR. This section also reviews the Brazilian Copyright Act and recent proposals to modernize it, including the May 2015 decision of the Superior Court of Justice, which accessed ISP liability for another's copyright infringement. The fourth part compares Brazilian and U.S. legislation and case law with respect to defamatory content and copyright infringement on the internet. The conclusion reflects about the worthiness of existing legislation.

## I. THE INTERNET ORIGIN AND THE BRAZILIAN INTERNET BILL OF RIGHTS

In simple terms, the internet is an international network of interconnected computers.[2] According to Barry M. Leiner et al., J.C.R Licklider of MIT wrote the first records of the internet during the Cold War in 1962.[3] The concept was to decentralize the U.S. information sharing, preventing its potential loss in a hypothetical attack.

In 1969, the UCLA Professor Leonard Kleinrock transmitted the first email in history.[4] In the 1970s, the United States started permitting other researchers to develop studies about the internet.[5] This resulted from the decrease of tension between the United States and Russia and the consequent risk reduction of immediate attacks.

In 1992, the scientist Tim Berners Lee created the World Wide Web.[6] By the same period, a global and commercial interest in the internet increased, resulting in the internet boom.[7]

As reported by Leonardi, the internet was launched in Brazil in 1989 with the incentive of the Science and Technology Ministry. However, until 1995 it was restricted to the research and educational fields.[8]

According to the International Telecommunication Union (ITU), in 2015 about 3.2 billion people around the world were using the internet every day.[9] This considerable number, which corresponds to 40% of the world's population, demonstrates that the internet is an imperative in the globalized world. It facilitates innumerous activities, but at the same time raises social conflicts that require proper rules.

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2. *See generally* MARCEL LEONARDI, RESPONSABILIDADE CIVIL DOS PROVEDORES DE SERVIÇOS DE INTERNET [THE INTERNET SERVICE PROVIDER LIABILITY] (2005).

3. Barry M. Leiner et al., *Brief History of the Internet,* INTERNET SOCIETY, http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet (last visited Sept. 26, 2016).

4. *Id*.

5. *Id*. at 8.

6. *Id*. at 12.

7. *Id*. at 14.

8. *See generally* LEONARDI, *supra* note 2.

9. *ITU Releases 2015 ICT Figures,* ITU (May 26, 2015), https://www.itu.int/net/pressoffice/press_releases/2015/17.aspx.

As Ascensão has noted, considering the internet is a global grouping of interconnected computers, no government or entity can absolutely take control of it.[10] Therefore, as a general rule the internet regulation pertains to each country. Nevertheless, there are some international efforts to suppress globalized harmful behaviors such as the Berne Convention of 1886 and the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994.

As stated by Reinaldo Filho, the development of the internet resulted not only in a technological revolution but also in a legal revolution.[11]

With that background in mind, during the 2014 NETMundial, the Brazilian President announced the Federal Statute No. 12.965/2014, also known as *Marco Civil da Internet* [Internet Bill of Rights] (IBR).[12]

The IBR resulted from a democratic process. First, its bill was submitted to public consultation and later passed through six public hearings.[13] Hence, it can be considered a transparent statute.

The initiative of regulating the Internet in Brazil started in 2006, with the cybercrimes' bill proposed by the Senator Eduardo de Azeredo.[14] The Brazilian society strongly reacted against this penal regulation, since its broad scope would turn thousands of Internet users into criminals.[15] In 2007, Ronaldo Lemos, the director of the Institute for Technology and Society of Rio de Janeiro, wrote an article for Folha de São Paulo, a respected press venue in Brazil, claiming the idea of a civil regulation and calling it "Marco Civil."[16] In 2008, the Ministry of Justice created a multitask team to draft a bill that encompassed this concept.[17] In 2009, the former Brazilian President, Luiz Inácio, defended a civil regulation of the Internet in the 10th International Free Software Forum.[18] In the same year, the Ministry of Justice and the Getúlio Vargas Foundation celebrated an agreement to launch a platform to stimulate the online discussion of the mentioned bill.[19] The first

10. *See generally* JOSÉ DE OLIVEIRA ASCENSÃO, SOCIEDADE DA INFORMAÇÃO E MUNDO GLOBALIZADO, PROPRIEDADE INTELECTUAL E INTERNET [THE INFORMATION SOCIETY AND THE GLOBALIZED WORLD: INTELLECTUAL PROPERTY AND INTERNET], (Marco Wachowicz et al. eds. 2002).

11. *See generally* DEMÓCRITO RAMOS REINALDO FILHO, RESPONSABILIDADE POR PUBLICAÇÕES NA INTERNET [LIABILITY FOR PUBLICATIONS ON THE INTERNET], (Forense ed. 2005).

12. CARLOS AFFONSO ET AL., UNDERSTANDING BRAZIL'S INTERNET BILL OF RIGHTS 6 (2015).

13. *Id*. at 27, 36.

14. *Id*. at 28.

15. *Id*.

16. *Id*. at 29.

17. *Id*.

18. *Id*. at 36.

19. *Id*. at 29.

phase of public consultation ended with more than 1,800 contributions.[20] This was the first time in Brazil's history that the House of Representatives took into account popular contributions. In 2010, the second phase of the public consultation ended with more than 1.168 contributions.[21] In 2011, the President Dilma Rouseff sent the bill to the House of Representatives.[22] In March 2012, Alessandro Molon, a Congressmen, was chosen as the leader of the bill and later created a special commission launching the virtual community of the IBR.[23] In 2013, Edward Snowden, a contractor for the U.S. National Security Agency (NSA), leaked documents that showed the President Dilma Rouseff and the oil company Petrobras were being target of the U.S. surveillance.[24] In the same month, the IBR was put in a constitutional regime.[25] Thus, it should have been voted in 45 days and the Congress was prevented from voting on any other issues until the completion of the IBR. Nonetheless, the bill was delayed several times. In March 2014, the Internet Bill of Rights was approved in the House of Representatives.[26] In April, it was approved in the Senate, and in the same month, it was sanctioned by the Brazilian President.[27]

The explanatory memorandum of the Congress, a report that accompanies the bill to the Brazilian President, marks the challenge of harmonizing the law and digital culture.[28] The document also stresses that the absence of legal definition results in contradictory judicial opinions.

20. *Id*. at 38.
21. *Id*. at 36.
22. *Id*. at 37.
23. *Id*. at 28.
24. *Id*. at 68.
25. *Id*. at 37-38.
26. *Id*. at 38.
27. *Id*.
28. *Id*. at 31

Ronaldo Lemos accurately represented the central disputes of the main stakeholders of the IBR:[29]

| 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 |

According to the Congress, the IBR was inspired by the United States' Electronic Communications Privacy Act of 1986 (18 U.S.C. §§ 2510-2522); the United States' Communications Decency Act of 1991 (U.S.C §§ 230, 560, 561); the United Kingdom Data Protection Act of 1998; the Electronic Communications and Wireless Telegraphy Regulations of 2011; the Electronic Communications (Universal Service) (Amendment) Order of 2011; the Privacy and Electronic Communications (EC Directive) Regulations of 2003; the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations of 2004; the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations of 2011; the Argentinian Ley 26.032; the Spanish Ley 11/2007, Ley 25/2007, Ley 56/2007, and Ley 18/2011; by the Portuguese Laws 69/98, and 32/2008; and by the French Loi 2004-669 2004, and 2009-669 2009.

One purpose of the IBR, according to the Brazilian Vice President of e-commerce, was to establish the basic internet rules in the country, mitigating an environment of insecurity that used to scare off potential investors. [30] To Silva, Lopes and Oliveira, the internet is a public space, where the fundamental rights must be observed.[31]

29. RONALDO LEMOS, FEET ON THE GROUND: MARCO CIVIL AS AN EXAMPLE OF MULTITAKEHOLDERISM IN PRACTICE IN UNDERSTANDING BRAZIL'S INTERNET BILL OF RIGHTS 30 (Instituto de Tecnologia e Sociedade do Rio de Janeiro ed., 2015).

30. Kalinka Iaquinto, *Caia na Rede* [*Fall in the Network*], CONJUNTURA ECONOMICA 38 (May 2014), http://bibliotecadigital.fgv.br/ojs/index.php/rce/article/view/31726 (last visited May 9, 2016).

31. Sherilyn Hayana da Silva, et al., Marco Civil da Internet 4 [Internet Bill of Rights] (2007), http://www.santacruz.br/ojs/index.php/JICEX/article/view/675.

In accordance with Gômara and Almeida, the IBR confirmed Constitutional rights such as privacy, data protection, and freedom of speech.[32] However, the aforementioned legislation also brought a huge controversy: the network neutrality. It is interesting to note that the European Parliament, almost concomitantly, approved a specific law safeguarding the network neutrality and the United States Court of Appeals District of Columbia Circuit held that the network neutrality rule announced by the Federal Communications Commission was invalid.[33]

The IBR is divided into five chapters. The first announces the preliminary provisions. The Second moves to user's rights. The Third reports the connection between Internet applications. The fourth addresses the judicial request of data and the fifth points out the government's role.

Saldanha presents seven fundamentals to the IBR, allocating the freedom of speech as the most important.[34]

Gomes and Néri acknowledges the main features of the IBR: privacy, personal data, data storage, surveillance in the web, free internet, end of targeted marketing and freedom of speech.[35] Freedom of speech includes the treatment for the ISP. As a rule, if the ISP does not remove the defamatory content after judicial order, it will not be held liable, therefore, ensuring the end of the "private censorship." Nonetheless, the IBR provides an exception to this general rule.

As reported by Souza, Viola and Lemos, the IBR may inspire other nations.[36] The Italian President of the House of Representatives, Ms. Laura Boldrini, decided that Italy's Parliament would create a commission based on the Brazilian experience.[37]

The Research Center of the Brazilian Legislative, led by Carlos Eduardo Elias de Oliveira, launched a manual for the referred legislation, explaining

32. Marcelo Pereira Gômara and Bráulio Dias Lopes de Almeida, *Lei 12.965, de 23/04/2014*, Marco Civil da Internet, Comentários [Federal Statute No. 12.965, from 04/23/2014 – Internet Bill of Rights. Commentaries], at 226-27, Revista do Tribunal do Trabalho. 2ª Região. Fonte Oficial de Publicação de Julgados. Revista, (Silvia Regina Pond. Galv.o Devonald. Desembargadora Presidente et al. eds, 2014).

33. *See supra* note 32.

34. *See generally* Jânia Maria Lopes Saldanha. *Marco Civil da Internet: Um Quadro de Princípios, Responsabilidade e de Protagonismo do Poder Judiciário* [*Internet Bill of Rights: A Framework of Principles, Responsibility and the Judiciary Protagonism*], *in* O PODER JUDICIÁRIO NA SOCIEDADE EM REDE 160, 164-165 (2015).

35. *Entenda o que está em Jogo na Proposta do Marco Civil da Internet* [*Understand What is at Stake in the Proposed Civil Marco Internet*], POLITICA (June 11, 2013 7:30 PM), http://g1.globo.com/politica/noticia/2013/11/entenda-o-que-esta-em-jogo-na-proposta-de-marco-civil-da-internet.html.

36. AFFONSO. *supra* note 12, at 6-7.

37. *Id*. at 8.

their personal interpretation.[38] First, it elucidates that the "Internet Constitution" is not the best term to refer to the IBR.[39] This name expresses an autonomy that the mentioned legislation does not have. Therefore, the IBR conflicts with the Brazilian Federal Constitution, Consumer Code, and Civil Code, among others. The Brazilian President recently regulated the IBR by the decree 8.771/2016.[40]

According to Nazareno, since the internet is no longer an ideal and free environment, where the users navigate without the interference and monitoring of companies and governments, the biggest challenge is to equate all the interests in an internet that is viable, fair and accessible to everybody.[41]

## II. THE INTERNET SERVICE PROVIDER SECONDARY LIABILITY IN BRAZIL: DEFAMATORY CONTENT

According to Binicheski, ISPs are essential actors to access the internet.[42] However, these technical intermediates are more attractive to civil liability lawsuits, for being in a more reachable position and because of its financial resources.

Until the IBR, the Brazilian Superior Court of Justice (STJ), the highest court in Brazil to try subjects related to the Federal Statutes, held that the ISP must take down, through mere request, all the defamatory publication within twenty-four hours of the receipt of the notice.[43] Otherwise, the ISP would be held liable.[44] This is the Court's position in any internet context, including social media and blogs.

For example, the judgment *AgRg no REsp 1309891/MG*, which Justice Sidnei Beneti held that according to the STJ precedents, the ISP is not liable

38. Carlos Eduardo Elias de Oliveira, *Aspectos Principais da Lei No. 12.965, de 2014, o Marco Civil da Internet: Subsídios à Comunidade Jurídica* [*Main Aspects of the Federal Statute No. 12.965, 2014, the Internet Bill of Rights: Subsidies to the Legal Community*] at 5 (2014).

39. *Id*.

40. Brazilian laws are subject to administrative decrees. Their purpose is to specify the interpretation of the law.

41. Cláudio Nazareno, *Texto de Referência Acerca do Marco Civil da Internet* [*Reference Text on the Internet Bill of Rights*], at 12, 14 (2014).

42. *See generally* Paulo Roberto Binicheski, *O Marco Civil da Internet: Primeiras Linhas* [The Internet Bill of Rights: First Insights], 2014.

43. S.T.J.J. EDcl no REsp 1323754/RJ (2012/0005748-4), at 10.

44. Until the STJ establishes the precedent regarding ISP, the national courts used to hold in three contradictory ways. The first used to exempt the ISP from any liability for other's content. The second used to apply a strict liability regime for the ISP. The final used to relate the liability of the ISP to a possible fault on its part. Some courts would hold the ISP liable for not taking down the content after becoming aware of its existence and other courts would hold the ISP liable for not complying with the court's order to remove the defamatory content.

for the content of third parties.[45] However, it is obliged to remove immediately the defamatory content, though mere request.[46]

Another example is the judgment *REsp 1193764/SP*, which Justice Nancy Andrighi explained that the commercial usage of the internet is subject to the Brazilian Consumer Code.[47] Therefore, the fact that the service rendered by the ISP is free of charge does not change the consumer relation, since the concept of consumer established in the Article III of the Brazilian Consumer Code comprehends indirect payments.[48] The Justice also reasoned that a previous monitoring of the content is not an intrinsic part of the service rendered by the ISP.[49] However, as soon as someone notifies the ISP of the illegal content, it must immediately act by removing it.[50] If it does not act this way, it will be liable for its omission.[51]

Justice Nancy Andrighi has the most comprehensive opinions regarding takedown notices. For instance, in the opinion EDcl no REsp 1323754/RJ (2012/0005748-4), the Justice explained that the speed that the information circulates in the virtual media makes it imperative for the measures to restrain the dissemination of defamatory contents, whereby rapidly and decreasing the libel dissemination and consequently its results.[52] Therefore, the ISP must take down the defamatory content within twenty-four hours of the notice.[53] If it fails to do so, it will be secondarily liable for its omission.[54] During the twenty-four hours, the ISP does not have to analyze the request.[55] After having proper time to analyze the notice, it should evaluate the veracity of the information. If the information is true, the ISP must definitely take down the content and if not, it should restore it. It is important to note that not being obliged to analyze a notice within twenty-four hours does not mean it can defer the analysis indefinitely. The ISP must be fair and adopt the legal

45. S.T.J.J. AgRg no REsp 1309891/MG, Relator: Ministro Sidnei Beneti and Terceira Turma, 06.29.2012, at 2id.

46. *Id*.

47. S.T.J.J. REsp 1193764/SP, Relator: Ministra Nancy Andrighi and Terceira Turma, 08.08.2012.

48. *Id*.

49. *Id*.

50. *Id*.

51. *Id*.

52. S.T.J.J. EDcl no REsp 1323754/RJ (2012/0005748-4), Relator: Ministra Nancy Andrighi and Terceira Turma, 10.17.2013.

53. *Id*. at 10.

54. *Id*.

55. *Id*.

means against the abuse of the notices.[56] There are several decisions with the same understanding.[57]

Interestingly, the STJ treated Google's liability with a different regime when Google acts as a "search provider." As held by the Court, Google is not liable for the defamatory information that its search engine may indicate.[58] The idea of the opinion was to recognize the search provider's role and ensure the fundamental right to access information.

The Brazilian Supreme Court (STF), the highest Court in Brazil to try subjects that are related to the Federal Constitution, by the same time, created a "general repercussion" in a case relating to a plaintiff who was trying to make Google liable for the Orkut's defamatory content.[59] The STF suspended all similar lawsuits to decide first which right should weight more in this type of cases: freedom of speech or privacy.[60] In the opinion, the Justice explains that due to the complexity of this case and the apparent antinomy, the Court should make a separate session to discuss these rights.[61]

After the IBR, the Brazilian case law must change. In Article 19, the IBR states freedom of speech as the main rule.[62] The concept was to prevent abusive notifications and protect the ISP, while favoring potential innovation. In this scenario, ISPs are accountable only if they do not take down the defamatory content after a specific court's order. Hence, the "victim" of the defamatory content cannot notify the ISP himself.

The IBR created two exceptions to the general liability rule in articles 19 and 21.[63] First, aiming to valorize privacy, the ISP has to comply with the victim notification to take down any content that involves nudity or sex (so-called revenge porn).[64] This exception was inserted in one of the last rounds of the IBR's bill as an answer to the case of two Brazilian teenagers that

56. *Id*.

57. S.T.J.J. REsp 1396417/MG, Relator: Ministra Nancy Andrighi and Terceira Turma, 11.25.2013.

58. S.T.J.J. REsp 1316921/RJ, Relator: Ministra Nancy Andrighi and Terceira Turma, 10.17.2013.

59. A general repercussion is a procedural instrument in the Brazilian Federal Constitution, which enable the STF select the lawsuits it is going to analyze, considering the criteria of legal, political, social or economic relevance. The concept is to decrease the number of lawsuits in the STF. Once the STF finds a general repercussion, it will analyze the merit of the question and after the inferior Courts will apply it in identical cases.

60. S.T.F.J. ARE 660861 RG, Relator: Ministro Luiz Fux, 11.07.2012.; S.T.F.J. RE 628624, Relator: Ministro Marco Aurélio, 08.16.2011.

61. The holding was not found, despite the fact the STF mentioned in the national media that it would solve the general repercussion in a few weeks after the mentioned case.

62. AFFONSO, *supra* note 12, at 48.

63. *Id*. at 52.

64. *Id*. at 54.

committed suicide after having their intimate videos shared through WhatsApp.[65]

Some authors, as Souza, understand that Article 21 can create several discussions in future lawsuits, because of its wording. [66]

According to Oliveira, the first exception should be interpreted conjointly with the Consumer Code, that articles 186 and 422, protects the *bona fide* and *neminem laedere* principles.[67] In this reading, besides the obligation of take down, the ISP must also provide the victim with the information of the author of the defamatory content (including name, address and the taxpayer registration number). This is necessary for the victim to try the author of the defamatory content for direct liability.

The second exception regards copyright infringement. Any infringement related to copyrighted materials continues subject to the Brazilian Copyright Act and the Federal Constitution. According to Souza, this exception was clearly created by the influence of the television broadcasters that did not want to change the established practice of sending notifications to take down the infringing copyrighted material.[68] Another reason for this exception is the idea of modernizing the Brazilian Copyright Act.[69] This would be a way to avoid overlaps in the legislation. The referred update in the legislation is still far from being materialized.

After one year being in force, it is very precipitate to appoint the failures of the legislation, since the Judiciary did not have enough opportunities to assess many cases involving it.

Some scholars interpret the Articles 18 and 19 of the IBR in a different way. Souza, for instance, states that not being liable for not removing a content without a court's order does not mean that the ISP cannot remove the content once notified by the victim and in accordance with its Terms of Services. Nevertheless, this interpretation disregards the purpose of the statute, which that was not to create a "private censorship."[70] In this sense, the IBR recognizes the Judiciary as the competent authority to decide to take down the material, since this would demand a subjective analysis of the ISP and therefore imperil freedom of speech.

Article 19 in the IBR also states that civil special courts may judge issues arising from this section.[71] The IBR referred to the special courts, created by

65. *Id*.

66. *Id*. at 55. Article 21 states that the ISP must act in a "diligent manner" and "considering its technical limitations," which results in subjective standards.

67. Oliveira, *supra* note 38, at 148.

68. AFFONSO *supra* note 12, at 52.

69. *Id*.

70. *See generally* AFFONSO, *supra* note 12.

71. *Id*. at 51.

the Brazilian Federal Statute No. 9.0099/1995, which procedure is guided by the principles of celerity, orality and simplicity. Nonetheless, nothing prohibits the creation of a different court specialized by subject.

The IBR, through Article 19, seems to be incentivizing the judicialization, which is broadly criticized. Souza brings one of the most recurrent arguments in this context, that the speed that things happen on the internet is not compatible with a lawsuit.[72] Nonetheless, the removal of the content can be granted by injunction of the civil special courts.

## III. THE INTERNET SERVICE PROVIDER SECONDARY LIABILITY IN BRAZIL: COPYRIGHT INFRINGEMENT

The protection of the intellectual property in the digital era is a challenge, mostly because reproducing an intellectual property work in the digital media is easy, fast, efficient, involves low costs, and it is difficult to differentiate the copy from the original.

There is no doubt that the Brazilian Copyright Act is applicable to the internet, once it recognizes the creations expressed in any media, fixed in any support, tangible or not, now known or that will be invented in the future. In addition, the mentioned statute ensures the immediate suspension of the transmission or retransmission of the copyrighted work independently of the media or process used for the practice of illicit.

According to the specialists, the Brazilian Copyright Act, Federal Statute No. 9.6010/1998, is one of the most restrictive in the world.[73] Therefore, many scholars thought the law would not resist the digital era. This is also the opinion of the Consumers International's IP Watchlist that evaluated the Brazilian law as one of the worst, among the thirty countries they assessed.[74] An example of restriction that the Brazilian Copyright Act announces is the concept of fair use. Brazil follows the European model, which is completely rigid, in contrast to the U.S. model. While in Brazil, the conduct is stated in a list that the scholars understand as exhaustive, the U.S. courts established some criteria that will be checked in the cases. In other words, in the Brazilian model, if the conduct of the agent is not exactly as stated by the list, it cannot be considered fair use.

The copyright cannot be an absolute monopoly. Otherwise, many rights would be impaired, such as the right to access culture, development, freedom

72. *Id*. at 9.

73. *See generally* SÉRGIO VIEIRA BRANCO JÚNIOR, DIREITOS AUTORAIS NA INTERNET E O USO DE OBRAS ALHEIAS [COPYRIGHTS IN THE INTERNET AND THE USE OF OTHER'S WORK] (Lumen Juris ed., 2007).

74. Consumers International, *IP Watchlist* (Apr. 18, 2011), http://www.consumersinternational.org/news-and-media/news/2011/04/brazil,-egypt-and-uk-among-worst-copyright-regimes-in-the-world.

of speech, and free flow of ideas. In this context, it is necessary to think about alternatives to balance the mismatch of the technology with such a restrictive law. The first option is a legislative reform in order to include the specificities of the internet and the conducts that are socially acceptable and what the law currently prohibits. The second option is the exercise of hermeneutics to interpret the current legislation taking into account the Federal Constitution that states the intellectual property as a fundamental right along with the users and judicial precedents.

The mentioned legislative reform seems to be the best option, but at the same time, seems unlikely to occur. According to Reia and Mizukami, the process to modernize the Brazilian Copyright Act started in 2007 in the National Forum for Copyrights that permitted public debate and consultation.[75] The idea was to use the same collaborative model of the IBR and try to balance the users and author's interests. However, the reform has suffered a stagnation period that coincided with the time that the President appointed the new Culture Minister, Ms. Ana Hollanda. It is interesting to note that Ms. Hollanda has a close relation to the recording industry and the Central Office of Collection and Distribution (Ecad), which are both against the bill. In 2015, a new Minister was appointed, Mr. Juca Ferreira, who brought with him the hope of the continuation of the legislative process. Nonetheless, as of now any governmental efforts toward the modernization of the Copyright Act remain to be seen.

The case law, in its turn, is presenting a new hermeneutics in the liability of the ISP in the cases of copyright infringement, in a movement that started in May 2015 in the STJ.

It is useful to acknowledge the facts of the case decided by the STJ to understand the opinion of Justice Salomão.[76] Botelho Indústria e Distribuição Cinematográfica Ltda, a company of legal education in Brazil that offers its products through CDs and DVDs, detected the commercialization of counterfeited copies of its products in an Orkut's link. Therefore, according to the Plaintiff, the company notified Google Brasil Internet Ltda to take down the related Orkut's communities. Nevertheless, Google answered the notification stating that it would be impossible to take down because they would need better specification of the communities, including the specific location (URL). In March 2008, the Plaintiff affirmed that it had expressly identified the communities; hence, there was no reason for Google not to take down.

75. *See generally* JHESSICA REIA & PEDRO NICOLETTI MIZUKAMI, REFORMANDO A LEI DE DIREITOS AUTORAIS: DESAFIOS PARA O NOVO GOVERNO NA ÁREA DA CULTURA [REFORMING THE COPYRIGHT LAW: CULTURE RELATED CHALLENGES FOR THE NEW GOVERNMENT] (2015).

76. Brazilian Superior Court of Justice (STJ). REsp 1512647/MG, Rel. Ministro Luis Felipe Salomão, Segunda Seção, judged in 05/13/2015 and published in 08/05/2015.

Considering Google's alleged omission, the Plaintiff filed a lawsuit asking that the Court should enter judgment in his favor; Google should be required to take down the communities; and that Google would pay the Plaintiff's actual and moral damages.[77] The District Court of Belo Horizonte/MG recognized the actual damages, required Google to provide the IP and the qualification of the users that infringed the copyrights and stated that the URL was unnecessary to take down the content. The District Court did not acknowledge moral damages to the Plaintiffs. The core concept of the District Court was that the ISP, while acting as the administrator of a social media and permitting the creation of profiles and communities that violates the law, is liable for all the actual damages that may arise when the copyright owners, among others communicates the ISP, but it does not act removing the content. The State Appellate Court affirmed the opinion on appeal.

Thereafter, the Defendant filed a special appeal to the STJ because according to the Defendant the obligation to remove content without the URL and to provide the IP and further qualification of the users who infringed the law was impossible. Moreover, the Defendant alleged it could not be condemned to actual damages since it did not directly or indirectly infringed the laws.

In May 2015, the STJ tried the case. Justice Salomão began his opinion by quoting the articles 102 and 104 of the Brazilian Copyright Act. This articles states that the ones who fraudulently reproduce, disclose or otherwise use a work of others' ownership, or that edit a literary, artistic or scientific work or who sell, expose for sale, hide, acquire, distribute, have in storage or use work or phonogram fraudulently, in order to sell, benefit, advantage, profit directly or indirectly, for themselves or others, are civilly liable. Next, the Justice argues that the common ISP that administrates a social media site cannot be obviously framed in the mentioned articles. Thereafter, he mentions that the U.S. doctrine is currently framing the ISPs into two categories of liability: direct and secondary. The former being applied when the actor personally engages in infringing activity and the latter, by contrast, when the actor is responsible for infringement of third parties, even when they have not themselves engaged in the infringing activity. Therefore, it applies when the ISP induces or encourages others to infringe the law or to profit from such acts, while it declines its right and ability to control them. Applying this to the case, Justice Salomão states that Orkut's purpose was not to share intellectual works. After analyzing the evidence, Justice Salmao stated that Orkut's structure did not permit the share of such files. Therefore, it is not a case of contributory liability. Likewise, there is no evidence that

77. *Id*.

the ISP received any financial benefit through the copyright infringement. Thus, there was no vicarious liability. Finally, he states that there is no obligation to remove content when the ISP does not have the specific location for the infringement (URL).

Justice Salomão considered that since September 2014, Orkut officially does not exist. However, considering it is still possible to search for Orkut's communities in a catalog available at http://orkut.google.com, the official closure of Orkut did not automatically remove the infringing communities.

The Justice also mentions in his opinion that the absence of a specific legislation in this sector makes the importance of the jurisprudence to evolve gradually. Therefore, he highlights that is the first time the STJ decided the ISP's hand in copyright infringement.

Justice Salomão mentioned that before the IBR the STJ had a precedent that the ISP had 24 hours to take down the defamatory material after being notified. However, after the legislation, the defamatory content is only removed after a judicial order that must be specific. Next, he mentioned that the IBR contained two exceptions: revenge porn and copyright infringement. The Justice concludes this reasoning noting that, in the absence of a specific legislation and precedents, the existence of the Brazilian Copyright Act and the foreign wide debate about the subject, the Defendant is not liable because Orkut's structure and the ISP conduct did not contribute to the infringement. He mentions the Copyright Act articles clarifying that Google did not do any of the actions. Thus, it cannot be direct liable and to discuss its potential secondary liability, he mentions *Sony v. Universal Studios*, Napster, Grokster and Pirate Bay cases. The Justice concludes with the understanding that to hold an ISP liable it would be like consider the post officers liable for the content of the private letters that they are only delivering. Finally, the Justice agrees with the dissent and partially changes his opinion to adjust that the ISP must take down the communities and inform the IP and qualification of the users, even without the URL.

Although other Justices have praised the STJ opinion, it disregards the Brazilian peculiarities. There is no question about the constitutionality of the use of the comparative law in the judicial opinions in Brazil. More than that, the use of comparative doctrine to develop a contextualized approach of problems that are common in several legal systems is not a novelty. In addition, historically, there is no substantial restriction on the use of foreign law in the Brazilian case law.[78] However, according to Cardoso, the excess in the comparative law may deviate the judges from the social, economic and

78. *See generally* Otávio Luiz Rodrigues Junior, *Fonte Estrangeira Pode Fundamentar Decisão Nacional?* [*Can a Foreign Source Base a National Opinion?*] CONSULTOR JURÍDICO (2012), www.conjur.com.br/2012-dez-12/direito-comparado-recurso-estrangeiro-fundamentar-decisao-nacional (last visited May 9, 2016).

cultural conjuncture, which increases the possibility of "bad" opinions.[79] Furthermore, until now every time Brazil, as United States, mentioned a comparative doctrine, it made a *obter dictum* proposition and never a *ratio decidendi*, as it was stated in this opinion.[80] The concept is to complement the opinion, enriching it and permitting the development of the legal system. The critique about the opinion is not only a question of defending the legal cultural in Brazil but also to question the legal qualification of the foreign doctrine.

## IV. A COMPARATIVE ANALYSIS OF THE BRAZILIAN AND UNITED STATES CASE LAW AND LEGISLATION

In the United States the theories of secondary liability (contributory and vicarious infringement) that were previously refined in the real world, were later applied to the ISP. These theories were developed for years in the United States courts, starting with the landmark case on vicarious liability *Shapiro, Bernstein & Co. v. H. L. Green Co.*[81] In this case, the court stated that there were two lines of precedents: the landlord leasing and the proprietor or manager of a dancing hall leasing his premises to or hiring a dance band.[82] Therefore, considering the storeowner retained the right and ability to control the record concession and concessionaire's employees and financially benefited from the unauthorized sale of counterfeited records that infringed the Plaintiff's rights, it should be held liable.[83] Another landmark case on secondary liability is *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,[84] in which the court defined contributory liability. According to the court, the liability for participation in the infringement occurs when the person (aware of the infringing activity), takes part in the other's infringing conduct by inducing, causing or materially contributing to it.[85] The development of the doctrine with regard to the flea markets, in *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.*,[86] and *Fenovisa, Inc. v. Cherry Auction Inc.*,[87] and the theory of fair use in *Sony Corporation of*

79. *See generally* GUSTAVO VITORINO CARDOSO, O DIREITO COMPARADO DA JURISDIÇÃO CONSTITUCIONAL [THE COMPARATIVE LAW IN THE CONSTITUTIONAL ADJUDICATION] (Revista Direito GV ed., 2010).

80. *Id*. at 26.

81. 316 F.2d 304 (2d Cir. 1963).

82. *Id*. at 307.

83. *Id*.

84. 443 F. 2d 1159 (2d Cir. 1971).

85. *Id*.

86. 955 F. 2d 1143 (7th Cir. 1992).

87. 76. F. 3d. 259 (9th Cir. 1996).

*America v. Universal City Studios, Inc.*,[88] were useful to deal with the early challenges from cyberspace, such as those presented in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,[89] when the CDA and DMCA did not yet exist.

Before the CDA enactment there was a controversy among the courts when assessing the ISP liability for third part defamatory content. For instance, in *Cubby, Inc. v. CompuServe, Inc.*[90] and *Stratton-Oakmont, Inc., v. Prodigy Services Co.*,[91] analogous facts lead to different holdings. In the first case, the court held the ISP could only be held liable for defamation if it knew or had reason to know the defamatory nature of the content.[92] Therefore, it was not held liable.[93] In the second case, the ISP was found liable for defamation.[94]

In response to *Stratton-Oakmont*, Congress enacted the Communications Decency Act (CDA) of 1996 to create an immunity for the intermediary that only made available third parties contents. The concept was also to incentivize the ISP to monitor its network's content. Thus, it established the general rule that the ISP "shall not be treated as the publisher or speaker or any information" provided by" third parties.[95] The statute also defines internet and interactive computer service, information content provider and access software provider, which are very broad definitions that are met in all cases. States are not allowed to enact laws increasing the liability of the ISP and there is no take down obligation. It does not affect criminal nor intellectual property law.

The United States Supreme Court struck down most of the CDA. According to the Court, several penal sections that conflicted with the freedom of speech were unconstitutional. However, Section 230 remained.

In the cases that followed the CDA's enactment, like *Zeran v. America Online Inc.*,[96] there is complete immunity from liability for defamatory speech posted in the ISP system by third parties. By the same time the direct liability of the actual content creator remains, the ISP does not have the obligation to remove such speech even after being given notice. The interpretation of the CDA was expanded beyond defamatory speech in cases like *Stoner v. eBay Inc.*,[97] when eBay was considered immune for liability

88. 464 U.S. 417, 104 S. Ct. 774 (1984).
89. 907 F. Supp. 1361 (N.D. Cal. 1995).
90. 776 F. Supp. 135 (S.D.N.Y. 1991).
91. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
92. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. at 142.
93. *Id*. at 144.
94. *Stratton-Oakmont*, 1995 WL 323710, at *7.
95. 47 U.S.C. § 230 (1998).
96. 129 F. 3d 327 (4th Cir. 1997).
97. No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000).

arising from listings for counterfeited music. The courts are possibly considering that everything in the internet is speech. That is also the understanding in *Dart v. Craiglist Inc.*,[98] *Gibson v. Craiglist Inc.*,[99] and *Miles v. Raycom Media Inc.*[100] It is interesting to note that with this understanding, the ISP liability seems to be almost absolute. Cases like *Charles Novins, ESQ. P.C. v. Cannon*[101] and *Carafano v. Metroplash.com Inc.*[102] confirm this.

Comparing this to the Brazilian experience, there is a tendency since the late nineties of not holding the ISP liable for defamatory content. This can be confirmed by the U.S. opinion in the case *Religious Technology Center* and the Brazilian case TJRS, Ap. Civ. N. 70001582444, Judge Antônio Correa Palmeiro da Fontoura in May 2002.

The IBR is in many portions similar to the CDA. As in the United States that left the copyright issues to the DMCA, the Brazilian legislation in its Article 18 states that copyright issues will be treated by the specific regulation. With the upcoming copyright reform, Brazil is about to choose which model to follow in the Copyrights Act. In addition to this, considering the ISP does not author the content, it is not secondary liable. Therefore, Article 19 of the IBR is very similar to the Section 230 of the Communication Decency Act.

The Brazilian and the U.S. legislation are also very similar regarding direct infringement of copyrights. Both does not require intent or state of mind, although willfulness is relevant and consists of the unauthorized exercise of one exclusive rights of the copyright holder. Nevertheless, as it was exposed by Justice Salomão in his opinion, the Brazilian legislation engages in an exhaustive list of acts that might configure copyright infringement.

The Digital Millennium Copyright Act (DMCA) of 1998, in its turn, provides the immunity for ISP that meet specific conditions in section 512. Under the DMCA, to avoid liability, the ISP must implement a policy of terminating the accounts of subscribers who are repeat infringers; upon learning of an infringing transmission, the ISP must act to remove the infringing material; not obtain financial benefit from the infringement; not have actual knowledge of the infringement and design an agent to analyze the notices of the copyright owners.

Among the most interesting features of the DMCA, it provides two definitions for ISP that are so broad that it is almost impossible no to fit into it; it encourages the ISP to monitor the content, despite not obliging it.

98. 665 F. Supp. 2d 961 (N.D. Ill. 2009).
99. No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009).
100. No. No. 1:09CV713–LG–RHW, 2010 WL 3419438 (S.D. Miss. Aug. 26, 2010).
101. 557 F. App'x 155 (3d Cir. 2014).
102. 339 F. 3d 1119 (9th Cir. 2003).

Moreover, it deals with a similar idea to contributory liability in the "information residing on systems or networks at direction of users" section.

Until nowadays, the decisions regarding the DMCA are differently construed and up to this moment, the Supreme Court of the United States did not try anything related to the mentioned legislation. There is a lot of disagreement in the enforcement of red flags (when differentiating it from actual knowledge) in cases like *Robert Hendrickson v. Ebay, Inc.*[103] Moreover, in cases like *A&M Records, Inc. v. Napster, Inc.*,[104] the courts disagree about the meaning of "through." Some courts opt for the purpose of the statute and some for the literal reading. Therefore, considering the court did not apply the safe harbor, it held Napster vicarious and contributory liable. This was a landmark decision on copyright and peer-to-peer technology and was used as parameter for the following decisions of *In re Aimster Copyright Litigation.*[105] In sum, even after seventeen years of existence, there are lots of disagreements in the application of the DMCA, which in most of cases, tend to benefit the innovation and disregard the copyrights. Holdings like *Costar Group, Inc. v. Loopnet, Inc*.[106] and *Viacom International Inc. v. YouTube Inc.*[107] support this understanding.

In contrast with the United States, Brazil does not have an internet copyright legislation, but only the Federal Constitution and the Brazilian Copyright Act. As previously mentioned, the main similarity in this field with the United States' model rises from the Brazilian STJ; subsequently, Brazil began considering the United States standard and began applying contributory and vicarious infringement. More than this, the similarity can be seen in the disagreement of the courts in assessing copyright infringement in the internet.

After studying the precedents and the current legislations, it is possible to state that ISP is almost always shielded, which may be creating an imbalance in the rights of the content owners and the victims of defamatory contents against the ISP and the regular internet users.

## CONCLUSION

The main problem with internet legislation is that it cannot keep up with the rapid pace of changes in technology. By the time a government discusses, drafts, and implements a new law, the market and technology have already raced ahead. Thus, any attempts to modernize the existing rules are difficult

103. 165 F. Supp. 2d 1082 (C.D. Cal. 2001).
104. No. 00-16401, 00-16403, 2000 WL 1055915 (9th Cir. July 28, 2000).
105. 334 F.3d 643 (7th Cir. 2003).
106. 164 F. Supp. 2d 688 (D. Md. 2001).
107. 253 F.R.D. 256 (S.D.N.Y. 2008).

and complex. Moreover, the increased use and the involvement of several actors, such as users, ISP and copyright holders, almost turns the internet into a battlefield, where each party wants their interests preserved. The attempt to balance all these interests is not a novelty, but the internet makes it even more difficult.

After analyzing the Brazilian and the United States experiences, it is possible to conclude that in most of cases the ISP benefits from the current legislation and doctrine, which is still controversial. In this scenario, the ultimate questions must be: How to balance the interests in a fairer way? Is it worthy to have a legislation is this field? Are the mentioned legislation and case law failures?

There are no current definitive answers for these questions. However, the tendency is that a more stable scenario will be established over time. While this does not happen, it is possible to infer that the legislation and the case law—despite presenting many failures—support, even minimally, the creators to keep creating and the ISP to keep existing. Otherwise, the creative process as a whole and the ISP would have succumbed. [108]

Finally, in an ideal world, it would be possible to infer that it is worthy to have legislation in this field, since the representatives of the people draft it. This would be more vehemently confirmed in the cases that the legislations result from the citizens' contributions, like the IBR, since they would be the transparent manifest will of the people. Therefore, this would the purpose of living a democracy. Nevertheless, despite recognizing this possibility, in the real world, politicians are not always moved by the majority's will, even though it may seem so.

108. This does not mean that they did not have to adapt over time.