

# AGENDA BUILDING AND THE INTERNET: THE CASE OF INTERMEDIARIES

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**Abstract:** *This paper addresses the increasing trend to regulate Internet intermediaries in Argentina, Brazil, Chile, and Uruguay. The cases are analyzed considering how the agenda-building process was developed, the extent to which scandals have played a role in determining policy changes about Internet intermediaries, and the depth of these changes. The research is part of a wider effort to conceptualize the process of Internet policy development, agenda-setting mechanisms, and the role and scope of national stakeholders, including policy makers, civil society, and the media.*

**Keywords:** *Internet policy development, Agenda-setting, Policy makers, Civil society, Media.*

## Introduction

The idea that the Internet is an un-ruled, ungoverned, and unregulated environment is an old cliché that has little to do with the current state of affairs. The literature has kept up pace with this change in perception. Authors with a realistic perspective have posited that not even in its inceptions, when the TCP/IP protocol finally predominated over the X.25 standard in the 1980s, did governments refrain from intervening in the development of this technology (DREZNER, 2007). Internet governance scholars (MUELLER, 2010; DRAKE, 2004) have shown that the web has never been a fully unregulated space. The role of the US was essential for the creation of ICANN, and other governments have contested this hegemony for many years. One of the most outstanding moments for developing governments was when they participated in the WSIS process (2003-2005).

Yet the last decade has also seen a notorious increase in government intervention in other, less political and international dimensions. Such

intervention has occurred in areas that are more closely related to users' experience of the Internet and thus have a greater impact on netizens. Governments have perceived the relevance of the Internet, and as this technology has become more ubiquitous in several policy spheres, there has been an attempt to increase its regulation in previously vacant areas. Intervention has taken different forms and shapes, from cybersecurity and cybercrime regulations, to net neutrality provisions, copyright enforcement, and, more recently, privacy debates, including the discussion around the “right to be forgotten.”

One of the issues that encompass many of these topics is intermediary liability for third-party content.<sup>1</sup> For most users, the relevance of the Internet is tied to their use of platforms such as Facebook, WhatsApp, Twitter, and Google. These are global Internet platforms that are supplemented by national ones for other services (information and communication portals, e-commerce sites, and so on). A platform is generally understood as any application or online service that allows users to seek, produce, and receive information or ideas according to the rules defined by a contractual agreement. Intermediaries, however, also comprise access providers, traditionally, for connectivity and infrastructure (ISPs, hosting providers, and so on).

As intermediaries acquired greater prominence in the public sphere, they also became the target for more regulation. This, in turn has compelled the media and users to increase their engagement in the discussion of an issue that may bear direct consequences for them, since the liability of intermediaries for third party content and users has been seen as potentially harmful for freedom of expression and online innovation (LARA, VERA, 2013).

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<sup>1</sup> Their definition is based on the text provided by the Dynamic Coalition of Platform Responsibility of the IGF in 2015 <http://review.intgovforum.org/igf-2015/dynamic-coalitions/dynamic-coalition-on-platform-responsibility-dc-pr/> The discussion and conceptualization of what constitutes an Internet intermediary is not discussed in the work, although it is clearly a category that encompasses many different activities from services providers at the infrastructure, logical and content layer of the Internet.

### **Agenda building, scandals, and policy changes**

The way in which issues command the attention of decision makers is an essential component for understanding and evaluating policy and regulatory modifications. The role of scandal in policy change concerning Internet intermediaries has not been addressed in the literature, and deserves some attention due to its potential ability to explain policy shifts. In the last three years many changes in regulatory scenarios and discussions about the Internet have been linked to what could be labeled as “Internet scandals,” in which Internet intermediaries have been involved with or without their knowledge and consent. From the widespread governmental surveillance programs exposed by Edward Snowden in July 2013, to the case of Costeja in Spain and the EU (which reignited the debate about the “right to be forgotten”) in 2014, to Brazil’s shutdown of WhatsApp (2015 and 2016), and to Apple’s fight with the FBI over the encrypted iPhone (2016), these scandals have received prominent coverage in all major national and global media.

For the purpose of this article, I have adopted Maesschalck's (2002) definition of a scandal as a social reaction of disapproval and outrage to a focusing event or set of events. This author argues that the problem with the concept of scandal is that it is defined in a descriptive rather than in an explanatory manner that would allow us to understand its role in promoting policy change. Because scandal on its own cannot account for policy changes, we need other concepts surrounding policy processes, such as the concept of agenda building, to provide a more comprehensive framework. According to Baumgartner and Jones (1993), in a scenario of relative stability in a policy domain, there is partial equilibrium and changes are incremental. When there is disequilibrium, by contrast, comprehensive policy change is needed. The latter involves both a profound revision of the policy venue that has authority to make decisions concerning the policy process and to decide who can

participate in it, as well as control over the institutional settings that contain that policy. Policy change implies the undermining of both the policy venue and the framers of that policy, what has been described as the “policy monopoly” (BAUMGARTNER, JONES, 1993). In addition, there is conflict expansion, in which the media usually play a critical role.

In the next section I examine four cases, namely, Argentina, Brazil, Chile, and Uruguay. To this end, I consider how the agenda-building process was developed, the extent to which scandals played a role in determining policy changes regarding Internet intermediaries, and the depth of these changes.

### **Understanding policy and regulatory changes of Internet intermediaries in Argentina, Brazil, Chile, and Uruguay**

The criteria used to select these cases reflect a quest for diversity of origins and processes in an effort to provide an understanding of the degree to which these contexts influence the outcome and to identify emerging patterns. What they all have in common is that until these policies and regulations were discussed or implemented, policy instruments that could address the issue were either relatively absent or fragmented.

Argentina does not have a law regulating Internet platforms, but in 2014 a Supreme Court sentence set an example of jurisprudence concerning a contentious case. A model sued search engines Google and Yahoo! for the dissemination over their platforms of erotic links to her name and of images against her will. This case had been ongoing for eight years, and there were other one hundred and fifty cases that followed similar arguments; search engines were being sued for damages to personal honor and reputation. The Supreme Court’s verdict dismissed the plaintiff’s claims, upheld freedom of expression, and rejected potential private censorship of Internet intermediaries. This case, popularly known as “Rodríguez vs. Google,”

inaugurated a jurisprudential line that has become known as the “Rodríguez Standard” (GINI, 2016).

In early 2016 the Argentine congress started promoting a bill for Internet intermediaries.<sup>2</sup> According to Congress, the changes needed to address the issue of Internet intermediaries’ liability for third party content require a new law (much like Marco Civil in Brazil). For this topic, however, the jurisprudential trend is that of partial equilibrium in the policy field. Clearer frameworks are necessary to assist in the definition of liabilities, responsibilities, and rights, as well as for a classification of the different types of intermediaries. So, while the initial scandal over the Rodríguez case (and over those of other celebrities invoking similar arguments and compensation from the search engines and platforms) was important to highlight the issue and give it prominence in the public agenda, it has not yet led to radical change in the policy venue and policy framing.

Brazil presents a challenging scenario in terms both of how the issue of Internet intermediaries is framed in the Marco Civil and of policy implementation. The proposal of a *Marco Civil de Internet*, advanced in 2009, responded to the introduction of a bill that criminalized Internet users’ activities, the Azeredo Bill, inspired by the Budapest Convention for Cybersecurity. Brazilian civil society organizations were immediately inflamed by the proposal, which they saw as a scandalous affront to online civil liberties, and organized a number of public protests. Helped by experts and with the support of Congress representative Alessandro Molon, based on CGI.br “Principles for the Governance and Use of the Internet,” civil society organizations launched an online platform for wide public consultation. The debate for a civil rights and principles framework for Brazilian Internet users took five years (until April 2014), and regulations for the implementation of

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<sup>2</sup> At the time this article there were two bills under discussion, one by Senator Pinedo and the other by Senator Fellner. Both use the court decision as a baseline, but they expand the scope of Internet intermediaries.

Marco Civil have just been approved. At the core of many of its principles are Internet intermediary provisions concerning copyright infringement, revenge porn, net neutrality, and freedom of expression.

As a policy instrument, Marco Civil represented a radical change, since it challenged the policy monopoly over the issue in three ways: it disputed the problem definition, producing an alternative proposal to the Azeredo Bill; it expanded the issues and incorporated them into a larger framework that included civil rights and not only criminal imputations; and it put institutional arrangements into question, since one of its defining features was its multi-stakeholder component and its public consultation process. The influence of Marco Civil has been widespread and global (ZINGALES, 2016), and the initial spark of the debate that stirred the fury and passion of civil society organizations was essential to achieving visibility among the wider public and to its final approval.

As is true for other national settings in the region, Chile does not have a comprehensive legislation that deals with intermediary responsibility for third-party content. Nonetheless, it does have two legal instruments that define service providers' obligations. The first one is the net neutrality law passed in 2010 (Law 20.453), the first policy instrument of its kind in the world to address this issue. This law was passed amid a campaign called “Neutralidad Sí,” which aimed both to educate the public about the matter and to support the legislative initiative. This platform is to this day an active actor that plays the role of watchdog to defend neutrality principles and other citizen-oriented policies through an NGO called Cívico.

The second instrument comprises policy changes affecting Internet intermediaries that were made after signing the free-trade agreement with the US. Consequently, the country's intellectual property provisions were revised in May 2010. Search engines and browsers are exempt from responsibility, but ISPs and hosting companies should abide by other rules to secure protection

from liability. In the first case, agenda building resulted from civil society's pressure on Congress after a neutrality breach by a service provider that achieved public notoriety. In the second, an international treaty forced the country to adapt its legislation. In the case of net neutrality, where the trigger was an "Internet scandal," there was a policy disequilibrium that was changed by way of a radical policy. In the case of intermediary liability and intellectual property, there was incremental change with legal adaptation, despite the fact that such change faced resistance and was defined as a policy issue by the media and social networks.

The case of Uruguay is one of an incremental policy reaction against an issue that achieved extreme public visibility. I am referring to the introduction of Uber in November 2015. While Internet and mobile app users embraced these services, taxi cooperatives and drivers' blockage of streets, demonstrations, and strikes contributed to incorporating the issue into the public agenda. Taxicab companies and associations have resorted to these measures in other cities where Uber had become operational, and citizens and policy makers in most countries expect a scandal every time Uber disembarks in a new place. What differs in this case is that the lobbying of taxi cooperatives and drivers brought the issue directly to the president, who introduced a bill in March 2016 that is currently being discussed in the legislature.

This bill allows Uber and all other platforms and online providers to offer services in Uruguay as long as they comply with the national legislation for these sectors (transport, housing, banking, commerce, and so on). The bill has been criticized for being vague and overreaching and for not recognizing the specificities of Internet intermediaries. It is a typical case of "creative destruction," for which incremental policy changes are rarely sufficient, since they cannot adequately address the contradictions and public controversies generated by these innovations. The bill attempts to bring about policy change

by introducing incremental modifications without reframing the underlying premises of the problem or adapting the institutional environment.

### Final comments

The following chart provides a synopsis of the agenda-building mechanisms used in the four countries to tackle the issue of Internet intermediaries until June 2016.

**Chart 1: Agenda-building mechanisms**

Agenda-building Mechanism	Incremental Policy Change	Radical Policy Change
Argentina	x	
Brazil		x
Chile (NN)		x
Chile (IP)	x	
Uruguay	x	

One outstanding characteristic of both Chile's Net Neutrality Law and Marco Civil in Brazil is their visibility. These initiatives were supported and pushed by policy makers, but were launched by civil society representatives that resorted to the media as part of their dissemination, awareness and outreach tactics to engage citizens. None of the other initiatives, which propose incremental policy changes, have achieved wide stakeholder engagement.

While scandals have not been the only source of policy change in all cases, they have had significant impact in attracting the attention of the media. This is an important finding to consider when identifying the motives and



rationale behind agenda-building processes in South America. Lastly, a relevant trend that emerges from this research is that contrary to what some scholars claim about the “hypodermic needle theory” of the international Internet context, and despite the borderless technologies that make up the current digital scene, most of these initiatives have developed from a domestic need and involved unique and original approaches. The only one that stands out as an adaptation to foreign norms is the Chilean case with regard to intellectual property provisions. This pattern should be further researched for other communications domains.

## References

- BAUMGARTNER, FRANK R., and BRYAN D. JONES (1993) *Agendas and Instability in American Politics*. Chicago: University of Chicago Press.
- BUSNELLO, F.; FROSIO, G. *Intermediary Liability Implications of Proposed Brazilian Libel Law Reform CIS*. Stanford Law School, 2015. Available at: <http://cyberlaw.stanford.edu/blog/2015/11/intermediary-liability-implications-proposed-brazilian-libel-law-reform>
- COMITÉ GESTOR DE INTERNET. *Principles for the governance and use of the Internet*. 2009. Available at <http://www.cgi.br/resolucoes-2009-003-en/>
- DRAKE, W. J. *Reframing Internet Governance Discourse: Fifteen Baseline Propositions*. In Workshop on Internet Governance. Geneva: International Telecommunication Union, 2004.
- DREZNER, D. W. (2004). The Global Governance of the Internet: Bringing the State Back In. *Political Science Quarterly*, v. 119, n. 3, p. 477–498, 2004. <http://doi.org/10.2307/20202392>
- EL PAÍS. Alertan inconstitucionalidad por el proyecto de ley Uber. Available at: <http://www.elpais.com.uy/informacion/alertan-inconstitucionalidad-proyecto-ley-uber.html>. Access: 12 Apr. 2016.
- GINI, Sa. La aplicación del standard Rodríguez a otros intermediarios de Internet. DITC, KNILL, C.; TOSUN, J. *Policy Making*. University of Konstanz, 2008.
- LARA, J. C.; VERA, F. La responsabilidad de los prestadores de servicios de Internet. *Derechos Digitales*. 2014. Available at: <https://www.derechosdigitales.org/wp-content/uploads/pp03.pdf>
- MAESSCHALCK, J. When Do Scandals Have An Impact On Policy Making? A Case Study of the Police Reform Following the Dutroux Scandal in Belgium. *International Public Management Journal*, v. 5, n. 2, 2002.
- MONCAU, L.; MACIEL, M. (2014). *Gobernanza de Internet y Marco Civil en Brasil*. LACTLD Report #4, 2014. <http://www.lactld.org/reports/lactld-report-4-mayo-2014/>
- MUELLER, M. *Networks and States*. The Global Politics of Internet Governance. Cambridge: MIT Press, 2010.
- SOUZA, A. P.; VIOLA, M., LEMOS, R. *Understanding Brazil's Internet Bill of Rights*. Instituto de Tecnologia & Sociedade do Rio, 2015.

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UDESAR, 2016. Available at: <http://www.ditc.com.ar/2016/05/24/la-aplicacion-del-standard-rodriuez-a-otros-intermediarios-de-internet/>

UNESCO. Fostering Freedom Online. The role of Internet Intermediaries Available. 2014. <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>

ZINGALES, N. The Brazilian approach to internet intermediary liability: blueprint for a global regime? *Internet Policy Review*, v. 4, n. 4, 2016. DOI: 10.14763/2015.4.395