

SPECIAL
EDITION

GLOBAL INFORMATION SOCIETY WATCH 2011 UPDATE I

INTERNET RIGHTS AND DEMOCRATISATION

Focus on freedom of expression and association online



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

Global Information Society Watch

2011 UPDATE I



Internet rights are human rights team

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OPPORTUNITIES AND THREATS FOR INTERNET RIGHTS IN ARGENTINA



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Nodo TAU

Background

On 24 March 1976 a military coup overthrew the democratic government in Argentina, forever changing the national consciousness. Between 1976 and 1983, the new regime committed countless crimes against humanity, leaving at least 30,000 people missing (their bodies are still missing to this day), and wreaking political, economic, social, cultural and institutional devastation on the country.

During this period, many human rights organisations started to denounce violations against human rights. These included SERPAJ (Servicio Paz y Justicia), Madres de Plaza de Mayo, Abuelas de Plaza de Mayo, and, later, HIJOS.

Soon after the former president of Argentina Néstor Kirchner took office (May 2003-December 2007), human rights became the political flagship for the government, shaping a remarkable and until then unseen alliance with the human rights movement. The government promised to bring to justice those military and police officials who, during the dictatorship, had committed acts of torture and assassinations. Kirchner dismissed powerful officials, and overturned amnesty laws¹ for military officers accused of crimes. Judgments for crimes against humanity are still taking place in Argentina today.

According to statistics of the Centro de Estudios Legales y Sociales (CELS), a total of 1,861 individuals – among them civilians and security forces personnel – are or have been involved in cases related to state terrorism. Of these, 17% have been sentenced and 244 are in the process of being sentenced or acquitted.²

The human rights discourse in Argentina has been significantly marked by these events. It is in this context that the national government constantly appeals to human rights, through policies

related to “memory, truth and justice”, but in a way that at times overshadows other important human rights concerns.

Freedom of expression³

During the military dictatorship, censorship was an everyday practice – but even after the recovery of democracy in 1983, the exercise of freedom of expression remains a central issue in our country. In the 1990s, governments aligned with neo-liberal policies continued implementing measures that restricted freedom of expression by applying the Broadcasting Act 22.285 – originally created by the military dictatorship – and allowed censorship of radio and television, the strict control of media resources, and limited media ownership by commercial entities. However, the implementation of these rules has since diminished due to successive modifications of the law. For example, in 2003 after a judicial process that banned community radio, the Supreme Court declared Article 45 of the Act (which prohibited non-profit organisations from using broadcasting frequencies) as unconstitutional. The argument being that it threatened freedom of expression, which is guaranteed in Argentina as a signatory to the American Convention of Human Rights.⁴

In 2010, after a long and rich debate, a new law dealing with audiovisual communication services was passed by Congress. The bill, promoted by the government of Cristina Fernández de Kirchner, was developed with the input from the civil society organisation Coalition for a Democratic Broadcasting. The Coalition’s “Citizens’ Initiative for a Broadcasting Law for Democracy (21 Points)” defined the main aspects of the new law. It promoted, among other things, a more transparent and democratic assignment of radio frequencies, which would have an impact on media diversity and, in turn, on the exercise of freedom of speech. However, since the law was approved, several aspects of its

1. The 1986 *Ley de punto final* and the 1987 *Ley de obediencia debida*
2. www.cels.org.ar/comunicacion/?info=detalleDoc&ids=4&lang=es&ss=46&idc=1488

3. The titles of laws mentioned in this report, as well as quotes from published articles and interviews, have been translated by the authors to convey the literal meaning of the original Spanish. Alternative English versions of these may exist
4. www.insumisos.com/diplo/NODE/2744.HTM

implementation have been criticised by the Coalition, including the assignment of media licenses.⁵

A brief note on internet access is necessary: we consider that a lack of real access to infrastructure is the first concrete restriction for exercising the right to freedom of expression. In this sense, we celebrate the national government initiative that plans to build the National Fibre-optic Network (Red de Fibra Óptica Federal) since it will radically increase the penetration of internet in the interior of the country – places that internet companies regard as unprofitable.

Recent data from the National Institute of Statistics and Censuses (INDEC)⁶ points out that over the last year, the total number of residences enjoying access to internet increased by 59%, with an increase of 62.4% in broadband connections.⁷ The total number of organisations (including businesses and institutions) with internet access increased by 74.5% in the same period.

According a recent survey, Argentina has over 30-million internet users,⁸ meaning that three of every four people living in Argentina have some kind of access to the internet. The country also boasts the second highest number of Facebook users in South America.

In June 2005, Law 26.032⁹ was approved by Congress, which provides a legal framework for internet services. The law establishes that “the search, reception and broadcasting of information using internet services are subject to the Constitutional guarantee of freedom of expression”.

From 2000 onwards, censorship on the internet has mostly been the result of decisions made by the private sector – typically when there is a perceived threat to their businesses. This is most clearly seen in the tension between intellectual property and freedom of expression. We argue below that the tension between economic and social interests define and shape the exercise of human rights online in Argentina.

Legal status of human rights

Human rights in general, and especially freedom of expression and access to information and freedom of association in particular, have constitutional status in Argentina. The constitutional reform of 1994

widened this legal basis, with the inclusion of international treaties¹⁰ such as the American Convention on Human Rights, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, among many others international mechanisms ratified by Argentina.¹¹

Article 14 of the Constitution includes, among the fundamental rights of all Argentine citizens, “the right to petition the authorities and to publish ideas through the press without prior censorship”. In the same sense, Article 13 of the American Convention on Human Rights states:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.¹²

In the same Article, the Convention stipulates: “The right of expression may not be restricted by indirect methods or means, such as through the abuse of government or private controls.”

Freedom of association

The tension between social protest, freedom of expression and civil rights is a current issue in most Latin American countries, including Argentina.¹³

One element of concern in relation to the exercise of freedom of association in Argentina is the criminalisation of social protest, which is, in some cases, the only way in which some groups can express their ideas and demands, especially marginalised groups such as indigenous communities,¹⁴ homeless people,¹⁵ and communities affected by mining.¹⁶ Typically the decisions to ban protest action comes from provincial rather than national government.

The Antiterrorist Act, approved on December 2011, raised concerns in this context. The law was created to punish crimes of terrorism, but human rights organisations and lawyers fear that it serves to criminalise social protest. One of the main questions posed by the law is based on the argument

5. www.farco.org.ar/index.php/es/noticias/1369-compromiso-y-participacion-por-la-total-aplicacion-de-la-ley.html

6. www.indec.gob.ar/

7. www.indec.gob.ar/nuevaweb/cuadros/14/internet_o6_12.pdf

8. www.argentina.ar/_es/ciencia-y-educacion/C10690-tres-de-cada-cuatro-argentinos-tienen-acceso-a-internet.php

9. infoleg.mecon.gov.ar/infolegInternet/anexos/105000-109999/107145/norma.htm

10. *National Constitution of Argentina*, Article 75, para. 22, www.argentina.gov.ar/argentina/portal/documentos/constitucion_nacional.pdf

11. www.derhuman.jus.gov.ar/normativa.html

12. www.hrcr.org/docs/American_Convention/oashr4.html

13. www.palermo.edu/cele/pdf/Protesta-social.pdf

14. tiempo.infonews.com/notas/repression-formosa-miembro-de-comunidad-qom-murio-y-otro-esta-coma

15. www.pagina12.com.ar/diario/elpais/1-158317-2010-12-08.html

16. www.pagina12.com.ar/diario/sociedad/3-186665-2012-02-01.html

that it was adopted at the request of the Financial Action Task Force (FATF),¹⁷ an intergovernmental forum that promotes norms that enable the prosecution of money laundering and the financing of terrorism. Argentina had to pass this bill in order to be considered as a “reliable country” by the FATF, and to be involved in the G20, which is very important for the national government.¹⁸

Several social organisations and political commentators¹⁹ argue that the FATF requirement is associated with corporate interests in preventing the realisation of labour, social and environmental rights, among others, and ensuring “a domesticated citizenship”, consequently posing a risk to the respect of human rights, including freedom of expression.

After the pressure and debate generated around the Act, government agreed to include a point establishing that the “aggravating circumstances do not apply if the actions in question [concern the realization of] human and/or social rights or any other constitutional right”.

Online freedom of expression vs. intellectual property

In recent years, a number of proposed internet-related laws, policies and practices that could impact negatively on the exercise of human rights in Argentina – such as the right to freedom of expression, access to information, freedom of association and privacy – have emerged.

Even though human rights issues do inform discussions – as we have outlined above – the debate around these issues does not extend to the general public, and is usually confined to small groups involved, in particular academics and journalists.

Some of the recently proposed legislation, policies and initiatives that in some way limit human rights on the internet in Argentina are:

- Telecommunications Law 25.873²⁰ which was sanctioned by the Senate on December 2003 in the last session of the year without parliamentary debate. This act stipulated that communication service providers had the responsibility of storing information and data for use by the authorities in criminal and other investigations. At that time the law was called the “Spy Law”, because it allowed the monitoring

of private communications. The law was established by decree 1653 in 2004 but withdrawn in 2005 after a public outcry.

- Two legislative projects aimed at ISPs: Senator Guillermo Jenefes’ bill²¹ that made ISPs liable for their users’ actions, and a second bill²² by Deputy Federico Pinedo that regulated ISPs.
- The aforementioned Antiterrorist Law (law 26.734), which amends the chapter on the Penal Code regarding the financing of terrorism.
- And the not so recent Law 11.723 of Intellectual Property, originally drafted in 1933.

We will focus this report on evaluating freedom of expression in Argentina based on the analysis of three cases that clearly exemplify the tension that exists between intellectual property rights and freedom of expression. In doing so, we will describe the impact of the legislative initiatives mentioned above regarding the role of intermediaries in the control of online content.

Cases in Argentina

Intellectual property in Argentina is regulated by Law 11.723, which dates back to 1933. This law penalises anyone who “edits, sells or reproduces by any means or instrument, an unpublished or published work without permission from the author or his/her heirs”. There have recently been a number of cases that called for its application online. These cases were brought to court and fuelled debates about the regulation and criminalisation of certain online activities, making it evident that the law is outdated and does not account for current social and technological contexts.

Horacio Potel, professor of philosophy

In 2008, a university professor of philosophy, Horacio Potel, published blogs dedicated to the work of philosophers Friedrich Nietzsche, Martin Heidegger and Jacques Derrida, in order to distribute their texts among his students. Many of these materials were already online, and Potel provided links to them; many of the texts were impossible to find in local bookshops. A lawsuit was initiated against Potel by the Argentina Book Chamber (CAL, Cámara Argentina del Libro), a guild that represents publishing houses, including those that hold copyrights of some of the works included in the blogs. Potel was notified by the police and told that his phone and

17. www.fatf-gafi.org

18. www.pagina12.com.ar/diario/elpais/1-183117-2011-12-11.html

19. www.resumenlatinoamericano.org/index.php?option=com_content&task=view&id=3065&Itemid=99999999&lang=es

20. www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/92549/norma.htm

21. www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=209/09&nro_comision=&tConsulta=3

22. www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=8793-D-2010

computer would be seized and his case brought to court.

After a long trial and a solidarity campaign Potel's case was dismissed. The campaign, launched by organisations and people interested in access to free culture, included criticism of CAL's position at conferences, lectures and in media and the inclusion of banners on web pages to show solidarity with Potel.²³ The blog "Derecho a leer"²⁴ (right to read) was also created (nowadays this blog serves as a reference in the analysis of the internet and ICTs). "The lesson we can learn from this situation is that virtual actions can lead to real effects", said Potel.²⁵ Immediately after the case's dismissal, the materials were back online, where they remain to this day.²⁶

In 2011 and 2012 legal actions for infringement of intellectual property rights were also initiated against two popular websites in the country: Taringa.net and Cuevana.tv. These cases and their impact on internet rights are analysed in the following section.

Taringa

Taringa.net is an online sharing platform for texts, images, files and links to content such as movies, music and books. By mid-2011, the people responsible for the website, brothers Hernán and Matías Botbol and Alberto Nakayama, were prosecuted for violating the Intellectual Property Law 11.723. They were accused of being "necessary participants" in the dissemination and reproduction of content protected by copyright and also of being clearly aware of the illegality of their actions, thereby "facilitating piracy".²⁷ This process was, as in the case of Potel, initiated by CAL.

In their defence, Taringa's legal representative argued that it was impossible for the site to determine if shared content violated copyright – given that 20,000 posts were published daily. They also noted that the lack of access to the National Registry of Intellectual Property represents a barrier to determining ownership.

On 7 October 2011 a criminal court upheld the prosecution of one of the owners of the site, which it said "gives anonymous users the possibility of

sharing and downloading free files whose contents are not authorised to be published by their authors, thereby facilitating the illegal reproduction of published material".²⁸

The case sets a precedent in the field of internet rights. A group of researchers analysing freedom of expression on the internet in Argentina indicated that "the idea that a web manager should know about the content that is uploaded to a site or linked from it...presents challenges of accountability...including for search engines that link to other sites or content in an automated way".²⁹

In January 2012 the Sixth Court of the Chamber of Criminal and Correctional Appeals upheld the prosecution and determined that Taringa should pay compensation of 50,000 pesos (approximately USD 11,500) to CAL. In April 2012, Taringa and the CAL reached an out of court agreement³⁰ that would exempt Taringa from paying the penalty if they provide a technological solution to identifying protected content, with CAL helping to define what could and what could not be included on the site.

Cuevana

In January 2012, while the world was talking about the Stop Online Piracy Act (SOPA³¹, a controversial US anti-piracy bill) Megaupload was being shutdown and its manager arrested,³² a controversy around the Cuevana website took centre stage in Argentina. This site was created in 2009 by three students who wanted to simplify the process of streaming videos from the web. The site offers a searchable database of films and TV series and soon had over 15 million users a month. Cuevana does not host content on its servers but facilitates access to them by linking to other sites. Instead, the content is hosted on third-party servers, including Megaupload, which provide the space for users to upload or download files of any type, including movies and television series.

In November 2011, a group of companies, among them Imagen Satelital, owner of licenses from Turner International, initiated a civil proceeding against the site, asking for an injunction to prevent "imminent or irreparable harm". Later, the Argentina Union of Video Editors also brought

23. partido-pirata.blogspot.com.ar/2009/04/comienzo-la-feria-del-libro-en-buenos.html

24. derechoaleer.org

25. www.pagina12.com.ar/diario/suplementos/espectaculos/2-16094-2009-11-23.html

26. www.nietzscheana.com.ar
www.jacquesderrida.com.ar/index.htm
www.heideggeriana.com.ar/bibliografia/bibliografia.htm

27. From the verdict in Taringa's case, www.cij.gov.ar/nota-6742-Confirman-el-procesamiento-de-propietarios-de-sitio-web-donde-usuarios-descargaban-musica.html

28. www.infobae.com/adjuntos/pdf/2011/10/474901.pdf

29. Claudio Ruiz Gallardo and Juan Carlos Lara Gálvez, "Responsabilidad de los proveedores de servicios de Internet (ISPs) en relación con el ejercicio del derecho a la libertad de expresión en Latinoamérica" in *Hacia una Internet libre de censura. Propuestas para América Latina*, compilador Eduardo Bertoni (Buenos Aires: Universidad de Palermo, 2012), 82-83

30. www.redusers.com/noticias/acuerdo-cal-taringa-no-fue-pero-puede-ser

31. en.wikipedia.org/wiki/Stop_Online_Piracy_Act

32. www.bbc.co.uk/news/technology-16642369

a case against the site. As a preliminary measure, the judge ordered ISPs to block access to a list of links included on Cuevana which provided access to audiovisual works. The National Commission of Communication, which operates within the Communications Secretariat in the Ministry of Federal Planning, Public Investment and Service, notified all ISPs in the country (through CNC 88)³³ that it should block the access to the links.

In mid-March 2012, one of the administrators of Cuevana was arrested in Chile.³⁴ The reason was a claim made by Home Box Office (HBO), a very important cable television network from the US. Meanwhile, the General Prosecutor of the National Chamber of Criminal Appeal in Argentina opened a case against Cuevana for violation of copyright law.

Eduardo Bertoni, director of the Centre for Studies on Freedom of Expression and Access to Information of the University of Palermo in Buenos Aires, explains that the companies' claim was protected by two precedents:³⁵ Article 232 of the Code of Civil and Commercial Procedure in Argentina allows an injunction where there is a justified fear that "there could be a suffering of imminent or irreparable harm", while Article 79 of the Intellectual Property Law 11.723 gives judges the power to order the suspension of theatre, cinematic and musical performances – or the confiscation of creative works – on the same basis.

As Bertoni underlined, "the judge's decision has three parts relevant to the analysis: i) it uses a precautionary measure to prohibit the dissemination of content; ii) it prevents access by internet users to complete pages of the site; and iii) does not issue the order to the author of the potential damage but to private agents (ISPs) who are not responsible for the content".

The three cases mentioned above were the source of much controversy. While legal analysts³⁶ argued that the internet should be regulated, they also pointed to the absence of legal tools with which to intervene. On the other hand, free culture activists, such as as Fundación Vía Libre, warned that "it is clear that any person who holds a digital device and reproduces a work is violating a law dating from 1933 that requires urgent modification".³⁷

These cases highlight several issues in Argentina. First, the balance between rights and responsibilities of the actors involved and the criteria to identify who is considered to be violating the law: the person who uploads copyrighted content, the one that hosts it on servers, or the person who provides the means for finding it online. The case of Taringa suggests that although the accused would eventually be those who upload or download copyrighted work, it is possible for some overlap in responsibility to occur.³⁸

In relation to the responsibility of private actors in the respect of human rights, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, indicates that "while States are the duty-bearers for human rights, private actors and business enterprises also have a responsibility to respect human rights".³⁹ In this regard, he highlights the framework of "Protect, Respect and Remedy" that rests on three pillars:

- (a) the duty of the State to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication;
- (b) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing the rights of others and to address adverse impacts with which they are involved; and
- (c) the need for greater access by victims to effective remedy, both judicial and non-judicial.

Other issues to be considered in relation to these cases are:

1. Both cases raised debate concerning the jurisdiction in charge given the physical location of the servers. The Criminal and Correctional Court of Appeals says that "although the links from which you download illegally reproduced works are located outside of Argentina, the servers from which the service is offered are in our country".⁴⁰ The general prosecutors concluded: "without prejudice to the foregoing, the effects of crime would have occurred in the country. Under the principle of ubiquity provided by Article 1

33. www.scpl.coop/index.php?page=ver&nid=1262

34. "¿Llegó el fin de Cuevana?", *BBC Mundo*, 16 March 2012, www.bbc.co.uk/mundo/noticias/2012/03/120316_tecnologia_cuevana_cierre_dp.shtml

35. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

36. www.infobae.com/notas/580877-Apoyan-fallo-penal-que-condena-a-Taringa-%20por-descargas-ilegales-de-musica.html

37. www.vialibre.org.ar/2011/05/15/el-delito-que-cometemos-todos

38. "Todos/as somos piratas", *enREDando.org.ar*, 16 May 2011, www.enredando.org.ar/noticias_desarrollo.shtml?x=65440

39. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27 (Geneva: United Nations General Assembly, Human Rights Council, 2011), para. 45, www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

40. www.redusers.com/noticias/caso-taringa-no-importa-donde-est-en-los-servidores-sino-donde-existe-el-dano

of the Penal Code, the criminal law in Argentina applies”. Cuevana⁴¹ announced that they would close the site only if a precautionary measure is issued and that they would only shut it down in Argentina.

2. The role of profit-making has also been discussed, and whether the copyright holder's rights are affected by the fact that the sites include paid advertising. The person responsible for Cuevana alleged that they had no profit intention and that they use income from advertising to pay for the high costs of maintaining the site. Nevertheless the prosecutor determined that the law had been violated because of the inclusion of the content, regardless of any profit motive.
3. The fact that the Taringa case ended in a settlement between private parties highlights the failure of legislation to resolve the conflict with respect to the right to freedom of expression.⁴² The agreement establishes that Taringa should develop a system that allows CAL to decide if content is infringing copyright. But this private settlement also raises questions that might have significant implications. For example: who will be responsible for defining the system? What kind of information will the system provide CAL? Who will develop or build it? Will it be open source so that the backend data capture procedures are transparent? How can the system's compliance with human rights be monitored?
4. When intermediaries do not comply with due process, they not only infringe on the rights of users but also establish a worrying precedent. It demonstrates how a conflict between several parties can be settled by two of them, generally those more powerful, disregarding legal principles that society took centuries to build. In relation to the role of justice, the Anti-Counterfeiting Trade Agreement (ACTA)⁴³ follows this trend because it opens the window for ISPs and copyright holders to cooperate directly with one another, without requiring a prior decision by a judge.

A practical consequence of this is that when asked to take down content for supposedly infringing copyright, ISPs, administrators or

search engines will comply with the demands in order to avoid legal processes, without any concern about the value of published content and about the rights to freedom of expression of those who published them. This has been described as having a “chilling effect”: “deterred by fear of punishment, some people refrain from saying or publishing anything that they legally could, and indeed, they should [say]”,⁴⁴ according to Bertoni. “If the injunction becomes the rule, users will choose to avoid the cost of a trial and choose to restrict their freedom of expression”.

The following case illustrates this point: in Argentina, Google and YouTube recently complied with demands to take down certain content that allegedly violated intellectual property rights. One of the demands was presented by a news channel whose videos were uploaded by a group of bloggers. The intermediary that hosts the blogs decided to take the content down. Moreover, some of the blogs were closed down after repeatedly publishing the videos. Due process was not followed: the copyright holder made a request, the intermediary reacted and the blogger was censored.⁴⁵

Paradoxically, the Intellectual Property Law in Argentina includes an exception in the case of journalism in its Articles 27 and 28.⁴⁶ Article 27 says that proceedings from conferences as well as political speeches cannot be reproduced without the explicit authorisation of their author. Moreover, parliamentary proceedings cannot be used for profit. At the same time it establishes an exception that should be applied in the case of journalism. In the same sense, Article 28 regulates the reproduction of anonymous works that are published in newspapers, magazines or other periodical publications. The media that purchased or obtained them has the right over their reproduction. However, the article mentions that news of general interest can be used, transmitted or reproduced, but when it is published in its original version (e.g. in an interview format) journalists should inform their source.

As the conflict regarding the blogs mentioned

41. www.bbc.co.uk/mundo/noticias/2012/03/120316_tecnologia_cuevana_cierre_dp.shtml

42. www.derechoaleer.org/2012/05/taringa-y-el-delito-que-nos-afec.html

43. The agreement was signed by six countries in October 2011 and by the European Union in January 2012, but its ratification is still pending

44. Frederick Schauer, “Fear, Risk and the First Amendment: Unraveling the Chilling Effect”, *Faculty Publications, Paper 879* (1978): 693, scholarship.law.wm.edu/facpubs/879. Cited by Eduardo Bertoni

45. Presentation of Beatriz Busaniche at the roundtable “Desafíos para la libertad de expresión en internet en la Argentina”, organised by the Asociación por los Derechos Civiles and FOPEA in Buenos Aires, 3 May 2012, pure-words.blogspot.com.ar/2012/05/mesa-redondalibertad-de-expresion-en.html

46. www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/42755/textact.htm

above was resolved between two private actors, the law could not be applied and the censored bloggers were not able to exercise their rights. The private agreement showed the vulnerability of third parties: in this case, the users of the site. They were neither asked nor taken into account in the agreement.

5. Bertoni outlines four issues related to the regulation of content that must be specifically taken into account in cases that affect freedom of expression. They are:
 - Regulation of content to protect honor and privacy
 - Regulation of content to protect authors' rights
 - Regulation of content to fight hate, racist or discriminatory speech
 - Regulation of content to fight child pornography.

The questions in relation to these issues should be: Who regulates them and using what criteria? Should intermediaries be made liable? What are the consequences of having regulation duties outside clearly established legal frameworks?

Inconvenient frameworks: Perspectives

The three cases mentioned show the lack of a regulatory framework that accounts for the enforcement of intellectual property in digital environments. The cases show how individuals or groups of people are criminalised for using the internet to share content.

In Potel's case we find that his right to express himself freely on the internet was restricted because of the profit interests of intermediaries. In the other two cases, the right to freedom of association was affected, since the measures against content sites did not consider that sharing, circulating and copying is essential to using digital technology resources to collaborate and organise online. In this sense sharing content on the internet could be equated with peaceful assembly or social association.

The issue that must be discussed is the legality or illegality of these practices. Nowadays uploading or downloading content such as books, pictures, songs, and films, and building platforms that facilitate these exchanges, is illegal. In this context, photocopying a book is also illegal in Argentina today.

It's important to consider who is affected by the illegal action and what is the harm they suffer. Are they earning less? Do they lose control over their work? And more precisely, the question should concern

the legitimacy of legal recourses. Any deliberation should take as a starting point that the internet is about sharing – that is its function. In this scenario, the economic consequences are not necessarily of primary consideration, and conventional frameworks for deliberation do not apply.

According to Bertoni, if exchanging content on the internet is a crime, then the burden of proof applies: "It is assumed that anyone who administrates a site has the duty to monitor and make sure that all content is not illegal. Does this relate to intermediaries? Are we allowing censorship by an individual who will be encouraged to censor content that should be shared publicly? Here we have a complex problem for freedom of expression for those who have their legitimate content arbitrarily censored".

In a sense, it is good that the cases discussed reached the courts because it allowed those affected to defend their rights with all the legal safeguards. This was possible because in Argentina there is still no specific regulation for the internet. "In most cases the regulation is privatised or handed out by administrative authorities or service providers themselves", explains Bertoni.

The declaration signed by Special Rapporteurs on Freedom of Expression of Africa, the Americas, Europe and the UN,⁴⁷ states that intermediaries should not be held responsible for the circulation of content and they should not control content generated by their users. Under the argument that this is not a document subscribed to by Argentina, judges rejected its consideration as a legal argument. Bertoni says that this is a mistake, because the document is an authoritative interpretation of freedom of expression that does not need to be officially subscribed to by any State.

Bertoni highlights three axes in the analysis of these cases, especially in the case of Cuevana: the use of intermediaries, censorship and the proportionality of the measures. First, the involvement of intermediaries in content take-downs appears to be a tendency in the region,⁴⁸ giving ISPs the role of policing content, which amounts to a form of censorship.

Second, the injunction in the Cuevana case is clearly a case of censorship, infringing Article 13 of the American Convention on Human Rights, which provides the limits for the regulation of content while respecting freedom of expression. The article states that the right to freedom of expression "shall not be subject to prior censorship but shall be

47. www.cidh.org/relatoria/showarticle.asp?artID=848&IID=2

48. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

subject to subsequent imposition of liability, which shall be expressly established by law". The article restricts prior restraint "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence", but without prejudice to the previous rule.

Third, as regards the proportionality of the measures, Bertoni considered that "in most cases the measures are disproportionate. That is, the end sought is inconsistent with the magnitude of the measure. A video of a baby singing the song of a known artist or a student posting a poem of his favorite writer on his blog may constitute uses forbidden by authors' rights, however they are not related to the objective of combating piracy, and they do not represent a risk from which society should care". In the cases of complete blocking of pages for infringement of author's rights, this also represents disproportionality because the measure also censors comments, analysis and opinions that are not infringing copyright.

"The protection of author's rights at the expense of citizens' basic rights, such as the respect of due process and freedom of expression, raises the question about what is really the priority of states in regulating the internet", he says.⁴⁹

Intellectual property and cultural rights⁵⁰

A proposal for reforming intellectual property law was presented in May 2012. It was introduced by Proyecto Sur, a progressive political party. The bill defines that it would not be illegal to download cultural content from internet for individual use, with the purpose of learning, educating, informing, or entertainment, nor should it be a punishable offense to facilitate access to this content when the offer is free.

The proposed bill includes two articles. Article 1 says:

Access to the authors' works covered by Law 11.723, or the use of the work on the internet, whether by an individual, at home, school, university or at public and free libraries, with the sole purpose of instructing, educating, informing, or entertaining – excluding commercial or public use of the works – constitutes the exercise of right to access to culture.

Article 2 defines "the repeal of any norm that opposes the free exercise of the right referred to in Article 1".

49. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

50. www.derechoaleer.org/2012/05/pino-solanas-y-la-despenalizacion-del-p2p.html

The drafters of the law argued there was a need to harmonise and define the scope of the constitutional rights of authors, as well as to define the right to access cultural goods, among which authors' works occupy a prominent place.

The bill is the most recent parliamentary attempt to modify the law and its consideration occurred in the context of the cases mentioned before. But although the bill had the backing of specialists and leaders of local organisations, the political organisation that promoted it had little force in Congress.

Latent threats to freedom of expression

In 2009, Senator Guillermo Jenefes presented a bill (S-0209/09)⁵¹ that concerned the regulation of internet content through the imposition of obligations and sanctions on internet service and/or connectivity providers. By the time he introduced this bill, he was the president of the Systems, Media and Freedom of Expression Commission of the Senate.

Jenefes based his bill⁵² on the argument that anonymity on the internet "constitutes shelter from punishment for libel, slander and committing crimes". The bill also states that even though internet service providers are not responsible for the content, it does not mean that they have to be passive actors when it comes to enforcing regulations.

Jenefes' bill tried to establish a system to identify all internet users. In this way, according to Jenefes, any individual would be in a better position to defend their rights and to have other people's opinions removed from the net.

In relation to the sanctions mentioned in the bill and the responsibilities of the hosting service providers, it is worth mentioning that making companies control the information that their users store is against the requirements established by national Law 25.326 on Personal Data Protection.⁵³ Besides this, the following questions should be considered: what kind of information should the hosts monitor? Who would be the one to provide these parameters? Would these intrusions fall under what the national Law 26.388 on Cybercrime⁵⁴ sanctions as an improper access to a data bank, system or repository?

According to the bill, any individual can act as "judge" and practice censorship against others, leaving aside the course of justice. Interestingly, the senator needed 2,154 words in the introduction to

51. www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=209/09&nro_comision=&tConsulta=3

52. Ibid

53. www1.hcdn.gov.ar/dependencias/dip/textos%20actualizados/25326.010408.pdf

54. infoleg.mecon.gov.ar/infolegInternet/anexos/140000-144999/141790/norma.htm

make his argument, and just 473 words for the bill itself and its articles.

Initiatives such as Jenefes' proposed bill are against what is internationally established regarding freedom of expression in the Universal Declaration of Human Rights, the UN International Covenant on Civil and Political Rights, the Pact of San José de Costa Rica, and in Argentina, Article 14 of the National Constitution.

In Argentina, Law 26.032⁵⁵ (2005) concerning internet services specifically establishes that "... the searching, reception and imparting of information and ideas of all kinds through internet services is included in the constitutional guarantee that protects freedom of expression".

"Faced with a vacuum in the legislation and since the industry has not shown, to-date, a satisfactory self-regulation policy on this issue, we need regulation of those individuals that, relying on their freedom of expression, trick both the constitutional guarantees and the existing rules on liability using the anonymity that the internet provides", Jenefes stated in an article.

In Article 1, the bill proposed that "[e]very inhabitant of Argentina may ask internet service providers (ISP) to block any access to content, including providing the name and designation of the author of the content, if the content causes injury to that person". The bill considers ISPs both internet access providers and hosting service providers.

In Article 2, the idea of bypassing the formal justice system is clear: "Where there is content deemed harmful to personal rights, the potential victim must notify the ISP. Upon receipt of the notification the ISP shall immediately initiate the necessary measures to prevent access by any user to the content, provided that the content is illegal, harmful or offensive to the person concerned. Also, it should inform the person concerned of the identity and address of the author of the content".

In Article 3 it states that if the ISP does not fulfill the requirements established in Article 2, the company will be directly responsible for the moral and material harm and prejudice that could have been occasioned to the affected individual since the date of the notification of the existence of the controversial content. Article 4 states that only if the ISP does not remove the controversial content, does the affected person have the right to go to the courts to have the access to the content blocked.

Bertoni recalls that in Argentina there were a series of legal actions initiated by celebrities and public officials against content search engines, particularly Google and Yahoo. The legal actions called for search engines to be responsible for content of third party websites to which they were linking. The judges' reaction was not uniform and in some cases this non-uniformity has led to the liability imposed on intermediaries for content that they neither created nor controlled. This is where we need to pay attention, because in Argentina we have no specific regulation on the liability of intermediaries. The judges who are making decisions in these cases are doing so on the basis of insights or interpretations of existing legislation and the results often pose a serious risk to the exercise of freedom of expression.⁵⁶

After Jenefes failed to get his bill passed in 2009, a second, similar bill was introduced. On March 2011, deputy Federico Pinedo proposed a bill to the Congress entitled "Regime for internet service providers"⁵⁷ (Régimen para proveedores del servicio de internet)⁵⁸ which includes regulation for internet services, hosting and content providers.

According to Pinedo, the purpose of the bill, made up of ten articles, was to exempt ISPs from liability for information on their networks, provided that there is a court order to force them to terminate the content that violates laws or rights of third parties.

Pinedo's initiative to regulate internet services was defended by its followers as an attempt to eliminate "malicious" content on internet websites. But in fact the Pinedo initiative raised more questions than it answered about restricting freedom of expression. For instance, who gets to decide what is bad and what is good content?

The main points of the bill are:

- The bill establishes that under the "internet service providers" category there are others such as the "internet access providers", "interconnection facilities providers", "hosting providers", "content or information providers" and "service providers", defining each one of them. Article 1 of the bill places ISPs, web hosting companies and content creators all in the same category. Under this situation, a simple order against a hosting provider would be enough to have a piece of content removed and the author could say nothing about it.

55. www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/107145/norma.htm

56. es.scribd.com/doc/102758515/Desafios-para-la-libertad-de-expresion-en-internet

57. www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=8793-D-2010

58. parlamentario.com/noticia-34666.html

- In Article 2, it is proposed that all ISPs will be responsible for content generated by third parties from the moment that they have effective awareness that that content is against the law.
- Article 3 establishes another general concept, similar to that provided under the Jefes bill, where the operating mechanism is only partially established. Essentially, any person can ask a judge to eliminate or block any kind of content that “harms the rights and guarantees recognised by the Constitution”. Article 3 of the bill states that “the judge may order the action required without hearing the other party, in particular where any delay is likely to cause irreparable harm to the rights holder, or where there is a demonstrable risk of evidence being destroyed”. This means that a judge shall have the power to order an ISP to put down a website or any content without having to hear the defence of the accused party.
- In Article 5, ISPs will be considered responsible for allowing the transmission of content generated by third parties when they are the ones originating that transmission or when they modify or select the content, or select the destination of the transmitted or retransmitted information.⁵⁹
- One of the most controversial points on the bill can be found in Article 6, which refers to website links: “Webhosting providers, content providers and service providers that offer links to other websites or offer information provided by third parties shall be liable for the information provided by third parties only in cases where they have actual knowledge that the information stored violates laws or rights of others”. This bill puts links on a website and the information hosted on sites at the same level, ignoring the interconnected nature of content on the internet. “If linking to other people’s websites can make us criminally responsible for what they do or say, then one of the main principles of the internet shall be broken”,⁶⁰ says Beatriz Busaniche,⁶¹ member of *Vía Libre* Foundation and Wikimedia Argentina.

This initiative puts in serious danger rights such as the due process of law and the presumption of

innocence, shaping what Busaniche described as a “mine field on the web”.⁶² Moreover, he says the bill presented by the deputy is built on a fallacy: the idea that there is no regulation on the internet.⁶³ “To pretend that there is no law on the internet is not an innocent move, but is one of the old strategies to try to impose on the network tougher laws and restrictions that force the elimination of constitutional guarantees such as freedom of expression and the presumption of innocence”.⁶⁴ Interestingly, Pinedo defends his proposal by saying that it is achieving what the bill is accused of denying: “It is a project that cares for the expansion of the internet and for free speech”, said Pinedo in a newspaper article.

Pinedo’s bill also entails a huge contradiction: the bill aimed to free companies from responsibility by actually holding them responsible for not eliminating suspected illegal or offensive content quickly or thoroughly enough.

Besides being a threat to individuals’ freedom of expression on the internet, what comes out very clearly from this bill are the interests of the entertainment industry to terminate any content that could harm their business interests, similar to the Lleras law⁶⁵ in Colombia or the Free Trade Agreements from the European Union and its intellectual property sections. This bill has also been frequently compared to the controversial *Sinde* law from Spain.

Busaniche is very clear about the nature of Pinedo’s bill: “What Pinedo proposes is to enable the ability to terminate content fast and without defence of the victims from this form of censorship, regardless of the constitutional guarantees of freedom of expression and the right to fair and adequate defence. Laws do already exist for all of Pinedo’s concerns”.⁶⁶

Awareness

We started this research assuming that human rights organisations in Argentina did not address the internet as a particular field for human rights concerns. As part of this work, we investigated the level of awareness that the human rights movements have when it comes to human rights issues on the internet. We created a survey to analyse the level of understanding of the concept of internet rights and their relation to human rights, and distributed this by email amongst national human rights defenders

59. As enshrined in Article 12 of European Directive 2000/31/EC of the European Parliament and the Council of Europe

60. Beatriz Busaniche, *Las recurrentes malas ideas sobre cómo regular internet*, www.unr.edu.ar/noticia/3439/las-recurrentes-malas-ideas-sobre-como-regular-internet

61. Beatriz Busaniche is a social communicator and member of *Vía Libre* Foundation, public leader of Creative Commons in Argentina and executive director of Wikimedia Argentina. She is also a professor at Buenos Aires University

62. Busaniche, “Las recurrentes malas ideas”

63. *Ibid*

64. *Ibid*

65. www.mij.gov.co/Ministerio/Library/Resource/Documents/ProyectosAgendaLegislativa/Derechos%20de%20Autor%20en%20Internet1680.pdf

66. Busaniche, “Las recurrentes malas ideas”

in general, and women's human rights defenders in particular, as well as ICT activists. The survey addressed the level of awareness on the subject, the existence of advocacy work in this area, and problems and opportunities considered pertinent.

The questions were sent to a total of 36 email addresses for diverse civil society organisations, and also to the Red Informativa de Mujeres de Argentina mailing list, which has 800 subscribers, all of them Argentinian women involved in the defence of women's rights in the country. Interestingly, the total number of the people who answered (13) were women's rights activists.

We consider that this could be a strong indicator of two trends:

First, that the women's movement in Argentina has a strong and long-standing tradition of using the internet for their work and they are aware of the potential of online spaces for advocacy and for the defence of human and women's rights.

Second, the lack of response to the survey from the other human rights advocates, most of them working specifically on seeking justice for the crimes committed during the last military dictatorship in the country, supports our initial hypothesis that human rights practice and discourse in Argentina are mostly related to rights-related issues of the past. The debate on internet rights from the human rights perspective is quite new to the human rights advocacy agenda and this situation could have been mirrored in the survey by the lack of participation.

Nevertheless, the survey showed that current debates taking place in the national arena on human rights and the internet are mainly focused on freedom of expression and secondarily, on whether access to the internet should be considered as a human right.

Even though the survey did not pretend to be exhaustive, thoughtful answers were obtained and interesting conclusions could be extracted from them:

1. All respondents agreed that respect for human rights is also necessary on the internet. Among the reasons they gave were that human rights are universal and they must be respected independently of the medium, without any kind of distinctions or discrimination.

Highlighted comment: *"There should be no area in which human rights are not worth it. All human activity must ensure respect for human rights."*

2. All respondents (except one) agreed that human rights can also be violated on the internet. Many of the respondents felt that anonymity is an incentive to commit crimes online. Many

respondents also mentioned the double face of the internet: it gives the freedom to exercise rights and also the freedom to violate them.

3. All participants in the survey (again, except for one) named at least two human rights that they considered relevant to the internet. Ordered from the highest to the lowest number of responses, the rights mentioned were: right to information; right to freedom of expression; right to life; right to privacy; right to freedom; and right to a life free from violence; among many others. The right to information and the right to freedom of expression were mentioned by the majority of the respondents as important rights that should be respected on the internet.
4. The majority of respondents answered that they do think that the internet in Argentina is a valid space to implement policies related to human rights. They gave many examples of policies or practices on the internet specifically related to human rights, such as the increasing possibilities of accessing online information (legislative debates can be seen online and there is online access to sex education materials), e-learning opportunities, and online campaigning for human rights, among others.
5. All respondents said they support the need for the protection of human rights on the internet, such as the right to non-discrimination, the right to education, the right to freedom of expression, the right to privacy, the right to freedom of association, the right to freedom of belief, intellectual property rights, the protection of children's rights, and the right to protection of personal data, among others.

Highlighted comment: *"We must consider that the internet is the medium, and that the use or abuse is created or designed by people. It is naive to think that the internet is a panacea, but it is a means we now have to spread and connect with each other when we are fighting for the fundamental rights of all people regardless of social status, race, religion, and gender choice who are censored, tortured or persecuted."*

Highlighted comment: *"Having to rely on private companies (responsible for search engines, telecommunications, among other services) for access to information on the internet has the consequence that, depending on their interests, they can restrict our ability to reach content. In various cities of the world we can access the same information as that blocked in certain countries."*

States need to take over the development of tools that facilitate access to information on the internet, as well as ensuring that all citizens can use this medium, which is not the case today.”

6. The majority of respondents showed that their organisations or groups had developed some kind of work related to the internet on activities such as capacity building processes, information dissemination about human rights using websites, blogs, webcasting, social networking, VoIP, and running news agencies with a gender perspective.

Impact on other rights

The first issue we want to mention at this point is the importance of the right to access the internet and its impact on other rights; more precisely, one should consider the lack of access as a loss of rights. Communication infrastructure in Argentina is still concentrated in the main urban centres, and is very scarce in smaller urban areas. As mentioned, the national government is slowly rolling out the National Fibre-optic Network (Red de Fibra Óptica Federal) that will greatly improve access in the future. However, this situation has not changed yet.

Secondly, as a general statement, when it comes to freedom of expression, we find that restrictions to this also violate other related human rights.

Right to privacy

Delegating ISPs control over the content circulating on the internet not only affects freedom of expression, but also threatens the privacy of users.⁶⁷ Bertoni describes what happened in the US, where ISPs asked not to be forced to violate the privacy of individuals, arguing that this would mean a dramatic increase in their costs. In response they obtained “a kind of legal immunity for possible copyright violations committed by users of their services, provided they cooperate in the control of content”.

Argentina has a National Law on Data Protection (Law 25.326)⁶⁸ that “aims at a comprehensive protection of personal data entered in files, registers, databanks or other technical means of data processing, either public or private”. However, empowering ISPs to be responsible for content violates this right.

Right to access to information

Restrictions imposed on content on the internet imply the lack of access to that information online. This situation affects mainly vulnerable groups. For example, some content related to women’s rights could be taken down for religious or ideological reasons. Women undergoing an unwanted pregnancy or dealing with gender violence might not be able to access information, considered inappropriate for some reason, and consequently the exercise of their sexual and reproductive rights would be affected.

Right to access to culture

We understand that restrictions applied to the free movement of content on the internet on the grounds of violation of intellectual property involve not only a restriction on freedom of expression, but also the infringement of the right to access to culture. “Given the increased possibility of access to culture in a multiplicity of formats, restrictive regulations over the circulation of cultural goods are increased. But the cultural industries have not stopped increasing their earnings, which have even been enhanced by internet”, said researcher Martín Becerra.⁶⁹

Conclusion

Freedom of expression on the internet has become an important issue over the last year in Argentina. The cases mentioned in this report were largely debated and discussed by groups linked with the issue, but the subject has had public significance as well.

While Argentina has a law that gives constitutional range to freedom of expression online, some legislative reforms relating to the role of intermediaries are being proposed, each with varying degrees of power and control over content. Other initiatives related to the definition of the place that author rights should occupy in relation to other rights are also being discussed. None have yet been approved, making this moment a key time to intervene in these discussions.

However, as shown in this report, the legal vacuum and the absence of a specific legislative framework means that the legal criteria applied in each case is left to the interpretation of judges who generally favour private agreements between parties (with the notable exclusion of other affected groups).

The following quote from Frank La Rue’s report is particularly relevant:

As with offline content, when a restriction is imposed as an exceptional measure on online content, it must pass a three-part, cumulative

67. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

68. infoleg.gov.ar/infolegInternet/anexos/60000-64999/64790/norma.htm

69. www.pagina12.com.ar/diario/economia/2-194126-2012-05-16.html

test: (1) it must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); (2) it must pursue one of the purposes set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and (3) it must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality). In addition, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.⁷⁰

We believe that legislative frameworks in Argentina should be very clear, accessible and with very specific criteria in order to determine the cases where content should be taken down through court orders.

As mentioned before, we find that restrictions over freedom of expression imply the violation of other related human rights such as the right to privacy (by giving ISPs control over content), the right to access to information (by restrictions imposed over content on the internet that causes the lack of access to that information online), and the right to access to culture (by the restrictions over the free movement of content on the internet on the grounds of violation of intellectual property).

We argue that it would be healthy for Argentina to start a legislative debate on the neutrality of the net – an issue where typically only a few voices are heard. If this discussion takes place, we will surely be working on a key node in the challenge of human rights and the internet.⁷¹

As mentioned at the beginning of the report, we also celebrate the national government's fibre-optic network initiative, since we consider that no real access to infrastructure is the first concrete restriction for the exercise of the right to freedom of expression.

When we started this research, we began by assuming that human rights organisations in Argentina did not address the internet as an issue of particular human rights concerns. But the survey we carried among representatives of the human rights movement (women's human rights defenders in particular, but also ICT activists) showed that the advocacy terrain for freedom of expression on the internet is much more mature than we initially suspected.

All the respondents agreed that respect for human rights is also necessary on the internet, and agreed that human rights can also be violated online. The right to information and the right to freedom of expression were prioritised as the main rights that should be freely exercised and guaranteed on the internet. They considered the internet a valid space to implement policies related to human rights and, interestingly, most of the respondents showed that their organisations or groups had developed some kind of work related to the internet. We feel that the survey results are really useful and even hopeful in terms of the upcoming development of national and regional debates around the right to freedom of expression on the internet.

Looking forward, we believe that the debates around the right to freedom of expression during the lobbying phase of the Law of Audiovisual Communication Services might allow the debate to be extended to the internet. Broadening and deepening discussion on this subject will require the determination, skills and sustained advocacy work of a number of civil society groups. ■

70. Frank La Rue, *Report of the Special Rapporteur*, para. 69

71. Eben Moglen: *Why Freedom of Thought Requires Free Media and Why Free Media Require Free Technology*, www.youtube.com/watch?v=sKOk4Y4inVY