

Terms of Service as a Case of Legal Pluralism¹

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Abstract

While discussions involving free speech often revolve around individual rights against the government, recent developments in technologies related to the Internet raise questions regarding new forms of censorship practiced by private Internet service providers. Past experiences, such as the movie pictures private regulation by the Production Code, illustrate how private agreements and practices can shape the level of free speech in certain realms. While obscenity and nudity became an obsession during the first regulatory efforts directed to the Internet, censoring legislation in this area often failed the constitutionality testing, and censoring efforts were shifted to more opaque practices. Recent cases of feminist protests using their bodies as political instruments in Brazil are analyzed and put in perspective with algorithmic and manual control in online social networks.

Keywords

Censorship; Free Speech; Nudity; Internet; Feminism.

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1. Introduction

A free speech doctrine in a connected world is a doctrine that suffers from simplification and ambiguity. Freedom of speech, or its more general counterpart freedom of expression, is secured in many of the human rights charts signed by countries in the 20th century, but its contours are concretized within states, by constitution, statute and official or non-official interpretation. It becomes challenging to discuss free speech when your object is the Internet,

¹ This paper was drafted for presentation at the Law & Society Minneapolis 2014, and is a preliminary presentation of an ongoing research. While some results are presented here, it sets the framework for a larger empirical work, for which I expect to profit from the discussion and inputs from colleagues at the session.

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a network connecting information in different servers in different countries. In other words, we are dealing with a communications network where information is distributed (or concentrated) across jurisdictions. Countries dispose of specific legislated in accordance to their histories and their political and cultural environments. In France and Germany, for instance, strict rules prevent the publication of content denying the Holocaust; in Scotland, blasphemy is still a crime; in China and other East Asian countries, political speech is controlled; in Thailand, it is a crime to insult the monarch. Such a diversity defies Internet content control, since information is distributed across national boundaries, but, by default, accessible anywhere. In fact, jurisdiction is possibly the most important matter to be solved by legal theory in the next years.³

As technologies related to the Internet evolve, new forms of controlling speech are developed. Although it cannot be asserted that democratic nations have always relied on public discussion and democratic procedures to define a society's desired level of protection to speech, a democratic approach to politics, in either of its modalities, assumes this level of transparency as desired, even if to allow for the suppression of certain kinds of speech. The Internet, that once seemed to offer a radical approach to the circulation of discourses, on the one hand refreshes traditional worries regarding inappropriate content – as is the case with obscenity –, and, on the other, is being shaped by many factors so as to allow new forms of censorship.

2. Private Censorship

Facing the risk of being reductionist, I will address free speech as a general theoretical agreement, sometimes referring to specific jurisdictions, as will be the case of Brazil, where this research is centered, and United States, due to their free speech tradition and to the wide scholarship produced in the subject in that country. I do not intend, for the moment, to produce a reconstruction of the free speech doctrine, what would certainly be of use in the future development of this project; in the following pages, however, I will loosely point to free speech understandings that relate to the research in question.

³ This is not an original thought and is being extensively discussed by academics, civil society and other Internet private stakeholders; the Internet & Jurisdiction project was launched in 2012 in a partnership with the International Diplomatic Academy, and aims at facilitating an evidence-basis dialogue process to address the tension “between geographically defined national jurisdictions and the cross-border nature of the Internet in a constructive manner”. See <http://www.internetjurisdiction.net/>.

Developing from the strictly liberal formulation of the *free marketplace of ideas*, democratic formulations understand the free speech doctrine relate as deriving from the democratic ideal of self-government: if government is to be the result of common decisions about the common good, different viewpoints are not to be suppressed. In this formulation, free speech would be two-tier: some speeches are the core of the protection, such as political viewpoints and other subjects of interest to the collectivity, while others, of private ordering, are less valued and are more subject to regulation.

Cass Sunstein reminds us that, for over a century, in the United States, the First Amendment was understood as protecting only against prior restraints; speech protection itself dates to the 1st World War, when the Supreme Court dramatically expanded its interpretation of free speech. It was in the 1920s that the Court took to suppressing speech that was critical to the government only when it represented “clear and present danger”, with a large degree of constitutional protection at least when it comes to political speech, instead of allowing for the suppression of a more general “harmful speech”. In the next 45 years, the American free speech school evolved between “absolutist” advocates, who argued that free expression should not be limited to political speech, there should be a neutral approach towards all discourses, and that any restrictions in practice would lead to further restrictions - the “slippery slope” theory, and those who believed that a “reasonable regulation” of speech should be allowed, so as to balance individual rights and collective rights, and in areas in which the state had reason to fear harm - certain kinds of speech such as advocacy of crime, commercial and hate speech, obscenity and libel of individuals and groups would fall outside the scope (SUNSTEIN, 1999:4-8). In contemporary debates, a compromise has been found between the two positions: all speech is not the same, since some speech qualifies at the free speech core. Free speech is therefore divided between “high value” and “low value”, despite there existing no theory that clearly distinguishes between them. While ordinary political speech is the core of the protection, obscenity for example is “understood to include a narrow category of speech that appeals to the prurient interest, is patently offensive, and lacks serious social value” (SUNSTEIN, 1999: 10) - but ordinary art and literature are almost always protected. “For constitutional purposes, most art is high-value. Obscenity is low-value” (SUNTEIN, 1999:11).

This division between high and low value speech is not unanimous within literature. For theorists that understand that democracy should, instead of being an ultimate goal, serve the value of autonomy, consider that such a distinction is simplifying, for not taking the

dimensions of auto-determination and self-fulfillment that lie in all sorts of speeches, and the intrinsic value speeches own for the development of the subject. Democracy should serve autonomy instead of collective self-determination, and dividing between political and non-political speech would therefore result in reductionism (MONCAU, 2011).

The liberal *free marketplace of ideas* version of the doctrine understands that the balance to a deregulated free speech is antitrust law: if all interference in the operation of the free market is excluded, and there are no monopolies in our communication, our free speech would be then protected. However, unregulated markets are not necessarily the mirror of a well-functioning free speech system. Free speech is closely connected to the functioning of a deliberative democracy, in which new information and perspectives influence courses of action by influencing social judgement (SUNSTEIN, 1999:19), if certain conditions are met.

“Those conditions include adequate information; a norm of political equality, in which arguments matter but power and authority do not; the absence of strategic manipulation of information, perspective, processes, or outcomes in general; and a broad public orientation toward reaching right answers rather than serving self-interest, narrowly defined.” (SUNSTEIN, 1999:19).

For such a system to succeed, Sunstein alleges two minimal features must be present: an education directed at developing the subject’s attention to public issues, and a public exposure to an appropriate diversity of views.

If this idea of free speech is to succeed, one should move forward from a merely negative approach to the doctrine, that understands freedom as the absence of government restrictions. Whether private entities have duties related to protecting speech is often misstated or ignored under the argument that private communications competition is enough to guarantee diversity of points of view. Sunstein advocates for the understanding of property as a right to be assessed in conformity with the free speech guarantee, on a case-by-case basis - and competition in the communications market is certainly an important part of that assessment (SUNSTEIN, 1999:41). Some regulatory efforts on private actors may in fact increase free speech, as is the case of establishing electoral campaign broadcasting times or a right of reply.

A 1976 Supreme Court decision claimed that the exclusion of abortion protestors from a shopping center did not implicate the First Amendment, since no government regulation of speech was implicated - private property owners would have the right to decide who stays in their land.⁴ This position is to be challenged, however, by the idea that the very police forces

⁴ Lloyd Co v. Tanner, Hudgens v. NLRB 1976.

called to enforce property rights reinstates governmental presence; in other words, governments are already involved. Another example of this paradox is the view that broadcasters are no subject to free speech considerations under the First Amendment - a poor way to understand the situation, since property rights broadcasters are given in their licenses are granted by government.

A view that, in abstract, excludes private power from having to comply to free speech obligations is a merely negative approach to the matter. The positive approach is largely accepted, on the other hand, when government protects a speaker from a hostile private audience, or from being defamed, through courts. "It is necessary instead to evaluate the consequences of the system by the reference to the purposes of the First Amendment - just as it is necessary to evaluate the consequences of any system in which property rights operate to hurt some and benefit others" (SUNSTEIN, 1999:48).

In certain historical moments, the level of freedom of speech in societies can be closely tied to private parties decisions, and these decisions might be more or less influenced by government demands. As we will dwell on later, this seems to be the case of certain ongoing measures and practices taken by private service providers on the Internet. As the proximity can be an obstacle to the proper understanding of a subject, let us shortly develop on a more distant example: the private ordination of speech in Hollywood, in the period comprehended between the 1920s and 1960s in the United States. If the situations under many aspects are not comparable, understanding how such a system can operate and the consequences it might lead to can be useful.

2.1. A private rule for speech: the Production Code

In 1887, a statute from the State of Maine prohibited the exhibition of prizefight films in its territory, in which it was followed by other U.S. states. In fact, in 1915, the Supreme Court decided that moving pictures were not to be comprehended in the protection offered by the First Amendment (*Mutual Film Corporation v. Industrial Commission of Ohio*), a ruling that was overturned only in 1952, when deciding a case on the short film *The Miracle*, by Roberto Rossellini (*Joseph Burstyn, Inc v. Wilson*). After 1915, therefore, many censorship boards were created within municipalities and states, with the authority to decide on the morality of films and their consequent banning or editing. In the year of 1921, thirty-seven U.S. states

proposed almost one hundred bills to censor movies, and different prohibitions began to be enforced in different states - e.g., a pregnant woman could not appear in a film in Pennsylvania, but in New York it was allowed. (LEFF, SIMMONS, 2001:3-4).

The government was not the only threat studios were facing regarding their freedom: the Catholic church had been clashing with the development of the movie industry, preaching that the American culture was being degraded; “the pest hole that infects the entire country with its obscene and lascivious movie pictures must be cleansed and disinfected”, was the statement of a church group in 1933 (LEFF, SIMMONS, 2001:xiv). Pushed and threatened by the idea of a not-so-far in the horizon federal censorship board, studios started to turn to self-regulation instead, creating their own industry trade and lobby organization.

The Motion Pictures Producers and Distributors Association, the embryos of the future MPAA (Motion Picture Association of America), was founded in 1922 to be directed by the ex-Republican national chairman, lawyer and an elder of the Presbyterian Church Will H. Hays. Drawing from the experience of censorship boards, he developed in 1927 a list of subjects studios should avoid, but his Studio Relations Committee, designed to implement the code, had no enforcement powers. For a few years studios would defy the Committee’s authority and refuse to comply.

Pressure from conservative segments of the North-American society resulted in the adoption of a stricter and more specific code, containing now not only the early “Don’ts and Be Carefuls” but also a moral system, developed in 1930 by a Jesuit priest, Daniel Lord, who was a professor at the Catholic St. Louis University - the *Hays Code*. Further amendments resulted in what is known by the name *Production Code*.

The General Principles of the Production Code stated:

- 1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience should never be thrown to the side of crime, wrongdoing, evil or sin.*
- 2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.*
- 3. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.*

Regarding sex, the Code prescribed:

The Sanctity of the institution marriage and the home shall be upheld. Pictures shall not infer that low forms of sex relationship are the accepted or common thing.

The Production Code went on to determine that adultery must not be explicitly treated; scenes of passion should be avoided; seduction or rape could only be suggested and when essential; white-slavery, miscegenation and actual child birth, even in silhouette, were never to be allowed; and children's sex organs should never be exposed. Vulgarly, profanity and obscenity were forbidden. Among other particular rules, the Code even determined that *the treatment of bedrooms must be governed by good taste and delicacy*.

The moral standards part of the Code went to the details to describe how movies should make us feel sympathy for the sinner, not for the sin; that correct standards of life should be presented; and so on.

Although a common simplified narrative about the period reckons that studios were eager to turn to self-regulation, in order to avoid government interference, truth is that the Code was not well received among studios, that understood that sexual, violent and "indecent" content guaranteed their audiences; especially during the Great Depression, turning to softer subjects could mean financial losses, and they were not willing to risk that. At the same time, the Catholic and conservative forces tone was starting to escalate: a "Legion of Decency" was recruited to condemn "vile and unwholesome pictures", that are "corrupting morals and promoting a sex mania in our land"; the Legion members must therefore promise "to remain away from all motion pictures except those which do not offend decency and Christian morality" (*apud* LEFF, SIMMONS, 2001:49). While that movement also threatened studios' audiences, the enforcement capabilities of the Code were greatly enhanced in 1934, when the legendary severe figure of Joe Breen articulated and became head of the Production Code Administration (PCA). From then on, all movies had to submit treatments and scripts to the PCA, and would be heavily fined when releasing a movie in violation of the Code; Association members, what by then meant all major players of the market, had to bar movies without the PCA Seal from their theaters. As much as PCA's enforcement status was private, and adhering to the Association was not required, all major studios complied. By then, official censorship was in fact becoming a major threat. For twenty years, the Code was rigidly applied, and censorship boards started extinguishing. The PCA acquired the fame of being a rigid and merciless board, that extended its activities even to the changing of studios' scripts.

When Rossellini's movie was accepted in the United States by the Supreme Court, in the 1952, it was generally understood that censorship threats were not as near as before, and the influence of the PCA diminished considerably. A few directors started to release films without a certificate of approval, notably Otto Preminger, whose films started to depict virginity, drugs, rape. Great successes such as *Some Like it Hot*, by Billy Wilder in 1959, and *Psycho*, by Hitchcock in 1960, were also released without the certificate, for the great discredit of the PCA.

In the political and cultural context of the 1960s, there was very little the MPAA could do to avoid losing its prevalence. Civil liberties groups were demanding alternative approaches to race and gender in the American culture; the British *kitchen sink realism* movement, with a realistic approach and depicting working-class life, had been invading the U.S., even if violating the Productions Code; and the PCA itself started allowing for negotiation and relativizing its positions, approving, for example, features of nude breasts (*The Pawnbroker*, directed by Sidney Lumet), and prohibited language as in *Who's Afraid of Virginia Woolf*; end of story comes when, despite being denied by the PCA, Antonioni's *Blow Up* was released by MGM, who did belong to the MPAA. There is wide research and commentary on this story (see SPERLING, 1998; LEFF, SIMMONS, 2001; LEWIS, 2000). MPAA turned then to work on a rating system.

For over twenty years then, every movie released in the United States was restricted to certain subjects and depictions or viewpoints about these subjects. This is not to say that, during that period, a democratic regulation of film content would have been less restrictive, what is impossible to assert for sure. What follows is that regulation of speech becomes indirect, falling under societal knowledge and control, and even disagreement becomes harder to practice. If, on the one side, a valid argument would be that studios could decide by themselves and their representative association on the sort of discourse they wished to circulate, it is known that this association was also subject to pressure. From the normative side, it could be questioned whether such an association would not have responsibilities under the First Amendment – we will not, however, develop on the constitutional questions such assertion raises. For now, it suffices to admit that free speech levels were privately determined in the sector during those years.

2.2. Moral Panics and Obscenity Censorship

“Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of person emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition the disappears, submerges or deteriorates and becomes more visible” (COHEN, 2005:1).

Admitting a certain subject has become a moral panic is not implying that such a subject is unimportant or mere fantasy; it signifies that discourse around a situation involves exaggeration, be it in itself or compared with other problems, deemed more serious, but also that the subject involve cherished values and an object of concern, anxiety and hostility (COHEN, 2005:viii, xxvii). Moral panics are characterized by the lack of congruence between action and reaction, social objects and their interpretation - however troublesome the definition of disproportionality is, since measurement is socially constructed. Also, the reaction can either exaggerate certain facts or deny and play down significant others (COHEN, 2005:xxii).

According to Stanley Cohen, the author of a comprehensive sociological study in the subject, and informed by labeling theory, cultural politics and critical sociology, moral panics are found in seven “familiar clusters of social identity”: Young, Working-Class, Violent Males - be it in the form of football hooligans, be it in the form of vandals - a contemporary Brazilian example is the coming into scene of groups self-proclaimed Black Blocs, during the wave of protests coming from June 2013. Second is school violence, especially in the form of bullying and shootouts - the first when leading to serious injury or the victims suicide, and the latter because of the idea that “it could happen anyplace” (COHEN, 2005:xii). Third relates to drugs, and the idea of its evils to a vulnerable user, this users’ “slippery slope” from soft to hard drugs, or the idea that she has been pushed by an evil one. Fourth is child abuse, paedophiles, and satanic rituals - particular of this kind of panics is its two-sidedness, directed both at the abuser and at parents or whoever in charge of the victim, who might be accused and have their privacy invaded, raising concern from other parents or people in the same situation.

Fifth is sex, violence and blaming the media. These are panics about the harmful effects of exposure to popular media, and the voicing that they glamorize and trivialize crime or undermine moral authority, or, from the liberal side, that the media favors moral panics by vindicating control and action. The Brazilian public sphere is currently thriving in this sort of dualistic panics: on the one side, the mainstream fear of violence and a popular taste for afternoon political TV shows exploring crime and repressive discourse (e.g. *Cidade Alerta*); on the other side, collective lynching of criminal suspects, followed by opinion clashes in the newspapers and social media.⁵ “The crude model of ‘media effects’ has hardly been modified: exposure to violence on this or that medium causes, stimulates or triggers off violent behavior” (COHEN, 2005:xvii), a model sustained by repetition and appeals by authoritative voices.

Sixth relates to welfare cheats and single mothers, stimulated by the neoliberal construction of an atmosphere of distrust. This sort of panics is currently concentrated in the welfare provision *Bolsa Família*, in Brazil, that visibly moves a long strain of clashes and dominates user commentary on news peaces. Seventh and last, refugees and asylum seekers, flooding the country and swamping our services. However the list has been defined based on the British political agenda, the situation is not far from a structurally distant Brazil, where a recent conservative uprising against government policies of granting asylum to Haitians has been taking place.

Defining, through sociological literature, attitude towards media and sex as moral panics is perhaps a biased start to this debate. Taken the critical theory perspective admitted, the stage of this project and space limitations, we will admit the argument for now.

Regulating obscenity

The obscenity debate and free speech are inseparable - in fact, obscenity has always been one of the major disputes in the field of democratic speech. The legal argument for

⁵ See, for example, recent case of a woman killed by lynching in the coastal city of Guarujá, because she looked like a facial composite by a Facebook page of a woman who would be abducting children for witchcraft: <http://agenciabrasil.ebc.com.br/en/geral/noticia/2014-05/relatives-and-friends-protest-over-lynching-woman>. In another recent case, a 15-year boy was attacked and tied by a group of people in Rio de Janeiro, supposedly because of being suspect of thefts in the region, and raising a series of discussions about racism in the country: <http://globalvoicesonline.org/2014/02/26/brazils-racism-problem-front-and-center-after-black-teen-brutally-beaten/>. The episode generated more public clashes when the polemist TV anchor Rachel Sheherazade claimed the actions were understandable (<http://www.forbes.com/sites/andersonantunes/2014/02/10/brazil-is-not-a-civilized-country-says-the-countrys-most-controversial-news-anchor/>), being subsequently dismissed from her post.

suppressing obscenity from the media is associated with religious groups' interests, and connected to the argument that certain categories of expression, even though consisting of words and pictures, are not "speech", in the sense of constitutional object of protection. Subversive to traditional morality, these expressions would not promote purposes under the scope of free speech protection, for lacking social value. "Obscenity", in the U.S., was legally formulated in the famous Supreme Court's *Miller* case (1973),⁶ as materials that (i) appeal to the prurient interest, (ii) are patently offensive to community standards, and (iii) lack serious social value. To that view, most art and literature would be immunized. The definition is unbearably open and greatly relies on subjective understandings of community standards, allowing for the censorship of speech containing ideas that people dislike (SUNSTEIN, 1999:211). Considering Sunstein's division of censorship in content and viewpoint-based or neutral,⁷ one question to be posed is whether censorship of obscenity can be viewpoint-neutral – viewpoint-based differentiations are far more complicated in a democratic political system.

Three positions can be found in the intricate debate on obscenity and speech. Defenders of the *Miller*-based restriction understand its validity lies in that community standards would objectively present themselves to the interpreter; civil libertarians understand, on the other side, not only that obscenity is speech, but also that the restriction of this speech is being based on its capacity of offending only a few groups - being viewpoint-based, therefore. For this position, the very idea of community standards is biased and affected by viewpoint.

A third position, that of the feminist radicalism, developed originally by authors Andrea Dworkin and Catharine McKinnon, advocates for the control of *pornography*, but on different grounds: it produces harm because of merging sex with coercion and violence, either in its production or in its use, or because it is associated with subordination. From this standpoint, the problem is not violation of traditional values, but concrete harms produced by the material. There are reasonable arguments for the causality between the pornography

⁶ *Miller v. California*, 413 U.S. 15 (1973).

⁷ Sunstein differentiates between content-based restrictions and view-point based restrictions. The last one refers to cases in which a particular viewpoint is silenced, and therefore one side of a debate is silenced. A restriction that is content-neutral is one in which the content of the restriction is irrelevant to the restriction itself - for example, banning of speech on billboards. A restriction can be viewpoint-based but content-neutral, such as when government bans all political speech in a certain place, regardless of the positions in discussions. But a viewpoint-based restriction is always content-based as well - it is impossible to silence a side of the debate without taking the content into account. Viewpoint-based restrictions are almost always understood as unconstitutional, content-based restrictions face a strong presumption of unconstitutionality, and a balancing test is normally applied to content-neutral restrictions. A few content-based restrictions are acceptable, such as obscenity and false commercial speech. (SUNSTEIN, 1999:11-13).

industry and harm, for example, to models and actresses - many coerced into pornography. But then it might be argued that governments should ban coercion and mistreatment, instead of speech; but difficulties in bringing an action against rape and sexual assault are fairly known, what could justify eliminating or reducing financial gains in the activities. Another argument is that there is a causal connection between pornography and violence against women. Even when pornography is more a symptom than a cause of inequality, it is also a cause, and a regulatory effort can change social attitudes and views that contribute to the inequality.

While the position is reinforced by the suggestion that pornographic material lies far from the center of constitutional concern, and therefore could be more regulated, it can also be argued that sexually explicit works play a relevant role in the development of individual capacities, self-discovery and definition (SUNSTEIN, 1999:215). We obviously do not intend to offer a solution to this debate.

2.3. The obscene Internet

The emergence of the commercial Internet, accessible virtually to everyone with a computer and able to afford a connection, refreshed the obscenity debate in new terms. Between 1995 and 1996, an image of the Internet as a place for sleaze, in the form of paedophilia and hard core porn, was symbolically fixed by the edition of news stories reporting on the uses the new technology afforded. In 1995, the Time Magazine published a cover story on “Cyberporn”, generally understood as the trigger for the US Communication Decency Act 1996 (CDA); in 1996, The Times and the Sunday Times, in the UK, would also report on the problem on Internet news-groups. Pornography on the Internet became a moral panic, and the control of obscene and pornographic material a major regulatory concern.

As we will delve on item 3 below, the earliest days of the Internet discourse is marked by a Cyber-libertarianism, according to which any attempt to regulate the Internet would consist of inappropriate censorship. It did not take long to the emergence of the “Cyber-paternalism”, a view that the Internet offered special risks, requiring therefore special restrictions. This position was deeply affected by the renewed possibilities of distributing child pornography content - Internet made porn shareable at marginal cost, with no national boundaries, undetectably, because of the size of cyberspace and of encryption, nullifying the possibility of supervision -, and using the Internet as means for becoming in contact with children for

sexual objectives. In fact, the Cybercrime Convention of 2001 contains only one provision regarding content-related crimes, and that provision is the criminalization of child pornography.

After the dot-com boom in 2000, Internet had generally become part of the daily social and family life, although striking regional differences are to be considered. It became a relative consensus that nations had the right and interest to regulate social relations on the Web. Since the jurisdiction of criminal laws is territorial, there is no legal vacuum regarding national policies to punish criminal acts perpetrated within a territory; it goes the same as with conventional media. The effectiveness of this regulation is what is at stake.⁸

When it came to Internet pornography regulation, however, public discourse was often indistinct regarding two different situations: content that is illegal for adults, of which the most obvious case is child pornography, and sexual material not illegal for adults, but that might also involve children in the sense that it may be considered harmful or upsetting if they have access to it. On the Internet, it is often not easy as in the offline world to separate zones by age.

Let us introduce the example of regulation in England: the Obscene Publications Acts 1959 and 1964 make it an offense to publish an article or have it published for gain; these acts do not criminalize possession, but distribution of content, and definition of an obscene article is the article that has the effect “to tend to deprave and corrupt persons who are likely ... to read, see or hear” it. Since the unsuccessful prosecution of the paperback *Inside Linda Lovelace* in 1976, the act has not been used to prosecute text. It restrains the circulation of obscene pictures, film and videos. Following the emergence of the digital technologies, the Acts have been amended in 1988 so as to include computer discs, and to expand the concept of publication to electronic transmission from a computer to the other. It became therefore acceptable to possess obscene material in private, but not to publish or distribute it or show it to others, especially for gain. (EDWARDS, 2009).

Regarding child pornography, the English Protection of Children Act 1978 (POCA) makes it an offense to have an indecent photograph of a child (under 18) in possession, as

⁸ One legal mark was the *France v. Yahoo!* case in 2000, when France sued Yahoo! for the selling of Nazi memorabilia through their webpages. Although France prohibited the practice in its jurisdiction, nothing prevented French Internet users from buying them from Yahoo.com, physically hosted in the US. French courts would order the US Yahoo! to restrict the practice when it came to French users, through IP control, but the US courts decided not to enforce the decision, under First Amendment arguments. Yahoo! decided to comply either way, because of the bad publicity the case had drawn to itself. The case was illustrative of the difficulties that would arise from tentatives to uphold national content laws on the Internet.

well as taking, distributing, showing or publishing the photograph. When amended in 1994 to encompass new digital technologies, it criminalized also the making of an indecent photograph through digital means. A few operations took place in the 90s for responding to the then recent acknowledgement of paedophiles' activities on the Internet. In 1995, Operation Starburst arrested nine men and convinced two of possession of paedophile images. Operation Cathedral in 1998 charged 9 people with various offenses; the major Operation Ore, in cooperation with the FBI, in 2003, led to the investigation of 6,500 British suspects, as well as 1451 convictions and 500 cautions. In 2000, the case *Atkins v DPP*; *Goodland v DPP* discussed whether indecent photographs stored on the computer cache should be considered possession under the Criminal Justice Act 1988, and whether downloading an image should be considered "making" a photograph according to the POCA. In the local court, the latter was denied, but the first was confirmed: it was a crime to possess an image even if it was the product of Web browsing, without any knowledge or intent. Both positions were reversed to their opposite by the Queen's bench: knowledge was definitely needed, but saving images deliberately was the equivalent to making them.

If in 1996 it was still questionable whether it was adequate and possible to regulate the Internet, developments such as the commented above showed that it was indeed possible and could be effective. During the same period, very similar developments were taking place in the area of what became to be known as "extreme pornography". In 2006, the UK government promoted a consultation about prohibiting this sort of material, that was then widely understood as legal in private. "Extreme" was then described by the UK Home Office as material that was so offensive, gross or disgusting to the vast majority of people that it should have no place in society, whether owned or circulated. That should be the case of material that threatens life or causes serious injury to sexual organs, or that is necrophiliac, or still bestial porn; either way, when, if not real, it looks real to a reasonable person. The government argument for expanding the prohibition was that, before the Internet, these materials would never have been made available via licensed sex shops. The vision circulated in tabloids was that real world crimes could be inspired by them. Effectively, the UK Criminal Justice and Immigration Act 2008, in its 63-67 sections, made it an offense to possess an extreme pornographic image, still or moving, or data capable of conversion into image, to the despair of free speech advocates, who started to claim that civil liberties were being eroded on the Internet when compared to the "real world", "and one [erosion] driven by moral panic rather than real research" (EDWARDS, 2009:22). Another worry was that the

tendency would eventually engulf the offline world, as put by the “slippery slopes” theory. In particular, the BDSM community (Bondage, Domination, Sadism and Masochism) protested that their private sexual choices, often involving possession of extreme porn or taping their actions, were being made illegal. Further government proposals in the UK involve criminalization the making of animes, cartoons and computer generated pornography depicting extreme sex and violence. “Given the above, the overall trajectory seems to be away from a clear bright line that only Internet child porn should be illegal, towards a grayer cloud of illegality which seeks to spread its shadow over parts of the previously legal territory of ‘unwelcome’ material” (EDWARDS, 2009:23).

In the U.S., a similar trend was put in place in 1996, when, after the Time magazine cover, Congress approved the CDA - Communications Decency Act, that imposed criminal sanctions on the person who placed obscene or indecent content on the Internet, knowing it could be read or seen by person under 18. As it is impossible to assert that children will not have access to a content online, the provision was *de facto* banning the obscene and indecent from the Internet. As we have discussed above, there are different theories regarding obscenity and free speech; the most restrictive of them, identified as the self-government approach to freedom of speech, sees obscenity as low-value speech, that is subject to regulation, but still protected. To the rage of free speech advocates, the CDA was therefore criminalizing speech that not only is protected, but that had been previously considered by the Supreme Court as protected. In 1997, in the *Reno v. ACLU* case, the Supreme Court unanimously quashed these provisions from the CDA, arguing that, while the protection of children was desirable, it should not be pursued in a way that interfered with the constitutional rights of their adult counterparts – and that the provisions would have the effect of turning the Internet into a “children’s reading room”⁹. An argument raised and considered by the court was also that the prohibition was so wide that it would affect websites promoting help on sexual abuse and AIDS, or that discussed homosexuality.

The second round of this debate was marked by the approval of the Child Online Protection Act (COPA), that repeated the quashed text, with more robustness in terms of constitutionality – it applied now only to commercial websites, and detailed further what was specifically harmful to children – still including material not considered illicit for adults. It

⁹ 40 years before, in the case *Butler v. Michigan*, the Supreme Court overturned one state law that prohibited the sale of any books unfit for children.

was also stroke down by the Supreme Court, who sent the case back to a district court for a trial, and the case was only shut in 2009, while the law never came into operation.

In Brazil, the Statute of the Child and the Adolescent (*Estatuto da Criança e do Adolescente*), approved in 1990, protects children against abuse and criminalizes sexual pornography in all media. A 1998 revision (Law n. 11.829/2008) reformed the criminal provisions, aiming at “criminalizing the acquisition and possession of such material and other conducts related to child sexual abuse on the internet”¹⁰ – and solving demands made by congressmen in other bills (4144/2004, 4990/2005, and 546/1999, from the Chamber of Deputies). A few operations have been taking place to detect and punish offenders: in February 2014, six suspects had their computers apprehended in the north of the country.¹¹

Drawing from a research conducted by the Observatório da Internet (*Internet Observatory*),¹² indexing all Internet-related bills proposed in the Brazilian Congress until the year of 2013, and searching for keywords “children”, “child” and “adolescent”, there are three further proposals from the Chamber of Deputies imposing further measures to protect children from improper content. Bill 2552/2011 determines that Internet Service Providers must, when displaying improper content, request proving of age; Bill 384/2011 prohibits publishing and distributing of “images, illustrations or signs depicting eroticism, pornography or obscenity” in any media, including the Internet, except for “publications, periodicals or any artistic or cultural manifestation that is destined exclusively to adults”. Bill 4426/2001 establishes access controls to children in public networks. No such bills were proposed in the Senate.

Regarding obscenity, the universe is wider: in the “pre-history” of the Brazilian Internet regulation, Bills 4581/1998 and 3258/97 criminalized publishing, on the Internet, of pornographic material, promotion of violence, teaching how to produce guns and explosives, and stimulating the use of drugs. Bill 3498/97 made it a crime to “make pornographic material available on the Internet”. The justification given with the bill stated that children and adolescents are subject to these materials, and cites the U.S. CDA, that, “though recently considered unconstitutional by the Supreme Court, demonstrates the preoccupation of society and North-American authorities to halt these spurious procedures” (Deputy Silas Brasileiro). Bill 4990/2005, besides criminalizing the exhibition or distribution of software containing

¹⁰ See http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Lei/L11829.htm#art1.

¹¹ “Operação combate pornografia infantil na Internet”, in *Portal Brasil*, February 2014. <http://www.brasil.gov.br/defesa-e-seguranca/2014/02/operacao-combate-pornografia-infantil-na-internet>.

¹² <http://observatoriodainternet.br>.

obscene texts, sounds and images for children under 16 (what was resolved in the reform of the Statute of the Child and the Adolescent), criminalized transmitting obscene material without specific soliciting from the user, or “making available for consultation on the Internet, without specific access control, obscene material under the form of text, sound and image”. Bill 1070/1995 provided exactly the same. Bills 4581/1998 and 3258/97, criminalized publishing, on the Internet, of pornographic material, promotion of violence, teaching how to produce guns and explosives, and stimulating use of drugs. The initial texting of the Bill 84/99 also included a general prohibition of pornography, but the bill – subsequently appended with other cybercrime bills, and becoming the infamous Azeredo Bill – was approved into a very watered down version, and without the disposition regarding pornography. The Congressmen discourse around these initiatives made a rhetoric use of the idea of obscenity, even when not citing children, to “nurture a fear discourse, that on its turn feeds the mythology of the necessity and urgency of a strong and unlimited criminal fight against youngsters” (RENÁ, 2010:53).

An interesting debate was set in place during the discussion of the recently approved Marco Civil da Internet. Its ISP liability rules establish that ISPs are only liable for third-party infringing content once they receive a specific court order demanding the removal of that content. While the bill was being debated in the Chamber of Deputies, a few cases of “revenge porn” came to public in the country, and, in two of them, the victims committed suicide. A provision was then included in the bill, stating the exception that ISPs are liable for this sort of infringing content once their victims notify them. Another interesting discussion was set when, in the middle of a battle for the maintenance of net neutrality dispositions, deputy Ricardo Izar (PSD party, São Paulo) presented a proposal to reform the Bill, stating that access providers could provide special traffic conditions under request, and justified his proposal under the argument of parental control. Brazilian civil society mobilized to convince him that parental control was carried out privately, through Web browsers. He was convinced and withdrew the proposal.

The examples taken from UK, the US and Brazil are representative of how obscenity, pornography and indecency have received legislative treating, but with little success. Censorship of these contents started then assuming different forms.

3. Censorship is evolving

Internet censorship is evolving. I follow here Bambauer's (2012) division of censorship on the Internet in three different historical moments (freely renamed): impossibility, feasibility and ubiquity.

As mentioned above, around the time of the opening of the Internet through commercial providers, it was seen by radical optimists as the absence of state, beyond the reach of real-space regulation. The Electronic Frontier Foundation founders Mitch Kapor, John Perry Barlow and John Gilmore are the paradigm of radically anti-regulation ideologists, and it did really seem back then that this new technology, built to adapt to major disruptions (war and physical damage), would be technologically immune to barriers to the free flow of information and knowledge. This optimism is a-critically appropriated, in the following years, in a neoliberal credo adopted by the combining of the bohemian environment of San Francisco with high-tech entrepreneurs, righteously named by Richard Barbrook and David Cameron *The Californian Ideology* (BARBROOK; CAMERON, 1995).

It wasn't for long. In a rather visionary work, *Code and Other Laws of Cyberspace*, published in 1999,¹³ Lawrence Lessig advocated that the conjunction of traditional intellectual property structures with technological architecture would become capable of regulating and controlling behavior on the Internet in an at the same time efficient and opaque fashion. The cyberlibertarian view that coercion was a government-centered evil, those "weary giants of flesh and steel" (BARLOW, 2006), needed reassessment, since it would increasingly be the result of the advances in control technology pushed by both government interests and those of the companies involved in telecommunications and online commerce.

3.1. Code is Law

The Internet architecture, in Lessig's view, allows for a very specific regulatory form, that of the code layer: *code is law*. If the Internet was born as the land of freedom, anonymity and impossibility of geographic identification, that was not the reality in 1999. Government and commerce interests had led to technical developments that allowed for knowing exactly who did what, where, and when. Even though the TCP/IP protocol had been developed to

¹³ A second edition of the book has been launched in 2004, correcting a few mistakes and adding a few comments and examples. I am basing on this second edition (*Code 2.0*).

preserve anonymity, net neutrality and geographic indifference, specific code layers complementing TCP/IP promoted a shift to control. Aiming at secure transactions for online commerce, or the identification for purposes of criminal investigation, personal identification became a reality. An ISP could be judicially demanded to reveal who the person behind an IP is; cookies and technologies such as Single Sign-On growingly allow for the recognition of the user. Cryptography, originally developed to secure confidentiality of communications, started being employed to mark Internet packages with their origin, irreversibly at least for common non-expert Internet users. Applications are capable of determining contents carried by packages through keywords, blocking of certain origin and destiny servers – more recently, through DPI (Deep Package Inspection). The tracking of the path followed by network packages, through the use of sheets that link IPs to locations, allow for determining where from an information is being accessed, be it for criminal investigations, be it to prevent online fraud in commerce (LESSIG, 2006:40-59).

If the Internet architecture is capable of breaching privacy, monitoring or controlling access to intellectual products, code becomes an instrument of power. It is evermore subject to political conflict, and parliamentarians from different countries were already regulating code behavior. Regulating through code can be much more effective than through laws: the architecture that blocks access to a certain content, in a country censoring the Internet, can be (relatively) unavoidable; safety and content control into private social networking spaces is self-applicable, can be carried through algorithm, and unilaterally determine removal of content. Private actors can determine the reasonable pattern of communication inside their services. The legal regulation of code, on its side, is directed to Internet service and application providers, but aims at controlling end-user behavior: it is indirect. Consequences for transparency and accountability are that regulation becomes invisible (LESSIG, 2006:134-8).

From a legal perspective, regulation through code is characterized by self-enforcement, since it does not rely on an external instance to be applied, as law in general is: based in digital language, enforcement is put through the 0-1 binary code, establishing a rule and automatically applying the rule. From a functional standpoint, Teubner and Karavas, in 2002, developed on the idea that such a regulation contradicts a Rule of Law tradition that is based in the separation between law production, application of the law and its coercive enforcement (KARAVAS; TEUBNER, 2002:1346). Digitization and regulation through code

would lead to an undermining of this process, destroying an important guarantee for the individual and institutional spheres of autonomy.¹⁴

In fact, even before the crash of the dotcom economy, in 1999, Saudi Arabia was already filtering the Internet. Censorship was now feasible, and began being practiced by states such as China, Iran, Burma and Vietnam (BAMBAUER, 2012:2-3). However viable the screening of information had become, censorship was then still a hard word, set political disincentives, and was subject to international reprisal – it was the work of “benighted” countries, from a strictly occidental perspective.

From 2006 on, the link between censorship and authoritarianism is lost (see BAMBAUER, 2012a: censorship becomes ubiquitous. In the name of other praised values other than free speech, the list of censor states starts growing. In the end of 2007, the UK was also taking measures to push ISPs into blocking access to child pornography websites, pushing them to comply to a blacklist developed by the IWF (Internet Watch Foundation, EDWARDS, 2009:38). In September 2008, France signed an agreement to block child pornography (REUTERS, 2008; ONI France). South Korea, that had a background on communications control since at least 2001, started heavily regulating on “false rumors” and “malicious postings” in 2008, adding liability to ISPs for users acts (ONI South Korea). During 2011 and 2012, India took 22 Internet firms to court, due to “objectionable content” posted by users (The Diplomat, 2012a) and started pressing social networking sites for the removal of “inflammatory material” (The Diplomat, 2012b). In Vietnam, a 2006 decree required ISPs to install monitoring software, and citizens to denounce content that opposed the state or threatened state security; a 2008 decree maintained users under tight control, prohibiting opposing the government, damaging reputation of individuals and organizations, and restricting blogs to personal content (ONI Vietnam). Turkey’s Telecommunications Authority Regulation of 2007 specified that hosting and access providers must remove illegal content from their system upon notification by the Communications Presidency, when technically feasible (ONI Turkey). In Singapore, the Media Development Authority, that ensures “national harmony”, “good taste” and “decency” in the media, fined a site called

¹⁴ Teubner and Karavas understand autonomy as guaranteed by the luhmannian triad of conduct-control, expectation-building and conflict-resolution, each one of them served by institutions, legal culture and a form of rule of law. Code reduces the triad to one function of electronic control, calculating normatively in a very exact manner, excluding interpretation. Normative conduct expectations, which could always be interpreted, adapted, manipulated or bent, are becoming rigid cognitive expectations of factual circumstances (inclusion/exclusion)”. Legal arguments are only allowed when formulating code, and the creation of exemptions, application of equity principles, or the recourse to non-legal communication, and even the informal non-application are precluded (KARAVAS; TEUBNER, 2002:1347).

“Meet Gay Singapore Friends” in 2005, and charged a person in 2006 for posting a Jesus charge on his blog (dropping the charge later on, after confiscating his computer and removing the images from the blog) (ONI Singapore). In 2008, the United States Treasury Department was responsible for, through their domain name registrar, disabling a few websites relating to travel in Cuba, alleging they were helping “Americans evade travel restrictions to Cuba” and “a generator of resources that the Cuban regime uses to oppress its people” (NYT, 2008). During 2010 and 2011, the Immigrations and Customs Enforcement at the United States, alleging consumer protection, seized dozens of domain names for sites that either were suspected of facilitating copyright infringement, such as torrent-finder.com, and sites for counterfeit luxury products brands (GRAZZINI, 2011).

These cases illustrate how commonplace filtering and blocking of content became - current discussions, such as the ITU WCIT-12, focus no longer on the existence of censorship, but under which conditions it’s performed (BAMBAUER, 2012:6). The cases presented refer, however, to different situations regarding openness, transparency and accountability of the censorship policy; restrictions to freedom of expression can be found to be legitimate in certain jurisdictions if there is general acceptance regarding the values they are promoting. When carried out under these circumstances, they also subject themselves to effective opposition (see, for example, opposition against SOPA, PIPA and ACTA in the beginning of 2012). The “ClearList” control in the UK only faced opposition when it finally came to the public sphere, when in 2008 Wikipedia was blocked because of an image of a well known classic rock album cover, depicting an apparently pre pubescent girl. Before that, UK citizens were not aware they were being censored (EDWARD, 2009).

Among the examples of filtering, particularly interesting or worrisome are strategies shifting blocking responsibilities to private ISPs, Online Service Providers (OSP) or trade organizations, or voluntary curtail of access to content by private actors. The two situations are to be distinguished here: *collateral censorship*, when states transfer burdens to private parties through legal arrangements, general or case-by-case pressure, turning policies into opaque censorship – in Australia, a very polemic government filtering strategy was successfully pushed to voluntary co-regulation through their Internet Industry Association. A different case is that of ISPs and OSPs *voluntarily* blocking websites or content (be it due to government pressure or not), measures usually not met with justification requirements. In these occasions, Code is the rule.

3.2. *Forms of Censorship*

If governments still regulate speech through their old practices – fines, injunctions, criminal penalties –, free expression in the beginning of the 21st century is increasingly connected to technology and cooperation between states and the private sector. It has become cheaper and more discreet to control speech. The same structure that allowed for decentralizing production and distribution of information has become targeted for control: broadband companies, domain name registrars, web hosting services, social networks, advertisers, search engines.

To stay on the side of clarity, we should distinguish on the strategies that can be used to enact Internet censorship. The Open Net Initiative differentiates¹⁵ between technical blocking, search result removals, content take-down and induced self-censorship. While on the last part of this paper we will focus on a specific form of the latter, I will briefly describe each one of them.

Technical blocking and search result removals are the strategies usually referred to as filtering. The first one refers to the strategies used most frequently by authorities, be it through laws or through court orders, to block access to Web pages, domain and IP addresses, through IP blocking, DNS tampering, and URL blocking using a proxy. Some countries also employ more advanced techniques, blocking through blacklisted keywords found in the URLs or blocking searches including the keywords. The Open Net Initiative observes that, while filtering based on reading the content of specifically requested websites (dynamic content analysis) is technically possible, their researches have not found the employment of the technique anywhere. Denial of Service (DoS) attacks are indirect means of producing the same results.

Filtering can be carried out through cooperation between governments and Internet search services to provide that illegal or undesirable websites are removed from search results. It should be observed that these strategies do not block access to the websites, since they are not blocked themselves, and users can still type the URLs directly on the browser, but the websites become harder to be found and therefore less visible.

Take-down is the strategy to remove a certain content from a website or a website from a server altogether, when regulators have access to the web content hosts, and legal

¹⁵ <https://opennet.net/about-filtering>.

jurisdiction to demand the removal. Within this strategy are all forms of ISP liability regimes present in different jurisdictions – notice and take down and notice and notice, performed by private parties (one private party sends a cease and desist notice to the other, that is then threatened to legal action, or, in a notice and notice regime, held liable if content is regarded infringing by a court afterwards), or through court orders. In countries where domain name servers are controlled by the authorities, the officials can deregister a domain hosting the illegal or undesired country themselves.

Finally, induced self-censorship is the strategy involving encouraging self-censorship by users, who, threatened of legal action or informal intimidation, will think twice before browsing or uploading content. Self-censorship is specially promoted when the user senses or knows he might be under surveillance or where prosecution, arrest and detention relating to Internet offenses is common.

ONI does not mention nor include in its methodology, however, the subject of self-censorship employed not by users themselves, but by online Internet services that, also threatened by legal action (Bambauer's *collateral censorship*) or for other voluntary reasons, decide to recur to their own filtering strategies. As Ethan Zuckerman puts, "ISPs are only one possible choke point in a global Internet. As the Internet increases in popularity around the world, we are beginning to see evidence of Internet filtering at other points in the network. Of particular interest are online service providers (OSPs) that host social networking services, blogs, and Web sites. Because so many Internet users are dependent on OSPs to publish content, censorship by these entities has the potential to be a powerful control on online speech" (2010:71).

Zuckerman offers a few examples on how OSPs are implementing filtering at the client software level. In April 2006, Skype admitted that its Chinese version, developed in cooperation with TOM Online, produced text filtering of users messages through a list of banned keywords, and, in 2008, it was discovered that users became surveilled when certain other keywords were used. In a context of concentration of platforms, users increasingly rely on OSPs for developing websites, as is the case of Wordpress.com, or on social networking platforms that offer unique dynamics, such as Facebook, for communicating. "While the ease of use of these platforms has been a great boon for free speech, it has put a great deal of power in the hands of companies that provide Web site or community hosting services" (ZUCKERMAN, 2010:72).

Their power over information can be used by governments demanding certain information, as was the case of journalist Shi Tao having his identity revealed by Yahoo! to the Chinese government because of leaking secret documents, or the removal of materials deemed illegal in certain jurisdictions. “Most unsettling, they may also remove material based on misunderstandings of local laws or based on calculations of fiscal and legal risk” (2010:73). The situation in China is particularly interesting, because of the high number of national publishing platforms with interfaces in Chinese, and is described by Reports Without Borders and China Human Rights Defenders, in 2007, in the report “A Journey to the Heart of Internet Censorship”. One of the findings was that a weekly meeting at the Internet Information Administrative Bureau among 19 leading Beijing Web sites discusses sensitive topics of the coming week and what to censor. Rebecca MacKinnon’s “China’s Censorship 2.0: How Companies Censor Bloggers” also describes an experiment of creating blogs with sensitive terms, and having them censored in very different manners, what suggests decentralized control.

Although, following Zuckerman, there is no evidence that the U.S. Government imposes a structural pressure on OSPs as the Chinese does, those providers based in the U.S. have also been removing user accounts based on legal misinterpretations. That is the case, for example, of users from countries sanctioned by the U.S. Treasury Department. The Department’s Executive Order 13391 prohibits

“transactions with any person, entity or organization found to: 1.) be undermining democratic institutions and processes in Zimbabwe; 2.) have materially assisted, sponsored, or provided financial, material, or technological support to these entities; 3.) be or have been an immediate family member of a sanctions target; or 4.) be owned, controlled or acting on behalf of a sanctions target”,

what has been interpreted by companies as a reason for Web hosts to disable Web sites from nationals of those countries, even in cases when those nationals were using their Web sites for fighting for human rights – the company BlueHost faced public polemics for banning a Zimbabwean, a Belarusian and a Persian activists. (ZUCKERMAN, 2010:73-76). Although the Treasury Department provides a list of Specially Designated Nationals and Blocked Persons, Web hosting companies probably find it faster and easier to ban all nationals from those countries altogether. Likewise, LinkedIn eventually banned Syrian users from their services, reverting the decision afterwards and blaming on human error. Zuckerman goes on explaining how companies have different attitudes towards complying with U.S. government

restriction – Google claiming, for example, that it does the minimum possible to comply with export restrictions and sanctions regimes (ZUCKERMAN, 2010:78).

The incentives an online service provider might have to remove potentially infringing material are connected with the ISP liability regime they are subject to. U.S. companies, that host most of the online service providers used worldwide, are subject, in their jurisdiction, to a notice and take down system established by their DMCA – Digital Millennium Copyright Act, of 1998. Wendy Seltzer argues that the North-American notice and take down is a regime that provides unbalanced incentives for providers – great incentives to remove content, little to protect the First Amendment and consequently free speech (SELTZER, 2010). Once service providers receive a take down notice, they must promptly remove the potentially infringing content, giving the user who posted it the opportunity to counter notice – if that happens, the provider should restore the content within 14 business days. That, she argues, creates chilling effects on free speech, since providers usually do not inform users of their possible rights on the content, and users will rarely seek for or be able to afford legal counseling.

Probably because of a cost-benefit evaluation, OSPs are turning to automated filtering and control. One important example is the Content ID system,¹⁶ used by YouTube to identify copyright-infringing content. Content owners can submit their copyright-protected content to the Content ID database, in order to manage their use by third parties in user uploaded videos. When submitting material, content owners can choose how YouTube will administer the situation: YouTube can disable the protected audio from a video, or disable the material containing the protected video; it can start monetizing the “infringing” video, transferring the values to the content owner; or, if the content owner prefers, YouTube can only monitor the video’s statistics and forward the information. It is a very intelligent system, that frees YouTube from dealing with too many individual take down requests and offers a reasonable level of flexibility to the content owner. However, as one recent case in Brazil depicts, it has serious flaws because of its lack of capability in balancing copyrights and free speech, or in recognizing exercise of limitations and exceptions to copyright.

Rafucko is a Brazilian activist and video maker who, in February 2014, produced a satire on Rede Globo Television, the largest broadcasting company in the country. His video consisted of a montage of an editorial from Jornal Nacional (*National News*), in which he

¹⁶ <https://support.google.com/youtube/answer/2797370?hl=en>.

assumed the position of one of the anchors, and corrected the comments of her fellow, exposing contradictions in his discourse regarding the recent uprisings in Brazil. After eight hours and having attracted 40,000 views, the video was removed from the social network, allegedly because of copyright infringement.¹⁷ Satires are protected not only by constitutional protection to speech, but by the Brazilian Copyright Law as well. However, the video was never restored, despite of all the public attention the case got. In all probability, the removal was due to Content ID filtering.

Scholarship on OSP censorship is scarce because of the difficulties in measuring it.¹⁸ As discussed before, ISP and OSP level censorship are particularly troublesome because of their opacity and lack of accountability. On our Rafucko case, YouTube never gave a public statement on through which procedure the video was removed, or under which arguments. Nor is it obliged to.

4. Nudity, Crime and Politics in Brazil

Brazilian Law typifies the crime of practicing an Obscene Act in a public or open/exposed to the public place (article 233, Criminal Code). It is sanctioned with detention of 3 months to a year, or a fine. The Criminal Code was approved in 1940, and does not define what obscenity is, leaving the interpretation to courts or, routinely, to the police. It is the typical case of an open or standard clause.

Legal literature in Brazil has been describing the obscene act as the act that offends decency, always defined by the environment and circumstances in which it is practiced. Offending decency requires offending someone who is not especially sensitive. Courts, on their turn, have been understanding as obscene the act that has evident sexual connotation.

The Supreme Court has interpreted, in 2004, that nudity during a theater play should not be considered an obscene act, for being comprehended within the scope of free speech (*Habeas Corpus* 83996, Minister Carlos Velloso, August 16 2004). A state court also decided, in 2012, that being naked for the sake urinating in public should not be considered

¹⁷ Brazilian Activist's Video Satire Censored After Tv Globo Claims Copyright, in *Global Voices*, February 2014, <http://globalvoicesonline.org/2014/02/27/brazilian-activists-video-satire-censored-after-globo-tv-claims-copyright/>.

¹⁸ See, however, Citizen Media Law Project, <http://www.dmlp.org/>, and Chilling Effects Project, <https://www.chillingeffects.org/>.

and obscene act, because of the lack of intent in offending sexual dignity (TJRJ, Apelação n. 20110110695323 APJ, Judge Aiston Henrique de Souza, January 01 2012). However, there is no clear leading position in jurisprudence on the occasions when nudity should be considered an obscene act.

This lack of a clear understanding about in which circumstances nudity is or not to be considered a crime is specially challenging as, in the last years, ever more kinds of political manifestations have been using nudity as their means of expression. In some cases, stripping is practiced for causes not directly related to the body itself. In 2012, Mick Jagger's daughter, for example, was photographed with her mother, both nudes, in a campaign raising attention for the consumption of extinguishing species of fish.¹⁹ The same year, Madonna stripped on stage to manifest for Malala Yousafzai, wounded in Pakistan;²⁰ in 2013, several Brazilian celebrities were photographed nude for a clothes donation campaign²¹.

More than an eccentricity, nudity became the central weapon for certain contemporary groupings, especially in big cities. A predecessor is the Mexican peasant group "Los 400 Pueblos", that, after years of protesting against de expropriation of autochthonous land, started using nudity in 2002 as a form of calling the attention of authorities. Several other cases are to add to the hypothesis that employment of nudity for political action is a trend, however different the examples are in method and objectives: the group of Indian women who marched in an Indian city protesting against rape and murder committed by soldiers, or the Spanish flight attendants who were photographed nude to raise attention to the financial crisis in their company (SIBILIA, 2014:5-6).

If the use of nude bodies in political protests draws attention to the causes, it is certainly because nudity is still a taboo, however relaxed moral rules over behavior might have become during the 20th century. Bodies are the center of certain political demands, and are therefore being used by feminist groupings in a reflexive way. One important example is Femen, an auto proclaimed feminist collective born in Ukraine in 2008, that has been organizing nude public apparitions protesting for feminist causes.

¹⁹ "Lizzy Jagger Poses With Dead Fish For Fishlove Sustainable Seafood Photo Project", in *The Huffington Post*, October 2012, http://www.huffingtonpost.com/2012/10/16/lizzy-jagger-dead-fish_n_1970478.html.

²⁰ "Madonna Strips For Malala Yousafzai, Dedicates Song To Young Pakistani Woman Shot By Taliban", in *Huffington Post*, October 2012, http://www.huffingtonpost.com/2012/10/15/madonna-strips-malala-yousafzai_n_1967872.html

²¹ "Projeto Generosidade: Nuas por uma boa causa" in *Revista Quem*, October 2013, <http://revistaquem.globo.com/QUEM-News/noticia/2013/10/projeto-generosidade-nuas-por-uma-boacausa.html>.

Another example is the “Slut Walk”, born in Canada, in 2011. Slut Walk was a reaction to a police officer having declared to University of Toronto students that they should not dress as “sluts” if they wanted to avoid rapes. The idea behind the demonstration was the affirmation that women could dress as they wanted and the way they dressed should not justify sexual violence. The Slut Walk spread through the globe, and started being practiced in several countries – in Brazil, women in different cities have been organizing a yearly “Marcha das Vadias”. Also, in 2013, at the Kaspovár University, in Hungary, students went nude to class, to protest against a prohibition of wearing short skirts.²² Nudity has also been used in a few online movements promoting women’s “real beauty”, a beauty that is not guided by marketing patterns, be it on political or erotic grounds (SIBILIA, 2014).

We have pointed above that pornography is polemic between the feminist movements; the use of the female body as a political statement against objectification is no less problematic, both in literature and in the organization of the various movements, as the interviews already conducted for this project show. Femen itself has been subject to severe critics by feminists; the Femen Brazilian group has been surrounded by many polemics,²³ and, after being dismissed by the Ukrainian group,²⁴ has disappeared from the public sphere. We shall not, however, dwell into this discussion here. I assume as a fact that a few (auto proclaimed) feminist movements are using nudity as a political instrument in Brazil and in the world. In many cases, images of these movements and profiles of their leaders have been blocked.

Interesting is that the Ministry of Justice, that is responsible for establishing rating policies in the country, has recently changed their system to clarify that non-eroticized nudity, for artistic, cultural or scientific purposes, is appropriate for all ages.²⁵ Veiled nudity is appropriate from 12 years old, and frontal nudity from 14 years old on.

²² "That's pants! Hungary students in naked protest at miniskirt ban", in *The Independent*, October 2013, <http://www.independent.co.uk/student/news/thats-pants-hungary-students-in-naked-protest-at-miniskirt-ban-8858454.html>.

²³ “Femen Brasil não tem propostas feministas, acusa ex-número 2 do grupo”, in *OperaMundi*, September 2012, <http://operamundi.uol.com.br/conteudo/entrevistas/24385/femen+brazil+nao+tem+propostas+feministas+acusa+ex-numero+2+do+grupo.shtml>.

²⁴ “Femen Brasil não existe mais”, in *UOL*, May 2013, <http://noticias.uol.com.br/internacional/ultimas-noticias/2013/05/18/femen-brasil-nao-existe-mais-diz-lider-do-grupo-na-ucrania-segundo-jornal.htm>.

²⁵ “MJ atualiza normas para classificação indicativa”, in *Folha de São Paulo*, march 2012, <http://www1.folha.uol.com.br/fsp/ilustrada/33012-mj-atualiza-normas-para-classificacao-indicativa.shtml>.

4.1. Facebook terms

A research developed by the Communications Secretariat of the Presidency in Brazil and released in April 2014 points that 68% of the Brazilian Internet users are on Facebook, and the social network is the most used of all platforms, blogs and sites, both on weekends and on weekdays; when asked about the media Brazilians use the most to get informed about news, 32,1% mentioned social networks.²⁶ The April 2014 report from Social Bakers describes Brazil as the third top country on Facebook. The platform is undeniably important for communications among Brazilians.

Although jurisdiction problems apply when it comes to platforms and users located in different countries, Facebook's need to comply with the Brazilian law was apparently solved when they opened an office in São Paulo, Brazil, in 2011. Brazilian superior courts have been interpreting that, whenever an international Internet company has a local office in the country, Brazilian law is to directly apply, and offices must locally comply.²⁷

The Brazilian media has given coverage to several cases of censorship of content posted on Facebook by Brazilian Internet users. There are no statistics or data on this blocking – our knowledge of them depends on users ability to call the attention to the cases.

One example involves a fangape having content blocked for illustratively reproducing the cover of a magazine that depicted soft nudity, when reporting on mass dismissions within the magazine²⁸; another fanpage reproduced the front page of a newspaper where a small nude was depicted;²⁹ users had their accounts suspended on grounds of publishing historical pictures such that of Simone de Beauvoir;³⁰ a newspaper fanpage had problems with the picture of a bare breasted woman who was participating of a protest against the prohibition of

²⁶ Secretaria de Comunicação Social da Presidência da República. *Pesquisa Brasileira de Mídia 2014*, <http://pt.slideshare.net/BlogDoPlanalto/pesquisa-brasileira-de-mdia-2014>.

²⁷ OLIVEIRA, Carlos Eduardo Elias de. “Aspectos Principais da Lei n. 12.965, de 2014, o Marco Civil da Internet: subsídios à comunidade jurídica”, in *Textos para discussão 148, Núcleo de Estudos e Pesquisas da Consultoria Legislativa, Senado Federal*, April 2014. In <https://www12.senado.gov.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td-148-aspectos-principais-da-lei-no-12.965-de-2014-o-marco-civil-da-internet-subsidios-a-comunidade-juridica>.

²⁸ “Facebook censura vaga referência a nudez na página do Blue Bus”, 2013 in <http://www.bluebus.com.br/facebook-censura-vaga-referencia-a-nudez-na-pagina-do-blue-bus/>.

²⁹ “Facebook censura postagem da Folha com nudez”, in *Folha Online*, February 2014, in <http://www1.folha.uol.com.br/poder/2014/02/1418174-facebook-censura-postagem-da-folha-com-nudez.shtml>.

³⁰ “Nudez de Simone de Beauvoir e o moralismo do Facebook”, in *Jornal Opção*, March 2012, <http://www.jornalopcao.com.br/colunas/imprensa/nudez-de-simone-de-beauvoir-e-o-moralismo-do-facebook>.

topless in Rio de Janeiro beaches;³¹ and still another fanpage faced the blocking of a picture of an activist undressed during protests against the World Cup in Brazil, in 2014.³²

The Facebook Policy for Facebook Brazil is exactly the same as the U.S. Policy, translated to Portuguese; it consists of a Statement of Rights and Responsibilities (the terms of use), a Personal Data Policy, and the Community Standards. By signing up, the user agrees to all these statements; on the Statement of Rights and Responsibilities, a session regarding other people's rights determines that

3. Safety

We do our best to keep Facebook safe, but we cannot guarantee it. We need your help to keep Facebook safe, which includes the following commitments by you: (...)

You will not post content that: is hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.

You will not develop or operate a third-party application containing alcohol-related, dating or other mature content (including advertisements) without appropriate age-based restrictions. (...)

You will not use Facebook to do anything unlawful, misleading, malicious, or discriminatory. (...)

You will not facilitate or encourage any violations of this Statement or our policies.

5. Protecting Other People's Rights

We respect other people's rights, and expect you to do the same.

You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.

We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies.

(...)

While, on the Community Standards, one can read:

Nudity and Pornography

Facebook has a strict policy against the sharing of pornographic content and any explicitly sexual content where a minor is involved. We also impose limitations on the display of nudity.

We aspire to respect people's right to share content of personal importance, whether those are photos of a sculpture like Michelangelo's David or family photos of a child breastfeeding.

There are several examples of Facebook blocking frivolous content worldwide, such as "nude" porcelain dolls³³ and a mermaid cake;³⁴ these are clear examples of over blocking. More interesting are the cases in which a line is harder to draw.

³¹ "Facebook censura postagem da Folha com nudez", in *Folha Online*, January 2014, in <http://www1.folha.uol.com.br/poder/2014/01/1394399-facebook-censura-postagem-da-folha-com-nudez.shtml>.

³² "Como o Facebook censurou a postagem antiga, estamos republicando.. Nudez em pro...", in *ReBaixada*, February 2014, <http://rebaixada.org/como-o-facebook-censurou-a-postagem-antiga-estamos-republicando-nudez-em-pro/>.

In June 2013, due to the heated discussion about their censorship, Facebook Brazil posted a release explaining the criteria and method for content blocking.³⁵ They declared not to remove content based on the number of denounces made by users:

We have a robust denouncing infrastructure that includes links to report on pages on Facebook, and also a team of highly qualified revisers to evaluate these cases. When content is denounced, it is only removed if it violates our Terms of Service. It is important to clarify that we do not remove content based on the number of reports.

In almost all cases, we revise manually all the denounces and do not dispose of automatized systems for removing political discourses: to protect millions of people who connect and share information on Facebook daily, the vast majority of cases is revised manually. We only use automatic systems for a very limited number of cases, as, for example, spam. In these situations, automation is used more frequently so that we can prioritize the cases that need manual revision, but this does not substitute manual revision. (...)

The opacity of these algorithms or of the specific criteria used by manual filtering is also a challenge for research. A full understanding how these practices are operating requires not only several interviews and a comparison between answers, but also developing a system for testing a platform like Facebook, possibly by posting different sensitive material and understanding the system (or the absence of a system) for speech evaluation. At this stage, three in-depth interviews were conducted with three different actors: two feminist and a free speech activists.³⁶

³³ “Facebook censura foto de boneca de porcelana por nudez”, in *Terra*, July 2010, <http://tecnologia.terra.com.br/internet/facebook-censura-foto-de-boneca-de-porcelana-por-nudez,b388ff8d8b8ea310VgnCLD200000bbcceb0aRCRD.html>.

³⁴ “Confeiteira tem imagem de bolo retirada do Facebook por nudez”, in *Terra*, March 2014, <http://tecnologia.terra.com.br/confeiteira-tem-imagem-de-bolo-retirada-do-facebook-por-nudez,eab201ef86fd4410VgnVCM5000009ccceb0aRCRD.html>.

³⁵ Facebook Brazil release, <https://www.facebook.com/FacebookBrasil/posts/649154085112359>.

³⁶ The in-depth semi-structured interviews were conducted by telephone, between May 1st and May 20. Because my idea was to research the specific case of feminists groupings using their bodies as a political instrument, I went after the Slut Walk organizations throughout the country. A seemingly comprehensive list of their Facebook pages and a few sites was found in the end of this page: <http://marchadasvadiasdf.wordpress.com/>. I became in contact with every one of them; in the cases in which the pages were events, I also contacted the event organizers. Of all contacts made, only one interview was completed - Sandra Muñoz, organizer of Slut Walk Salvador. Besides not having received answers, in some cases, representatives of the movements answered they could only speak as a collective, and further conversations did not lead to an effective meeting. Besides the Slut Walks, I decided it was important to interview someone from the recent movement #EuNãoMereçoSerEstuprada, for the reasons I describe in the text, and mainly because of its being a virtual protest, Facebook-based. In my research, I became in contact with a movement led by Claudio Willer, a university professor and poet who has been gathering Facebook censorship cases since 2012. All interviewees agreed to have their names disclosed.

4.2. *My body, my rules*

Nana Queiroz is the head behind the movement *#EuNãoMereçoSerEstuprada* (I don't deserve to be raped) – it was a Facebook event, now turned into a Facebook group.³⁷ A researcher on feminism for 4 years, she defines herself as a journalist-activist. In the end of March 2014, IPEA (Institute of Applied Economic Research), a governmental research institute, published the results of an opinion research that, inquiring about sexual violence, concluded that 58,8% of the interviewed agreed totally with the phrase “If women knew how to behave, there would be less rapes”, and 65,1% agreed totally or partially with the phrase “Women who wear clothes letting their bodies show deserve to be attacked”.³⁸ While the research led to a wide public outcry, Nana had understood the most appropriate way of protesting was organizing an online movement on Facebook, suggesting that women sent pictures of themselves: the standard image was that of a topless woman, covering her breasts with the sign “I don't deserve to be raped”, but nudity was not required.

If I went topless in the streets, I would probably not find enough people who would support me and do the same; I could be aggressed or even arrested. Online, I knew there could be a mass effect: connections between people who would like to join are quickly made.

As a blogger, she was already connected to respected activists who supported the cause and helped giving it publicity. What she observed was that, stating her viewpoint, other people had incentives to do the same, and reinstate the same viewpoint of others.

This whole process showed how the Internet has a very large potential of breaking the silence spiral; since sexism is spread in society, it is really hard for women to raise their voices; they think they won't be well received. On the Internet, rejection is less risky: you are not endangered by physical aggression, and written aggression is less threatening than in person. Minorities lose their fear.

Nana argues, however, she did not foresee the movement could become as important as it did: the official event page on Facebook gathered 45,7 thousand confirmed people, and other 5 or 6 similar events or fanpages were created; feminist groups provided support. Considering they gathered 300 thousand people altogether, and that a few of them were probably repeated, she estimates some number between 40 and 200 thousand people were

³⁷ <https://www.facebook.com/groups/eunaomerecoserestuprada/>.

³⁸ “Para 58,8%, comportamento feminino influencia estupros, diz IPEA”, in *G1 Brasil*, March 2014, <http://g1.globo.com/brasil/noticia/2014/03/para-585-comportamento-feminino-influencia-estupros-diz-pesquisa.html>. The case was polemic also because, ten days after the release of these results, IPEA declared they had made a mistake when wrapping up the results, and the second number, saying 65,1% agreed with “Women who wear clothes letting their bodies show deserve to be attacked”, actually accounted to 26%. The movement was however thriving, as Nana Queiroz declared she does not believe these statistics change the movement's positions: “Brazilian Women Share Topless Selfies to Combat Sexual Violence”, in *Cosmopolitan*, March 2014, <http://www.cosmopolitan.com/cosmo-latina/blog/brazilian-anti-rape-campaign>.

involved. Effects spread outside Facebook: protests were organized - “more symbolic than expressive in numbers”, she had the chance to speak at the Commission for Human Rights at the Chamber of Deputies, and to deliver a position paper on public policy regarding sexual aggression to president Dilma Rousseff.³⁹ The traditional media was very supportive, what she believes is also connected to her profile as an intellectual, what might have conferred a reflective, instead of aggressive, character to the movement.

When asked about having content blocked by Facebook, Nana tells that her experience shows that there are effectively two levels of control. It was not few people who were enraged at the campaign. They organized a community on the social network Orkut, and, besides having managed to hack the Facebook event, changing its name for a short time, they started denouncing the page, that received several identical messages, saying the person felt offended by that sort of content. “I think there is first an automated filter. My page was eventually blocked, with a message from Facebook saying ‘too many people are denouncing your page on grounds of nudity, so we are blocking it. Do you want to provide an explanation?’”. Nana answered, in English, that she was an activist, that the page was being denounced because people were enraged, and that pictures posted depicted not nudity, but semi-nudity. She tells the page was restored within five minutes, what makes her believe it was the result of manual (human) management.

She faced the opposite situation as well. Someone created another Facebook fanpage, under the name “Nana Queiroz denounced me, and now I will rape her mother”. She and the network she had articulated started denouncing the page; they all received the same answer, which she believes was automated, saying the page did not seem to be offensive or contain pornographic content. She believes an automatic filter tries to detect, after the denounces, whether there is nudity content - and, in fact, there was not. After more denounces, every denouncer received a message apologizing, and declaring the page was being blocked. That second response, she believes, was also the result of a real person’s evaluation. “I think they receive an outrageous number of denounces everyday. I don’t believe all control is human, therefore. I think this automated process can identify nudity, through an image algorithm - they certainly have the technological capabilities to recognize that”.

Several women posting campaign content on the page or on their own timelines had either the image or their profiles blocked. While she advised them to react as she did, she does not know whether they all had the same success.

³⁹ See also www.eunaomerecoserestuprada.wordpress.com.br.

Sandra Muñoz, 40 years old, describes herself as the coordinator of the *Marcha das Vadias* (Slut Walk) in Salvador, capital of Bahia, in northeastern Brazil, and also of the national and latin-american movement. She tells she has been a feminist activist since she was thirteen. She embraced the Slut Walk because of her belief in the importance of stressing how women should have their bodies freed from violence and oppression, and insisted a few times, during the interview, on how important it is that protestors understand the political significance of using nudity as a means of expression⁴⁰ - “going naked is our contemporary burning bras”.

Slut Walk Salvador is organized on Facebook, according to Sandra, because it is the most popular social network in Brazil, and people are not as familiar with other ones. However, she understands that giving priority to Facebook as a means of organization is very excluding in a country like ours, and especially in a state like Bahia, where levels of access to Internet and even literacy are problematic. “When I go work in the rural areas of the state, girls have never heard of Slut Walk - their first reaction is to laugh at the idea”. Still, Sandra feels Facebook is important to give publicity to these subjects, and to provide contact with other opinions.

She tells her experience with the *#EuNãoMereçoSerEstuprada* was very intense, because “it was the first time I felt brave enough to tell my story, that I was raped. Social networks give people this courage”. After this, she tells she has been receiving an average of 20 messages a day, from women from various parts of Brazil telling about the sexual aggressions they suffered, be it asking for help, be it for sharing their stories. She also uses Facebook to correspond with women and teenagers she meets in her activism, people who also seek her to share stories – although she says she never accepts children as friends on Facebook, because of the sort of material she often posts.

She had many experiences with content blocking, always because of nudity or obscenity. She had her own profile blocked, once, because she published the folder of the Slut Walk Salvador, in which she appeared, topless. She replied to the message, and her profile was restored. She did not have the same luck with other contents. Her reaction to the practice is vigorous: “My ‘Face’ is mine, it is no one else’s, I post whatever I want, and

⁴⁰ She also mentions there are disagreements, within the feminist movements, on whether this is a positive feminist strategy. Particularly, black women movements have argued that their bodies have been used as objects throughout Brazil’s history, and they do not feel contemplated in such movements. Sandra says to like that dissent is possible, but that women should unite instead of dividing, and respect each other’s decisions.

nobody has the right to remove it”. As a result, she has not been posting nudity-related content anymore. But she believes activists should protest more and force the changing of policies: “I don’t think Facebook should be God; we should reeducate ourselves, as we are doing regarding sexism”.

When asked about the protection of children, she feels either Facebook should be stricter about their presence on the network, or parents should be caring for that. She has received complaints from parents who disliked what their children was being exposed to by being connected to Sandra – but she did not know they were children.

Claudio Willer is a poet, writer and translator. In 2012, he started compiling a dossier about censorship on Facebook, provoked by the censoring of his colleague Rubens Arat, who posted a historical picture of a nude Allen Ginsberg - “a historical picture that is widely available through search mechanisms”. He then used his own website to collect censorship cases,⁴¹ and has been promoting the idea on Facebook ever since. From march 2012 up to today, and after excluding a few cases that do not fit, he gathered 88 cases, all described on his page.

Claudio believes some of the censorship cases based on nudity are absurd. He is speaking of a Botticelli Venus, an image of Brazilian indigenous populations, works of art available otherwise in museums and on their websites. “There are two levels of stupidity: that of people who denounce, and that of moderators”. He also argues to believe some of the censorship is carried out exclusively through “algorithmic sweeping”.

Claudio believes this over-censoring is connected with previous experiences in Brazil – “it is said that Orkut was very often used by paedophiles”. As much as he understands Facebook is worried with this sort of content and has reasons to be, the weakness of their system would be the consequence of an insistence in simplicity and low-cost. However, distinguishing between eroticism and pornography is not an easy quest, and more prepared and competent persons should perform it. Also, practices such as suspending users are illegal, he claims, for offending free speech, besides being disrespectful and offensive. “From my part, I am a grown-up, emancipated, these people have no right to control what I post”.

When asked about exposure of bodies by feminist groupings, Claudio answers he finds it interesting, and that, with current censorship practices, they will engage in self-

⁴¹ <http://claudiowiller.wordpress.com/2012/03/22/censura-no-facebook-um-dossie/>.

censorship, because the social costs of not being on Facebook are high - “Facebook starts to assume a certain role in people’s lives”.

5. Conclusion

Obscenity and nudity are controversial subjects. In many occidental countries, there is no clear position on how to regulate them, whether they are punishable, and whether there should be stricter control of their exposure to children. Even when used by means of confrontation and political protest, there is no consensus on their status.

What seems troublesome is that a plain solution be offered by private parties – or that these parties have more reasons to worry about prohibiting nudity than protecting free speech. The same Internet that was believed to be the land of the uncensored suffers the risk of becoming a stricter environment than that of traditional media or offline world. Or that a subject that was in discussion on the public sphere, in parliaments or public court decisions, be shifted to the realm of code. In the lack of a legal understanding of these communication platforms and which duties they should perform, little can be done to bring these policies to light and to public discussion.

The common argument that OSPs are private services, and that competition should be the regulatory force driving them, is challenged both by figures representing concentration in this market, and by the few accounts provided by the interviewees in this incipient research. As narrated, Facebook is being used, in Brazil, as a tool for allowing otherwise hidden and suppressed positions to come to light. It seems reducing to state that such platforms are not performing public functions.

The discussions and findings of this work point to the necessity of developing further empirical research to gather evidence on how OSPs are performing their censorship and providing information for proper judgment or their appropriateness. Given past examples of how such private policies may shape free speech in societies, it seems like an important subject for an extensive research agenda.

6. Bibliography

- BALKIN, Jack M. “Old School/New School Speech Regulation”, in *Harvard Law Review, Forthcoming Yale Law School, Public Law Research Paper No. 491*, 2014. Available in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377526
- BAMBAUER, Derek A. “Censorship v3.1”, in *Arizona Legal Studies Discussion Paper n. 12-28*, September 2012.
- BARBROOK, Richard, CAMERON, Andy. *The Californian Ideology*, agosto de 1995, em http://www.alamut.com/subj/ideologies/pessimism/califIdeo_I.html.
- BARLOW, John Perry. *Declaration on the Independence of Cyberspace*, in http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration.
- CARR-GOMM, Philip. *A Brief History of Nakedness*. London: Reaktion Books, 2010.
- COHEN, Stanley. *Fold Devils and Moral Panics*. New York: Routledge, 2005, 3rd ed.
- EDWARDS, Lilian. “Pornography, Censorship and the Internet”. *LAW AND THE INTERNET*, L. Edwards & C. Waelde, eds., Hart Publishing, 2009. Available in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435093.
- GRAZZINI, Margaret, “Four Rounds of ICE Domain Name Seizures and Related Controversies and Opposition”, in *BERKELEY TECH. L.J. BOLT*, Feb. 23, 2011. Available in <http://btlj.org/?p=917>.
- KARAVAS, Vaivos; TEUBNER, Gunther. “<http://www.CompanyNameSucks.com>: The Horizontal Effect of Fundamental Rights on ‘Private Parties’ within Autonomous Internet Law”. *German Law Journal*, vol. 04, no. 12, pp. 1336-58, 2002. In http://www.germanlawjournal.com/pdfs/Vol04No12/PDF_Vol_04_No_12_1335-1358_European_Teubner_Karavas.pdf
- LEFF, Leonard J., SIMMONS, Jerold L. *The Dame in the Kimono: Hollywood, Censorship, and the Production Code*. Kentucky: The University Press of Kentucky, 2001.
- LESSIG, Lawrence. *Code and Other Laws of Cyberspace*. S.1.: Basic, 1999.
- _____. *Code 2.0*. Nova York: Basic Books, 2006.
- LEWIS, Jon. *Hollywood v. Hard Core: how the struggle over censorship created the modern film industry*. New York: NYU Press, 2000.
- MONCAU, Luís Fernando Marrey. *Liberdade de expressão e direito autoral: mapeando um conflito ressignificado pela tecnologia*. Master thesis, Pontifícia Universidade Católica do Rio de Janeiro, 2011.

in

https://xa.yimg.com/kq/groups/16848104/637141116/name/LIBERDADE+DE+EXPRESSÃO+E+DIREITO+AUTORAL_+MAPEANDO+UM+CONFLITO+RESSIGNIFICADO+PELA+TECNOLOGIA.pdf

OLIVEIRA, Carlos Eduardo Elias de. “Aspectos Principais da Lei n. 12.965, de 2014, o Marco Civil da Internet: subsídios à comunidade jurídica”, in *Textos para discussão 148, Núcleo de Estudos e Pesquisas da Consultoria Legislativa, Senado Federal*, April 2014. In <https://www12.senado.gov.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td-148-aspectos-principais-da-lei-no-12.965-de-2014-o-marco-civil-da-internet-subsidios-a-comunidade-juridica>.

RENÁ, Paulo da Silva Santarém. *O Direito Achado na Rede: a emergência do acesso à Internet como direito fundamental no Brasil*. Master Thesis defended at University of Brasília, available in <http://hiperficie.files.wordpress.com/2011/04/dissertac3a7c3a3o-o-direito-achado-na-rede.pdf>.

Secretaria de Comunicação Social da Presidência da República. *Pesquisa Brasileira de Mídia 2014*, <http://pt.slideshare.net/BlogDoPlanalto/pesquisa-brasileira-de-mdia-2014>.

SELTZER, Wendy. “Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment”, in *24 Harvard Journal of Law & Technology*, 2010.

SIBILIA, Paula. “A POLITIZAÇÃO DA NUDEZ: Entre a eficácia reivindicativa e a obscenidade real”, in *XXIII Encontro Anual da Compós, Universidade Federal do Pará*, 2014.

SPERLING, Cass Warner. *Hollywood by thy name: The Warner Brothers Story*. Kentucky: University Press of Kentucky, 1998.

SUNSTEIN, Cass R. *Democracy and the Problem of Free Speech*. New York: The Free Press, 1995.

ZUCKERMAN, Ethan. “Intermediary Censorship”, in *Access Controlled: the shaping of power, rights, and rule in cyberspace*. Edited by Ronald J. Deibert, John G. Palfrey, Rafal Rohozinski, and Jonathan Zittrain. Cambridge: MIT Press, 2010.

Websites:

Content ID, YouTube: <https://support.google.com/youtube/answer/2797370?hl=en>.

The Open Net Initiative, <http://www.opennet.net/>

Country Profile: France, <https://opennet.net/research/profiles/france>

Country Profile: Singapore, <https://opennet.net/research/profiles/singapore>

Country Profile: South Korea, <https://opennet.net/research/profiles/south-korea>

Country Profile: Turkey, <https://opennet.net/research/profiles/turkey>

Country Profile: UK, <https://opennet.net/research/profiles/united-kingdom>

Country Profile: Vietnam, <https://opennet.net/research/profiles/vietnam>

Citizen Media Law Project, <http://www.dmlp.org/>

Chilling Effects Project, <https://www.chillingeffects.org/>.

Facebook Brazil release,

<https://www.facebook.com/FacebookBrasil/posts/649154085112359>.

Observatório da Internet: <http://observatoriodainternet.br>

News:

"France to Block Child Pornography Websites," *Reuters*, June 10, 2008, <http://www.reuters.com/article/technologyNews/idUSL1077696620080610>.

"India's Censorship Struggle", *The Diplomat*, February 28, 2012a, <http://thediplomat.com/2012/02/indias-censorship-struggle/>.

"India's Internet Freedom Nightmare", *The Diplomat*, August 25, 2012b, <http://thediplomat.com/2012/08/indias-internet-freedom-nightmare/>.

"A Wave of the Watch List, and Speech Disappears", *N.Y. TIMES*, Mar. 4, 2008, http://www.nytimes.com/2008/03/04/us/04bar.html?_r=0.

"Operação combate pornografia infantil na Internet", in *Portal Brasil*, february 2014. <http://www.brasil.gov.br/defesa-e-seguranca/2014/02/operacao-combate-pornografia-infantil-na-internet>

Brazilian Activist's Video Satire Censored After Tv Globo Claims Copyright, in *Global Voices*, February 2014. <http://globalvoicesonline.org/2014/02/27/brazilian-activists-video-satire-censored-after-globo-tv-claims-copyright/>

"Lizzy Jagger Poses With Dead Fish For Fishlove Sustainable Seafood Photo Project", in *The Huffington Post*, October 2012, http://www.huffingtonpost.com/2012/10/16/lizzy-jagger-dead-fish_n_1970478.html.

"Madonna Strips For Malala Yousafzai, Dedicates Song To Young Pakistani Woman Shot By Taliban", in *Huffington Post*, October 2012,

- http://www.huffingtonpost.com/2012/10/15/madonna-strips-malala-yousafzai_n_1967872.html
- “Projeto Generosidade: Nuas por uma boa causa” in *Revista Quem*, October 2013, <http://revistaquem.globo.com/QUEM-News/noticia/2013/10/projeto-generosidade-nuas-por-uma-bo-a-causa.html>.
- "That's pants! Hungary students in naked protest at miniskirt ban", in *The Independent*, October 2013, <http://www.independent.co.uk/student/news/thats-pants-hungary-students-in-naked-protest-at-miniskirt-ban-8858454.html>.
- “Como o Facebook censurou a postagem antiga, estamos republicando.. Nudez em pro...”, in *ReBaixada*, February 2014, <http://rebaixada.org/como-o-facebook-censurou-a-postagem-antiga-estamos-republicando-nudez-em-pro/>.
- “Facebook censura vaga referência a nudez na página do Blue Bus”, 2013 in <http://www.bluebus.com.br/facebook-censura-vaga-referencia-a-nudez-na-pagina-do-blue-bus/>.
- “Facebook censura postagem da Folha com nudez”, in *Folha Online*, February 2014, in <http://www1.folha.uol.com.br/poder/2014/02/1418174-facebook-censura-postagem-da-folha-com-nudez.shtml>.
- “Facebook censura postagem da Folha com nudez”, in *Folha Online*, January 2014, in <http://www1.folha.uol.com.br/poder/2014/01/1394399-facebook-censura-postagem-da-folha-com-nudez.shtml>.
- “Nudez de Simone de Beauvoir e o moralismo do Facebook”, in *Jornal Opção*, March 2012, <http://www.jornalopcao.com.br/colunas/imprensa/nudez-de-simone-de-beauvoir-e-o-moralismo-do-facebook>.
- “Facebook censura foto de boneca de porcelana por nudez”, in *Terra*, July 2010, <http://tecnologia.terra.com.br/internet/facebook-censura-foto-de-boneca-de-porcelana-por-nudez,b388ff8d8b8ea310VgnCLD200000bbceeb0aRCRD.html>.
- “Confeiteira tem imagem de bolo retirada do Facebook por nudez”, in *Terra*, March 2014, <http://tecnologia.terra.com.br/confeiteira-tem-imagem-de-bolo-retirada-do-facebook-por-nudez,eab201ef86fd4410VgnVCM5000009ccceb0aRCRD.html>.
- “Para 58,8%, comportamento feminino influencia estupros, diz IPEA”, in *G1 Brasil*, March 2014, <http://g1.globo.com/brasil/noticia/2014/03/para-585-comportamento-feminino-influencia-estupros-diz-pesquisa.html>.
- “Brazilian Women Share Topless Selfies to Combat Sexual Violence”, in *Cosmopolitan*, March 2014, <http://www.cosmopolitan.com/cosmo-latina/blog/brazilian-anti-rape-campaign>.
- MJ atualiza normas para classificação indicativa”, in *Folha de São Paulo*, march 2012, <http://www1.folha.uol.com.br/fsp/ilustrada/33012-mj-atualiza-normas-para-classificacao-indicativa.shtml>.