

March 25, 2024

The Honorable Justices

First Chamber of the Mexican Supreme Court

File Number: D.A. 8/2023

Re: Amicus Curiae Brief in Support of the Open Development and Evolution of the Internet

Esteemed Justices,

We, the Internet Society, an American charity and non-profit organization founded in 1992 with local chapters around the world, respectfully submit this Amicus Curiae brief in the matter referenced under file number D.A. 8/2023 currently before the First Chamber of the Mexican Supreme Court.

The Internet Society supports and promotes the development of the Internet as a global technical infrastructure, a resource to enrich people's lives, and a force for good in society. As an organization with expertise in how the Internet works and how laws, regulations, and court decisions can impact the Internet, we seek to provide insights and perspectives to assist the Court in its deliberations on matters relating to the Internet and its impact on society.

In this case, we offer our perspective on the importance of upholding protections for intermediaries from liability for user-generated content, including protection for their content moderation decisions. We believe that our insights will be of value to the Court as it considers the implications of its decisions on the rights and interests of Internet users, content creators, and technology providers in Mexico.

We are grateful for the opportunity to contribute to the Court's understanding of these complex issues and stand ready to provide any further assistance or clarification that may be required. Thank you for considering our submission, and we look forward to the Court's deliberations on this matter of extreme importance.

Respectfully submitted,

Joseph Lorenzo Hall

Distinguished Technologist, Strong Internet,
a nombre de la Internet Society



INTEREST OF AMICUS CURIAE

Founded in 1992 by some of the original technical creators of the Internet, the Internet Society is a U.S. charity and non-profit organization headquartered in Reston, Virginia, and Geneva, Switzerland, for the worldwide coordination and collaboration on Internet issues, standards, and applications. The Internet Society's staff is comprised of technical experts in internetworking, cybersecurity, and network operations, among other fields, as well as policy and legal experts in a broad range of Internet-related areas.

As a global non-governmental organization, the Internet Society believes that the Internet should be for everyone. It supports and promotes the development of the Internet as a global technical infrastructure, a resource to enrich people's lives, and a force for good in society, with an overarching goal that the Internet be open, globally connected, secure, and trustworthy. The Internet Society supports communities that seek to connect to each other through the Internet.

It advances the development and application of Internet infrastructure, technologies, and open standards. The Internet Society also advocates for policies that protect the Internet and allow it to flourish for all.

THIS CASE

A blogging platform enables Internet users to post their own blog content without the need to create their own website or other online platform. It also aggregates blogs of diverse content and authorship in one place, making it easier for users to locate new conversations they may be interested in joining. The content on a blogging platform is voluntarily provided by users of the service, who are free to remove that content after it has been posted.

If a user believes that another user's content is unlawful or harmful to them, and an intermediary declines to remove the content as requested, the appropriate course of action is to ask or legally demand that the author, i.e., the content creator, remove the content.

THE INTERNET

A key characteristic of the Internet—one that sets it apart from every other communications media—is that it was meant to be open for everyone. Individuals can speak, debate, create, invent, and engage with others, whether they are across town or around the world. Before the Internet, almost all mass communications (such as radio, television, and cable systems) were one way—large companies would deliver content of their choosing to members of the public. With the Internet, for the first time, individuals could create and share content with others around the world and engage in conversation and debate on a



global scale. That transformation has spread knowledge, social engagement, and economic opportunity across the world. And—directly relevant to this case—almost all this new person-to-person communication is transmitted, stored, and facilitated by a range of intermediaries on the Internet—without which, the Internet simply could not exist.

These intermediaries fulfill many different functions on the Internet and include a wide range of entities, including, among others, Internet Service Providers (which primarily transmit data to and from users), web and content hosting providers (which primarily house and “serve” content created by their customers and users), and social media platforms (which enable users to engage with each other online, for example, by sharing files and other forms of media). These and other types of intermediaries would be put at potentially extremely high financial and legal risk if they face liability for content they transmit or host.

Without basic protections from liability for Internet intermediaries, we would not have the robust engagement of hundreds of millions of Mexicans and individuals around the world in the online conversation, nor would we have the astounding innovation in online services that we have witnessed over the past 25 years.

The Internet was developed in the 1970s (by several of the founders of the Internet Society, among others) within the U.S. academic community through a United States government project.¹ Even at this early stage, the potential for interactivity—individual participation—unique to the Internet was apparent. In the 1970s and 1980s, it was used primarily for collaboration between academic, government, and commercial researchers, with non-research commercial traffic effectively prohibited. The broad ban on commercial activity—including commercial services offered to individuals—lasted until the United States government relinquished its control and the Internet was transitioned to the private sector in April 1995.²

The Internet’s design is somewhat peculiar in that it is not a single system but rather a system built up from other interconnected systems. This nature is immediately apparent from its name—the Inter-net. The designers recognized that the best way to deploy a very large, distributed network was to take advantage of both existing and new networks and link them together with some basic common technology. This fundamental design of the Internet is what has allowed it to grow so large and what allows even small or remote communities to connect to the Internet at a relatively modest cost. As new needs, areas of operation, or inventions come along, new networks can join the Internet without adjusting the rest of the system. This feature of the design is especially relevant for any consideration of the role of Internet intermediaries.

¹ Vint Cerf, A Brief History of the Internet and Related Networks, Internet Society, <https://www.internetsociety.org/internet/history-internet/brief-history-internet-related-networks/>

² See A Brief History of NSF and the Internet, National Science Foundation (Aug. 13, 2003), https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050



PROTECTING INTERMEDIARIES AND USERS FROM LIABILITY FOR USERS' CONTENT

The Internet, unlike prior “published” forms of mass communication, transforms the individual from a passive recipient of mainly corporate-created products into an active participant in shaping communication and content. To protect this individual-driven “interactivity,” Internet intermediaries need to be able to display user-generated content without fear of liability. Similarly, every time an individual on social media forwards an interesting newspaper article or a critical online restaurant review, the individual and the intermediary should be protected from liability for the underlying content.

There is a huge diversity of online discussion groups in Mexico and around the world, most of which are hosted by individuals, small organizations, government agencies, and others. Every person and organization hosting or moderating those discussion groups should be protected against liability for content posted on their sites by other people. Without such protections, anyone hosting or moderating content would face enormous potential liability for other people’s content, and many would decide not to host the content in the first place.

Many entities, such as small businesses, also host comments from customers, users of their products, and people interested in their work. Some small online retailers allow customers to post reviews of their products (e.g., Fontocases³, Avon⁴, Eternal Secret,⁵ among others), some newspapers (e.g., el Universal⁶, el País⁷, etc.) allow readers to post comments, and there are numerous software and service providers aimed at enabling small businesses to build interactive online communities of their customers. Any of these small businesses or individuals that allow customers, users, or the public to post comments should also be protected against liability for others’ content.

User-generated content on the Internet is more than just blog posts and comments. For instance, the popular route and traffic app in Mexico City, Waze, allows users to add their business to the map or to become part of the community of map editors.⁸ Mercado Libre, as another example, is an intermediary for large and small sellers⁹, allowing them to “pitch” their products as well as complete the sale. Customers

³ <https://fontocases.com/products/ts-eras-sticker>

⁴ <https://www.avon.mx/p/new-latam-romance-brand-edp/AVNMEX-94489?listTitle=category%20page%20list%20showcase%20-%20fragancias&position=6>

⁵ https://www.eternalsecret.com/serum_colag_hidro_50gr_eternal_secret-p/p

⁶ <https://www.eluniversal.com.mx/elecciones/sheinbaum-propone-planificar-la-inversion-extranjera-segun-recursos-naturales-de-cada-entidad/>

⁷ <https://elpais.com/mexico/economia/2024-02-28/gabriel-yorio-el-mercado-entiende-que-el-gobierno-mexicano-esta-atras-de-pemex.html>

⁸ https://support.google.com/waze/topic/6263209?hl=en&ref_topic=6024567,6024551,&sjid=17567717817513186222-NC https://support.google.com/waze/answer/6270175?hl=en&ref_topic=6263209&sjid=17567717817513186222-NC

⁹ <https://sustentabilidadmercadolibre.com/en/actuacion/entrepreneurs-and-smes>



can provide reviews of products they buy in Mercado Libre. Mercado Libre is not liable for the opinions of the customers, or the product descriptions that Mercado Libre makes available on behalf of the sellers.

In May 2021, the Fourteenth Collegiate Court in Administrative Matters of the First Circuit, in Amparo Directo 89/2021, confirmed a decision at first instance that Mercado Libre was not liable for intellectual property rights infringement caused by its users because Mercado Libre (an online marketplace) was acting as an intermediary between sellers and their customers (both of which are Mercado Libre's users). In its decision, the Court observed that Mercado Libre's terms of service were clear that users were responsible for the content they posted, and Mercado Libre did not encourage the intellectual property rights infringement. Further, the Court held that Mercado Libre did not attract any liability by receiving revenue from the user's sales.

SERIOUS RISKS OF HOLDING INTERMEDIARIES AND USERS LIABLE FOR OTHERS' CONTENT

If the Supreme Court of Justice of Mexico were to rule that Google Inc is liable for content posted by a user on its blogging platform when there is no legal order for removal, it could be catastrophic to the Internet in Mexico, to the more than 100 million Mexicans who use and engage online over the Internet, and to the tens- or hundreds-of-thousands of businesses in the country that directly offer Internet-based services.

Other intermediaries such as Internet Service Providers—which provide Internet access to many thousands of big, small, rural, underserved and all kinds of communities across this country—could immediately be at grave risk of being sued for harmful content transmitted over their networks. And even if they might ultimately prevail in such lawsuits, the costs of litigating can be extremely high and could easily put them out of business.

Many more thousands of other businesses would similarly face grave risks for providing online services. Over time, as the understanding of the risks became clearer, many businesses would, at a minimum, stop supporting any user-supplied content, and some of the businesses would choose to shut down or leave the Mexican market.

These risks of liability could profoundly damage the ability of users to speak, provide and receive information online. Providers facing the risk of crippling liability would rationally decide not to carry user or other third-party content at all or to carry only a very limited amount that they could be confident would not subject them to liability (e.g., because it was entirely non-controversial or came from an “authoritative” source). It would reduce the opportunity for the great diversity of users across Mexico to share content online.

The reason for this danger goes back to the very nature of the Internet itself. Because it is a distributed network of other networks, there is no central point of control, and a huge abundance of parties (most of



which are viewed as intermediaries) are involved in its operation, and in the delivery and display of content. The protection of Internet intermediaries against liability for user-generated content safeguards the entire Internet ecosystem—from providing Internet access to hosting online spaces—and allows individuals to participate online.

Further, the national government of Mexico has already directly “recognized the importance of the promotion of interactive computer services, including for small and medium-sized enterprises, as vital to the growth of digital trade” (per Article 19.17.1) by its agreement to and adoption of the United States-Mexico-Canada Trade Agreement¹⁰, which specifically provides that intermediaries (interactive computer services) should be protected from liability for their users’ content.¹¹

Protecting intermediaries from liability for user-generated content recognizes the pivotal role of interactive computer services in driving economic growth, promoting entrepreneurship, and facilitating the participation of smaller enterprises and individuals in the digital economy.

FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

The outcome of this case also has significant implications for the ability of users to exercise their fundamental rights online, including the right to freedom of opinion and expression and to seek, receive, and impart information and ideas through any media regardless of frontiers (pursuant to the UN Universal Declaration of Human Rights¹² and The Political Constitution of the Mexican United States¹³). Internet intermediaries are facilitators of content sharing on the Internet; they allow users to easily share information with each other. They play an important role in enabling individual participation on the Internet, including expressing opinions, accessing information, and engaging with communities.

In this sense, we note that the legal and constitutional issues are covered comprehensively in the Amicus Curiae Brief submitted jointly by Article 19 and the Rule of Law Impact Lab at Stanford Law School¹⁴. In addition to those considerations, and as we discussed above, a critical value of the Internet is its ability to

¹⁰ <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>

¹¹ Although USMCA Article 19.17.1 specifically excludes intellectual property claims from its scope, other provisions of the USMCA extend similar protections to intermediary with regard to intellectual property claims.

¹² Article 19 of the UN Universal Declaration of Human Rights: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

¹³ Article 6 of the Political Constitution of the Mexican United States: The manifestation of ideas shall not be subject to any judicial or administrative inquisition, except in the case that it administrative inquisition, except in the event that it attacks morals, private life or the rights of third parties, provokes a crime, or disturbs public order; the right of reply shall be exercised in the terms provided by law. provided by law. The right to information shall be guaranteed by the State.

¹⁴ Joint submission by Article 19 and the Rule of Law Impact Lab at Stanford Law School, <https://law.stanford.edu/wp-content/uploads/2024/01/Amicus-Article-19-Impact-Lab-Spanish.pdf>



support and allow individuals to engage in robust speech and exchange of ideas. A decision that imposes liability on Internet intermediaries for content posted by Internet users would critically undermine the ability of individuals to speak and engage online. Unless a court has specifically held that certain content is illegal, an intermediary should not be required to remove the content. Further, the Mexican Supreme Court has held that any legal restrictions on content, through an order or legislation, must have a legitimate purpose, be necessary, specific (i.e., not generic) and proportional¹⁵.

When faced with a similar issue, namely whether intermediaries should be required to remove content pursuant to a “right to be forgotten” request, the Mexican Supreme Court ruled that such a requirement would be incompatible with the Constitution. In thesis 1a. II/2023 (11th.)¹⁶, the Court held that the last paragraph of article 1392 Bis of the Civil Code for Mexico City, which established a “right to be forgotten”, was unconstitutional because it is incompatible with the Mexican constitutional rights of freedom of expression and access to information. The Court concluded that “a right to be forgotten” would constitute prior censorship, which is contrary to the American Convention on Human Rights, and further, that assigning a legal obligation on intermediaries to determine what content should or should not be removed would provide an incentive for intermediaries to excessively remove content to avoid civil or administrative liability, impacting users’ rights to freedom of expression and access to information.

Similarly, in Amparo Directo en *revisión* 1956/2020¹⁷, the Court held that an employment website, an intermediary, is not liable for discriminatory job postings made by its users.

CONTENT MODERATION ON THE INTERNET

The Internet empowers individuals around the world to speak, share ideas, learn, and connect. Internet intermediaries are an important medium for these purposes, as they facilitate easy-to-use, person-to-person connections online and often do so globally. Content moderation is a critical tool of intermediaries that display user-generated content, permitting those services to work as designed, to create diverse communities online with their own rules of engagement, and improving user experience in these voluntary shared spaces. An important aspect of content moderation is intermediary discretion in applying its content moderation policies.

A service’s content moderation policy sets the rules of the road for engagement, ensuring that all users are aware of what is permissible when interacting with the service. These rules may address issues like civility

¹⁵ Digital Registry 2014519 <https://sjf2.scjn.gob.mx/detalle/tesis/2014519> and Digital Registry 2014656 <https://sjf2.scjn.gob.mx/detalle/tesis/2014656>

¹⁶ Digital Registry: 2025995 <https://sjf2.scjn.gob.mx/detalle/tesis/2025995>

¹⁷ Digital Registry: 2024454 <https://sjf2.scjn.gob.mx/detalle/tesis/2024454>



and profanity, facilitating productive discourse. Content moderation policies may also define the target audience for the conversation, like users interested in hiking a particular trail or high school students learning robotics, or the target topic for discussion, such as gardening.

Intermediaries often rely on content moderation to facilitate user engagement, protect users online, and improve users' experiences. It also allows them to adjust their business model to match user demands. They experiment with different technologies and types of moderation to compete for users, providing different experiences that certain users may prefer, such as profanity or "family" filters, or more extensive privacy controls. Content moderation also allows services to scale their operations as they grow and avoid a morass of unwieldy and unusable content. This voluntary moderation is essential for useful and functional websites and online services. Limiting or second-guessing content moderation will inhibit person-to-person communications, degrading the value of the Internet for individuals.

A user will not always agree with an intermediary's decision to display, remove, or decline to remove other users' content, just as they may not agree with a decision about their own content in the same service. Further, they may have a different opinion on the legitimacy or lawfulness of the content. Yet, if intermediaries were required to comply with such requests or risk facing liability, innocent and vulnerable communities could have their content expunged from the Internet and intermediaries may stop hosting user-generated content altogether. This can expose these services to what is referred to as "the heckler's veto," where threats of punitive action from powerful people can silence legitimate voices online.

Furthermore, not all online services control the content moderation that takes place. Certain platforms that are likely to be affected by the ruling in this case, such as Reddit and Wikipedia, rely on decentralized content moderation undertaken on a forum- or topic-level basis. Each individual subreddit community that is created can implement additional content moderation guidelines. Holding Reddit liable for content moderation taken at a community level would be unjust, and it would likely require a complete revamping of the service to remove the very community-building features so attractive to Reddit users. On Wikipedia, where anyone can edit most of the content, there are special procedures to handle strongly disputed topics.¹⁸

There are also smaller platforms that currently serve more limited communities and rely heavily on content moderation. For example, the growing platform Mastodon is a free and open-source software and social network managed by a German non-profit that provides a space for online communities through thousands of distributed servers; all operated independently. Mastodon is expressly designed to empower individual online communities to operate their own Mastodon servers with the power to self-regulate and create

¹⁸ See Wikipedia: Editorial oversight and control, Wikipedia.org, https://en.wikipedia.org/wiki/Wikipedia:Editorial_oversight_and_control.



moderation rules specific to each server.¹⁹ Many up-and-coming intermediaries, like Mastodon, were created because there was a desire for more or innovative moderation after bigger services relaxed or abandoned their moderation rules. Although Mastodon and other newer platforms are relatively small now, many aspire to become much more widely used.

If the Court were to hold that intermediaries are liable for failing to remove user-generated content that a member of the public considers is in violation of an intermediary's content policy, when requested by that person, it will likely drive intermediaries to refuse to engage in *any* form of content moderation to avoid legal exposure. The obvious result would be more hateful or harmful content on those services.

The Internet is at its best when individuals worldwide can connect with each other and safely and usefully share information and ideas. Voluntary content moderation is one key to accomplishing those goals. We ask the Court to ensure that intermediaries continue to be able to perform content moderation without fear of liability.

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¹⁹ See Mastodon.org, About Us, Mastodon.org, <https://joinmastodon.org/about>