CROSSROADS OF INNOVATION AND LIABILITY: BRAZIL AND THE US'S DIGITAL REGULATION STRATEGIES

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APRIL 2024

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INTRODUCTION

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The rapid advancements and widespread influence of the digital realm have led to a lot of disparate information among internet regulators, creators, and users. This asymmetry is often overlooked as we become accustomed to the seamless integration of technological innovations and their enhancement of our lives. Yet, there is a pressing need to quantify the contributions of the digital economy within broader economic statistics—it is crucial for creating a more effective and unified understanding of regulation across the ever-evolving digital landscape. This task is both a priority and a formidable challenge.

The digital economy profoundly affects individual lifestyles and business decisions, yet measuring its scope is complex. The quick evolution of high-tech hardware and software, which continuously improves aspects such as computing power and functionality, contributes to this complexity. Traditional price indexes must be adapted to reflect these advancements accurately. Moreover, many digital services are free, like internet searches, or developed internally by companies, such as bespoke software or IT hardware.

Evaluating the effect of e-commerce on household productivity poses a unique challenge. While e-commerce streamlines shopping and delivery, increasing online buying efficiency, it also shifts individual efforts from personal tasks to market-driven services. This shift changes how we allocate our time and labor, underscoring the multifaceted impact of the digital economy. These dynamics illustrate why traditional economic metrics fall short and highlight the need for innovative approaches to fully comprehend and quantify the true impact and value of the digital economy.

The American Bureau of Economic Analysis (BEA) defines the digital economy as a broad sector that includes everything from the essential infrastructure for computer networks to e-commerce and priced digital services. This scope also extends to federal non-defense digital services, covering the budget for federal non-defense agencies that support the digital economy. Despite a 2.2 percent decline in the total US real gross domestic product (GDP) in 2020, the digital economy demonstrated remarkable resilience and growth, with a 6.5 percent increase in real value added. By 2022, the contribution of the US digital economy surged to $2.6 trillion.[1]

In parallel, Brazil's digital economy, encompassing sectors such as digital advertising, e-commerce, software, IT services, telecommunications, and cloud services, amounted to R$ 981.3 billion in 2022. A study by the Movement Competitive Brazil and the Getúlio Vargas Foundation, employing a methodology akin to that of Britain's Office for National Statistics, highlights the significant potential for Brazil's economic growth through further digitalization. This study calculated Brazil's "digital supply"—the total production of digital goods and services—and found that it constituted 8.6 percent of the country's total economic added value in 2021.[2] This figure is close to those of the United States and the United Kingdom, indicating a substantial opportunity for Brazil to boost its GDP through enhanced digitalization, potentially increasing it by R$ 1.1 trillion.

The impressive economic estimates from the largest economies in the Western Hemisphere highlight a crucial issue: Until Brazil's economic measures catch up to the rapidly evolving digital landscape, there will be an incomplete understanding of the scale and impact of the digital economy. To close this gap, researchers are innovating new methods to quantify the contributions of digital intermediary services in sectors like ridesharing, travel, and food/grocery delivery.

Tina Highfill and Brian Quistorff's working paper from the BEA, "Measuring Digital Intermediation Services: Experimental Estimates of Gross Output for Rideshare, Travel Services, and Food/Grocery Delivery Service Platforms," addresses the complex task of evaluating the economic contributions of these services. Their research found that in 2021, these digital intermediary services contributed at least $31 billion to the economy, accounting for nearly 1 percent of the digital economy's total value.[3] This figure represents a notable advancement in understanding the economic impact of digital platforms.

Meanwhile, a discussion paper published by the UK's Economic Statistics Centre of Excellence examined the economic impact of free digital goods—a vital yet often neglected component in digital economy statistics. The paper aimed to assign a monetary value to free services like videoconferencing, personal email, and online news by benchmarking against the prices of their paid counterparts. The study revealed that, particularly during the COVID-19 pandemic in 2020, these free digital services made a substantial contribution to UK household consumption, estimated at between £7 billion and £25.4 billion.[4] This increase highlights the pivotal role these services play in enhancing consumer experience and softening the economic impact of the pandemic.

This publication delves into the intersection of legal, economic, and social dynamics shaped by the digital economy, focusing mainly on the United States and Brazil. Both countries, with their significant digital markets and vast territories, have also experienced similar political turmoil, intensified by misinformation spread through social media. The storming of government buildings in Washington, DC, and Brasília, driven by election fraud claims, marked a troubling chapter in the histories of the two largest democracies in the hemisphere and underscored the urgent need to stop the spread of misinformation. Yet, the unrest wasn't solely a product of social media dynamics. In Brazil, intelligence reports pointed to physical mobilization and complex coordination beyond online platforms, raising concerns about security and the ease of breaching government buildings. These events have thrust social media's responsibility for managing misinformation into the spotlight, reigniting debates on the role of technology companies in content moderation and the broader implications for internet regulation, particularly concerning platform liability for third-party content.

This publication offers a nuanced exploration of the legal and economic dimensions of platform liability for online content, specifically contrasting the legislative frameworks of the United States and Brazil. In the United States, the focus is on Section 230 of the Communications Decency Act. This crucial piece of legislation provides extensive protections to internet companies, shielding them from liability for third-party content on their platforms. This legal provision has been instrumental in fostering the growth of online platforms by allowing them to host user-generated content without bearing the legal risks associated with such content.

In contrast, Brazil's approach to platform liability is encapsulated in Article 19 of the Legal Internet Framework (Marco Legal da Internet). This law adopts a judicial notification system for the removal of content. Under this system, internet application providers are required to assume responsibility for third-party content only after they receive a specific court order to remove it. This approach signifies a more reactive stance, where providers are not obliged to monitor or proactively remove content but must act once legally notified.

Both legal frameworks reflect distinct philosophical and practical approaches to handling online content, balancing the need for freedom of expression and information dissemination with the imperative to manage harmful content. The implications of these differing approaches extend beyond legal considerations, influencing the economic landscape of digital platforms and their role in society.

The discussion extends to the economic implications of these legal frameworks. Section 230 is essential for the thriving US e-commerce and Web 2.0 businesses. Brazil's Article 19 impacts over 90 percent of Brazilian enterprises, which are small and micro businesses contributing significantly to the country's GDP and employment. The economic impact of free digital goods on these businesses and the broader economy is yet to be fully understood in both countries.

This publication discusses the potential economic costs and benefits of legal changes in platform liability. It recognizes the challenges in measuring the digital economy's precise economic value and suggests that an ideal liability regime should balance responsible content management with the promotion of free speech and innovation. This includes improving compliance with legal responsibilities, enhancing detection and removal of offensive content, and experimenting with new approaches like rating and reputation mechanisms, aligning regulations with international norms, and acknowledging the evolving content industry. The ultimate goal is to find a balanced approach that fosters innovation while ensuring responsible management of online content.

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ANALYSIS OF WEAKENING OR REPEALING SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

DANIEL CASTRO

INTRODUCTION

Section 230 of the Communications Decency Act has played a significant role in the development of the Internet. The law contains two main provisions: one that protects online services and users from liability when they do not remove third-party content, and one that protects them from liability when they do remove content. In recent years, however, this law has come under scrutiny from policymakers, scholars, and activists who believe it should be weakened or repealed.

Proposed changes to weaken or repeal Section 230 would have a significant economic impact on online services, business users, and consumers. Such changes could:

- Expose online services to substantial legal costs for third-party content
- Increase costs for online services for business users and consumers
- Result in some online services shutting down or eliminating popular features that deliver value to consumers

As policymakers consider proposals to reform Section 230, they should carefully consider the potential economic impact of these changes for all stakeholders.

OVERVIEW OF SECTION 230

For more than a quarter of a century, Section 230 of the Communications Decency Act has provided the legal foundation for many of the most popular websites, apps, and services on the internet. The law shields online services from civil liability for third-party content, even when they actively monitor and moderate this content. As a result, the law has facilitated the creation of various online services that include third-party content as well as content moderation tools.

History of Section 230

Congress passed the Communications Decency Act in 1996. The law criminalized using the internet to transmit "obscene or indecent" messages to minors. The law also contained an amendment—Section 230—added by Reps. Chris Cox (R-CA) and Ron Wyden (D-OR) to protect online service providers and users from liability for content produced by third parties.

They added this provision in response to unexpected outcomes in two lawsuits against online services.

In one case, the court found that the online service Prodigy was liable for an anonymous comment one of its users had posted on its platform. The court reasoned that because Prodigy moderated its forums, it had editorial control and should be just as liable as the user who created the post. In the other case, the court found that the online service CompuServe was not liable for an anonymous post because the company did not moderate its forums. In effect, the decision created a strong incentive for online services to not moderate third-party content to avoid potential liability.

Free speech advocates quickly challenged the Communications Decency Act, and the US Supreme Court struck down significant portions of the law dealing with offensive speech, finding that these restrictions violated the First Amendment. Yet, Section 230, which protects free speech, remained.

How Section 230 Works

Section 230 is a relatively succinct law with some important nuances. There are two key provisions. The most often cited provision states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[1] This means that neither online services nor users are liable for unlawful content that others post.

The other provision states that online services are not liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[2] This provision protects online services from liability for moderating content. These two provisions work together. The former protects online services when they do not remove third-party content, and the latter protects them when they do.

There are some exceptions to this statute. For example, the law does not apply to federal criminal law, intellectual property law, or sex trafficking laws, and it does not prevent states from enforcing state laws that are consistent with those exceptions. However, states cannot enforce laws that deviate from those exceptions, such as imposing liability on online services for third-party content that is otherwise legal under federal law.

The Legacy of Section 230

Section 230 has provided the legal foundation for many popular Internet services, especially those that involve user-generated content, such as Wikipedia, Craigslist, YouTube, and Facebook. Moreover, the law provides broad immunity to businesses that develop online services involving third-party content, insulating them from lawsuits that, even if they were ultimately unsuccessful, could have significantly limited the growth of the Internet. Section 230 also protects Internet users from liability for third-party speech, such as when they forward emails or repost content from others on social media.

While US courts have repeatedly upheld Section 230's broad liability shield, they also have found areas where the law does not apply. For example, Section 230 does not apply if an online service induces or contributes to the creation of illegal content. One noteworthy case involved Roommates.com, a website designed to help people find someone to live with. A court found that Section 230 did not protect the company from a lawsuit accusing it of violating the federal Fair Housing Act, because the website required its users to disclose their sex, sexual orientation, and familial status and then matched users based on their preferences for those criteria.[3]

Courts have also found that the limits on liability for online services restricting access to third-party content apply only when those actions are taken in good faith. For example, courts have found that Section 230 protections do not apply when the allegation is that an online service is removing or blocking content for anti-competitive reasons.[4] Notably, the US Supreme Court chose in 2023 not to take any action on a pair of cases that called into question potential limits on Section 230.[5] This decision suggests that any future changes to Section 230 will most likely come from Congress.

The only substantial legislative change Congress has made to Section 230 came in 2018, when it passed the Allow States and Victims to Fight Online Sex Trafficking Act.[6] This legislation amended Section 230 so that it no longer applied to federal and state sex trafficking laws. The impetus for the law was concern among policymakers that sites like Backpage.com, which hosted classified ads for adult services, facilitated prostitution and child sex trafficking. Opponents of this legislation have argued that the government did not need new authority to bring criminal charges against bad actors. Indeed, the US Department of Justice seized Backpage.com five days before the new bill was signed into law.[7] Notably, Senator Ron Wyden (who, as a member of the House of Representatives, co-authored Section 230) was one of only two senators who opposed the legislation.[8]

POTENTIAL ECONOMIC COSTS OF CHANGES TO SECTION 230

Changes to Section 230 would likely have direct and indirect impacts on many stakeholders in the internet ecosystem, including online services (e.g., social media platforms, e-commerce sites, search engines, hosting services, user-generated content sites, etc.); business users (e.g., creators, sellers, website owners, etc.), and consumers (i.e., the average individual Internet user). Given that the US digital economy accounted for $2.41 trillion of value added in 2021—approximately 10.3 percent of the US gross domestic product (GDP)—changes to Section 230 could have a significant economic impact.[9] This section explores the potential economic costs of changes to Section 230 for each of these groups. (Note: This analysis does not attempt to quantify whether any of the proposals would create positive economic benefits; in fact, most proposed changes do not allege any economic benefits.)

Online Services

The internet has evolved significantly since Congress enacted Section 230 in 1996. Today, the law protects not only online message boards and email providers but also a wide range of popular online services, from e-commerce sites and search engines to dating apps and social media platforms. Virtually every major internet company benefits from Section 230: Search engines (like Alphabet and Microsoft) avoid liability for snippets of third-party content in search results; social media platforms (such as Meta, YouTube, TikTok, and Snapchat) avoid liability for their users' posts; app stores (including Apple, Alphabet, Amazon, Meta, and Microsoft) avoid liability for third-party apps; and online exchanges and marketplaces (like Airbnb, Etsy, StubHub, and Craigslist) avoid liability for third-party listings. The list goes on and includes not only many of the businesses that provide key web services—such as web hosting, domain registration, content delivery networks, cloud storage and backup, and web security—but also many small and medium-size internet services.

Losing the liability protection offered by Section 230 for third-party content would have two major impacts on online services. First, online services would face greater costs from meritless lawsuits. One of the primary benefits of Section 230 is that it provides a procedural fast lane for defendants to get cases against them that have First Amendment protections dismissed.[10] These cases would eventually fail because of those protections.

One estimate finds that lawsuit costs grow substantially the further along a case proceeds.[11] When a firm receives a letter threatening a lawsuit, the costs to respond can reach $3,000. Moreover, firms may have to initiate a litigation hold and begin preserving documents, a process which can incur additional costs. Firms can then file a motion to dismiss using Section 230, which can still cost them $15,000 to $80,000. But without Section 230, firms would face many more costs, with motions for summary judgment costing $30,000 to $70,000. And if a case proceeds past that point, additional motions and discovery would quickly bring costs to anywhere from $100,000 to $500,000 or more.[12] Many online services—especially those run by startups, nonprofits, and individuals—would find it cheaper and less risky to settle, even if they are likely to win at trial (defendants are generally not entitled to recover their legal costs).[13] Others might shut down in the face of these high costs. The First Amendment protects free speech online, but defending these rights can be expensive, especially without the procedural safeguards that Section 230 provides.

Second, changes to Section 230 would diminish the value of some online services. The threat of lawsuits for third-party content would compel online services to remove objectionable third-party content, such as speech on controversial topics or products and services for which they receive cease-and-desist letters. Individual pieces of third-party content rarely have significant value to online services, so it makes sense for them to remove this content when faced with a substantial legal threat.[14] For example, online services might prevent businesses from running online ads about certain topics or prevent consumers from discussing certain issues to retain Section 230 liability protection. Conversely, online services might refuse to moderate platforms for fear of assuming liability for their content moderation decisions, thereby leading to online services with more objectionable content. These types of changes would likely reduce the utility of these platforms for many consumers and businesses, making the service less valuable.

The degree to which changes to Section 230 would impact online services would depend on the scope of the proposal. Some proposals would apply to all online services, while others would apply more narrowly to social media services or only online services of a certain size. Still, even small changes could be significant. A 2017 study estimated that weakening Section 230 would decrease the US GDP by $44 billion annually and eliminate 425,000 jobs.[15]

Users

Changes to Section 230 would greatly affect both consumers and business users. First, higher legal costs could force some online services to shut down or increase their prices. For example, online ad networks might charge advertisers more money to cover the cost of reviewing third-party ads. Higher costs would limit the viability of online advertising for certain businesses because their return on investment would be lower.

Higher costs would also significantly affect consumer usage of online services. In surveys, consumers overwhelmingly express a strong reluctance to pay more for online services, either directly through subscription fees or indirectly through receiving more ads.[16] For example, a study from the University of Oxford about the willingness to pay for news content online found that "around half of non-subscribers say that nothing could persuade them to pay for online news" and the way to attract more users was through "less cluttered (ad-free) websites and apps."[17] Similarly, another study found that most consumers prefer lower-cost, ad-supported streaming services to ad-free options that cost more.[18]

Second, as noted previously, many online services would likely adjust their services to minimize their legal exposure, and these changes may have unintended consequences that result in subpar services for users. For example, after Congress passed the reform to Section 230 on sex trafficking, many mainstream sites like Craigslist and Reddit shut down sections of their platforms, and online services like Skype banned adult content to avoid any potential liability.[19] Many reforms to Section 230 would likely negatively impact marginalized communities, such as undocumented immigrants and unhoused individuals, who are often least able to defend their interests through expensive court cases.[20]

Video gaming services that make changes to decrease potential liability could disappoint their users. Consider that the gaming industry contributed nearly $60 billion to the US economy in 2020.[21] Approximately two-thirds of US adult gamers play with others in person or online, so a substantial portion of the value from the industry is from games with social features.[22] Section 230 ensures that gaming companies are not responsible for user-generated content on their platforms, such as players making harassing or threatening remarks. Eliminating or weakening Section 230 protections would expose these companies to substantial legal costs and lead them to change popular social features in ways that lower their value to consumers.

The costs of these changes could be substantial but difficult to measure. Most estimates of the economic value of services focus on GDP, or the measure of production, rather than consumer surplus, or the measure of consumer well-being. However, many online services have a significant consumer surplus. One study found that Facebook users would give up using the site for one month in exchange for a median payment of $48.[23] Therefore, changes that would reduce the utility of online services to consumers may be even larger than the baseline GDP numbers suggest.

PROPOSALS TO MODIFY SECTION 230

In recent years, Section 230 has become a hot political issue on both sides of the aisle. Lawmakers on the right believe social media platforms remove too much third-party content, thereby unfairly restricting free speech. Meanwhile, many lawmakers on the left believe these same platforms remove too little third-party content, thereby exposing consumers to harmful content. Although policymakers disagree

Table 1: Impacts of Proposed Changes to Section 230

Proposal	Legal Costs	Impact on Users	Scope
EARN IT Act	High	Low-Medium	Narrow
See Something, Say Something Online Act	High	Medium	Medium
Internet PACT Act	High	Medium	Narrow
SAFE TECH Act	High	Medium	Broad
Repeal Section 230	High	High	Broad

on the problem, many of them agree on an approach to address it: rescinding or modifying Section 230 to expose online services to more liability.

This section briefly summarizes some of the most popular proposals for reforming Section 230. Each of these proposals has received either bipartisan support in Congress or multiple high-profile legislative sponsors. This analysis focuses only on those impacting Section 230. Table 1 shows the scope and potential impact of the proposals, in terms of legal costs for online services and effects on users.

EARN IT Act

Senators Lindsey Graham (R-SC) and Richard Blumenthal (D-CT) reintroduced in 2023 the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act (S. 1207), also known as the EARN IT Act.[24] The sponsors of this legislation intend for it to reduce the prevalence of child sexual abuse material (CSAM) on the Internet. As noted previously, Section 230 does not apply to federal crimes, and federal authorities can prosecute intermediaries who knowingly distribute CSAM. However, the EARN IT Act would go further by allowing states to impose criminal and civil liability on online services that are "reckless" in removing CSAM (as opposed to having actual knowledge of CSAM on their platforms). By eliminating Section 230 liability protection for these state laws and allowing states to use a much lower standard for what is considered "reckless," this legislation would open the door to lawsuits against online services even if they have no knowledge of bad actors using their service to distribute CSAM.[25] One particular concern is that the EARN IT Act could force online services to implement potentially invasive features, such as client-side content screening, that would prove unpopular with privacy-conscious users.

See Something, Say Something Online Act

Senators Joe Manchin (D-WV) and John Cornyn (R-TX) reintroduced in 2023 the See Something, Say Something Online Act (S. 147). This legislation is intended to address the illicit sale of opioids and other drugs online. The legislation would amend Section 230 so that online services lose liability protection if they fail to report suspicious activity on their platform related to major crimes, such as drugs, hate crimes, murder, and terrorism.[26] Online services would have to proactively turn over suspicious private communications to law enforcement or else lose their liability protection from

Section 230.[27] This requirement potentially threatens user privacy, because platforms would be compelled to reveal sensitive user communications to law enforcement simply because they appeared suspicious. It would have little impact on stopping crimes. As noted previously, Section 230 does not prevent law enforcement from prosecuting online platforms that break federal laws, including drug laws. For example, a federal judge ruled that the operators of the underground drug website Silk Road were not exempt from prosecution under Section 230.[28]

Internet PACT Act

Senators Brian Schatz (D-HI) and John Thune (R-SD), along with six Senate cosponsors on both sides of the aisle, reintroduced in 2023 the Internet Platform Accountability and Consumer Transparency Act (S. 483), also known as the Internet PACT Act.[29] The purpose of the legislation is to require social media sites to create and enforce clearer content moderation policies. However, the legislation would also remove Section 230 liability protection for online services that fail to remove content deemed illegal by the courts (e.g., defamatory statements) within a short, specified timeframe. This provision would not apply to certain intermediary online services, such as web hosts and broadband Internet service providers. The PACT Act would also amend Section 230 so that its liability protection would no longer apply to cases involving federal civil law and state defamation law. This change would mean that online services would not be able to rely on Section 230 liability protection for third-party speech in civil actions brought by the Federal Trade Commission or the Department of Justice.

SAFE TECH Act

Senators Mark Warner (D-VA), Mazie Hirono (D-HI), Amy Klobuchar (D-MN), Tim Kaine (D-VA), and Richard Blumenthal (D-CT) reintroduced in 2023 the Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms (SAFE TECH) Act (S. 560).[30] The SAFE TECH Act would make numerous substantial reforms to Section 230. First, the law would vastly expand the areas where Section 230 liability protection does not apply to include federal civil rights law; antitrust law; stalking, harassment, or intimidation laws; international human rights law; and civil actions for wrongful death. Second, the legislation would not apply Section 230 liability protection if the online service or user received payment to make the content available. This means that social media platforms would be liable for third-party online ads, social media users would be liable for sponsored posts, and many other paid online services, such as web hosts, would be liable for third-party speech. Third, the legislation would change Section 230 to an affirmative defense, which means that defendants would have the burden of proof to convince the court that Section 230 applies based upon a preponderance of evidence. Such changes would increase litigation costs for online services because they could no longer quickly file to dismiss cases about third-party content.[31]

Repeal Section 230

In 2021, Senators Graham, Josh Hawley (R-MO), and Marsha Blackburn (R-TN) introduced S. 2972, legislation that would repeal Section 230 entirely.[32] This bill did not have any Democratic cosponsors and did not advance out of committee. However, President Biden has also called for Congress to "remove" or "revoke" Section 230 liability protections, both in January 2020 while a candidate for president and in September 2022 while in office.[33] A complete repeal of the law may be unlikely (such legislation has not been reintroduced during this Congress), but it would have the broadest economic impact.

CONCLUSION

Section 230 of the Communications Decency Act has been a cornerstone of the internet's development for more than 25 years, providing critical legal protections for online services and users. While the law has faced renewed scrutiny and various proposals for reform, it is essential to recognize its vital role in supporting innovation, fostering the growth of internet services, and preserving free expression. Importantly, policymakers should consider the potential economic costs and impacts of proposed changes to stakeholders, including online services, business users, and consumers. Any changes to Section 230 should be carefully considered, as they could lead to increased legal costs, reduced online service value, and other unintended consequences. The future of Section 230 is uncertain, but any modifications should strike a balance between addressing legitimate concerns and preserving the internet's dynamism and the digital economy's substantial contributions to the nation.

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ANALYSIS OF THE EFFECTS OF REPEALING ARTICLE 19 OF BRAZIL'S LEGAL INTERNET FRAMEWORK

CLAUDIO R. LUCINDA

EXECUTIVE SUMMARY

In the United States, platform liability for online content posted by users is regulated by the Section 230 of the Communications Decency Act, but it was under consideration by the United States Supreme Court in two cases: one involving YouTube and Google,[1] and the other targeting Twitter.[2]

The Brazilian Supreme Court (STF) is also looking at this problem, in judging Article 19 of the Civil Rights Framework for the Internet (commonly known as the Legal Internet Framework or, in Portuguese, *Marco Legal da Internet*). This white paper aims to provide an overview of the current controversies surrounding the subject, describe the economic relevance of the Brazilian content-producing industry, discuss the challenges ahead, and consider what the economics profession would say is a better platform liability regime.

This paper describes the evolution of the Brazilian legal framework for content production and liability, both in terms of content regulation and economic regulation. In response to what was perceived as regulation framework shortcomings regarding the internet, Law No. 12.965 (the Legal Internet Framework, or *Marco Legal da Internet*) was enacted in 2014.

The Legal Internet Framework puts in place a system of mandatory judicial notification and removal of content. In other words, the law clearly imputes responsibility to the application provider for the content inserted by third parties only after the provider is issued a court order declaring the content in a certain domain and subdomain to be blocked, with a deadline for compliance.

The current controversy under review by the Brazilian Supreme Court began with the analysis of the Extraordinary Appeal No. 1.037.396, from São Paulo. The case was assigned to Justice Dias Toffoli, with Facebook as the petitioner and the respondent as Lourdes Pavioto Correa.

In her appeal to the Brazilian Supreme Court, Correa claimed Article 19 is harmful to the freedom of the press and to the right to redress damages. She also claimed the article encourages a passive position from internet providers regarding injuries to privacy, honor, and image, counter to the Brazilian Constitution of 1988.

Facebook stands by the legality of Article 19, basing its position on the prohibition of censorship, freedom of speech, and jurisdictional precedence, claiming the internet application provider could be found liable for third-party content only after a specific court order. It is not clear when the court will decide on this case.

This case is especially important because these internet platforms are relevant to Brazilian production and consumption of content. Analysis of sectoral data lends support for the following conclusions. The increase in internet content consumption has affected most of the written-content-producing sector. The offline audio- and visual-content-producing sectors seem to have been less affected, but their content consumption has stopped increasing since the mid-2010s. Ultimately, the discussion of content liability could be especially important for the health of the written-content-production industry.

This white paper also examines what economists might say about the optimal liability regime for online content. Several suggestions come from the literature. One is to formulate rules that require platforms to create conditions that enable users to comply with their responsibilities. Another is to link a regime of liability exemption to an infrastructure that allows for effective detection and removal of offending content, consistent with internet market conditions.

An improvement to the "notice and takedown" regime would be implementing mechanisms for user-friendly notices that are easier to access and communicating those mechanisms more clearly to users. Furthermore, effective rating or reputation mechanisms should be encouraged when they can decrease the asymmetry of information users experience on platforms.

An issue related specifically to the Brazilian experience is consistency with international norms on the subject, and learning from the experience of more advanced jurisdictions. Adapting solutions already in place in the United States or in the European Union, or allowing internet platforms to comply with these rules in accordance with Brazilian law, could be effective.

Finally, and consistent with the second point, no liability regime will move the content producing and consumption patterns back to what they were in the 2000s. The regime must take into account that the industry is changing and will continue to change.

CONTENT REGULATION IN BRAZIL

In Brazil, the foundation for the contemporary regulation framework for content production and liability, which at the time mainly affected the press, is Law No. 2083 of November 12, 1953. This law defined *press* as newspapers and magazines only, with all other media subjected to the Civil Law Code. This law was replaced on February 9, 1967, during the Brazilian military dictatorship, with the enactment of Law No. 5260, which expanded the definition of press to include radio, TV, and press agencies.

In line with the political context, the 1967 law restricted freedom of speech and thought, declaring that which was not aligned with the military government as illegal war propaganda that undermined public order (understood as such by the military government) and promoted class and race discrimination. This law required federal government licensing for radio and TV stations and forbade news organizations from being owned by non-Brazilian nationals. It prohibited anonymity in news stories (all stories must contain a byline) but protected anonymity of sources. Finally, it allowed a party that was found unjustly accused by a press organization to respond to the accusation through that press organization. In short, the 1967 law expanded the universe of press organizations, included economic and content regulation aspects, and enabled censorship during the Brazilian military regime.

This law remained in force even after the military regime ended in 1985 and a new constitution was enacted in 1988. It was repealed in 2009 because of a suit brought to the Brazilian Supreme Court. This was an ADPF, a type of suit in which a party can address the court because it is arguing that one or more articles of the Brazilian constitution has been violated. The plaintiff of ADPF 130-7 asked for the full repeal of Law No. 5260, because several of its articles contradicted the 1988 constitution, especially by:

- Allowing censorship
- Forbidding foreign ownership of press companies
- Imposing a three-month deadline for parties to claim redress from journalists and news organizations

- Imposing a five-day deadline for news organizations and journalists to reply to redress claims
- Imposing stronger sanctions for criminal libel for news organizations than the ones in the Brazilian Civil Code
- Limiting the value of damages awarded to an injured party by criminal libel.

The majority of the Brazilian Supreme Court was in favor and decided to strike down the 1967 Law completely, with the criminal libel cases to be decided using the Brazilian Civil Code.

Economic Regulation

The current Brazilian regulatory framework for TV, radio, and internet operation is based on Constitutional Amendment 8 from August 15, 1995, and the General Law of Telecommunications of 1997. These two acts declared that different parts of the content distribution infrastructure would be regulated by different public agencies:

- Radio and TV (content broadcasted by airwaves): regulated by the Ministry of Telecommunications
- Telephone, cable TV, and internet (content distribution by "wires"): regulated by the National Agency of Telecommunications (ANATEL – *Agência Nacional de Telecomunicações*) under the structure of the Ministry of Telecommunications but with a large degree of autonomy

There is much overlap between agencies—for instance, ANANTEL regulates the radio waves used in wireless communications. There have been several changes in government structure since 1997.

For cable TV, all regulation frameworks were consolidated in 2011 into the Regulation for Conditioned Access (*Regulamento de Acesso Condicionado*), common to cable TV through cable, direct-to-home (DTH) technology, or multichannel multipoint distribution service (MMDS).

The internet infrastructure is provided under ANATEL frameworks, either under cable operators, phone, or mobile operators. The Legal Internet Framework regulates internet content.

Legal Internet Framework and Current Controversies

The Legal Internet Framework is based on six guiding principles:

1. Recognition of the global scale of

the internet
2. Allowing the exercise of human rights, personality development, and citizenship in digital media
3. Plurality and diversity
4. Openness and collaboration
5. Free enterprise, free competition, and consumer protection
6. Social purpose of the network

These six principles are derived from the three underlying principles guiding the Brazilian internet: neutrality, privacy, and freedom of expression.

The current Legal Internet Framework establishes network neutrality as a principle, even though it delegates to the executive power the subsequent regulation of the topic (to ANATEL and MINICOM), in a way consistent with the prior framework.

When it provides for liability for abusive data discrimination, the Legal Internet Framework refers to the Brazilian Civil Code (art. 927) and not to the Consumer Protection Code (art. 14). Even if it seeks to restrict possible discrimination of information to technical aspects and determines that the provider acts with proportionality, transparency, and equality when doing so, this point is somewhat controversial. Most relationships that could be affected by this sort of behavior are between connection providers and network users, and these usually are regulated by the Consumer Protection Code.

Another relevant issue in the Legal Internet Framework is the extent of copyright protection. In the first version of the Framework, copyright infringements were to be subjected to the same procedure as harmful content. In the final version, this part was dropped. Now there is no explicit protection mechanism regarding copyright infringement.

Articles 18 to 20 of the Legal Internet Framework focus on the issue of liability for damages resulting from third-party content. The Framework puts in place a system of mandatory judicial notification and removal of content. In other words, the proposed law entrusts responsibility to the application provider for the content inserted by third parties, only after the provider is issued a court order declaring the content in a certain domain and subdomain to be blocked, with a deadline for compliance. This system was the subject of intense debate before and during the vote in the Brazilian Congress, and its standing is the object of a suit currently before the Brazilian Supreme Court.

Articles 18 and 19 of the Legal Internet Framework are as follows:

> Art. 18. The internet connection provider will not be held civilly liable for damages resulting from content generated by third parties.
>
> Art. 19. In order to ensure freedom of expression and prevent censorship, the internet application provider may only be held civilly liable for damages arising from content generated by third parties if, after a specific court order, it does not take measures to, within the scope and technical limits of its service and within the indicated deadline, make the content identified as infringing unavailable, except for legal provisions to the contrary.

This standard is consistent with the current orientation in the Brazilian court system, which jurisprudentially constructed a system close to that of "notice and takedown." There were some controversies about the need to specify the exact location of the information on the internet to make the takedown decision to be legally valid.

The current discussions on Article 19 on the Brazilian Supreme Court began with the analysis of the Extraordinary Appeal 1.037.396, from São Paulo. The case was assigned to Justice Dias Toffoli; Facebook was the petitioner, and the respondent was Lourdes Pavioto Correa.

At the first level (analogous to the US district court system), the case consisted of a takedown request combined with damages Correa filed against Facebook Serviços Online do Brasil Ltda. The judge decided partially in favor of Correa, ordering Facebook to remove a fake profile under Correa's name and provide the IP address of the computer from which the fake profile was created, but did not award damages.

Correa appealed to the district court, which awarded damages from Facebook's delay in taking measures to remove the fake profile and not informing Correa that the fake profile was taken down.

Correa then appealed to the Brazilian Supreme Court, claiming Article 19 is harmful to the freedom of the press and to the right to redress damages. She also claimed the article incentivizes a passive position from internet providers regarding injuries to privacy, honor, and image, against the Brazilian Constitution of 1988.

Facebook stands by the legality of Article 19, basing its position on the prohibition of censorship, freedom of speech, and jurisdictional precedence. Facebook claims the internet application provider can be found liable for third-party content only after it receives a specific court order.

It is not clear when the court will decide on this case.

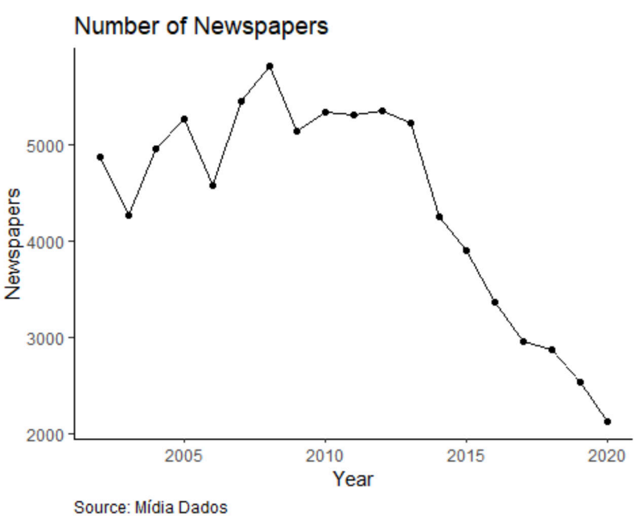
CONTENT PRODUCTION AND CONSUMPTION IN BRAZIL

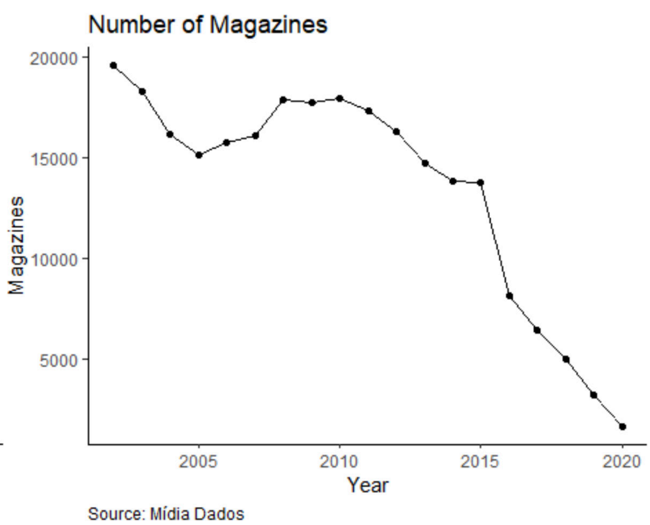
The case of Correa vs. Facebook is especially important because social media internet platforms are relevant to Brazilian production and consumption of content. This section presents data collected from several sources to shed light on how content consumption in Brazil has changed in the past few years. The purpose is to highlight how different liability rules could affect the Brazilian landscape for content production, distribution, and consumption.

The three data sources are:

1. RAIS (*Relação Anual de Informações Sociais*): A comprehensive matched employer-employee database that can show the evolution of the number of companies and firm sizes over time. This paper focuses on firms and workers in three sectors:
   a. Sector 221: Editing Services and Printing
   b. Sector 921: Cinema and Video Activities
   c. Sector 922: Radio and TV

Figure 1





2. Mídia Dados: A trade publication that records information for the communication sectors.
3. TIC: A database on internet usage and installed base.

This study of the evolution of content consumption in Brazil begins with a look at newspapers and magazines, TV, and Internet.

Newspapers and Magazines

Figure 1, above, shows that the number of newspapers in Brazil declined from around 5,000 in the mid-2010s to slightly above 2,000 in 2020. For magazines, the decline is even greater, with consumption amounting to just above 10% of 20,000 in 2000.

This phenomenon is not exclusive to Brazil.[3, 4] Several studies (Wu, 2011 and 2017), indicate this decline can be related to problems with the business models of newspapers and magazines. Originally, their business models were based on newspapers and magazines being platforms that acted as intermediaries between readers and advertisers. Faced with competition from both sides, many newspapers and magazines had to close down.

TV

TV delivers a somewhat different result. On one hand, Figure 2, below, shows more than 24 million TV sets are on, and the share turned on at specific times during the week has not shown any evidence of decreasing.

Figure 2

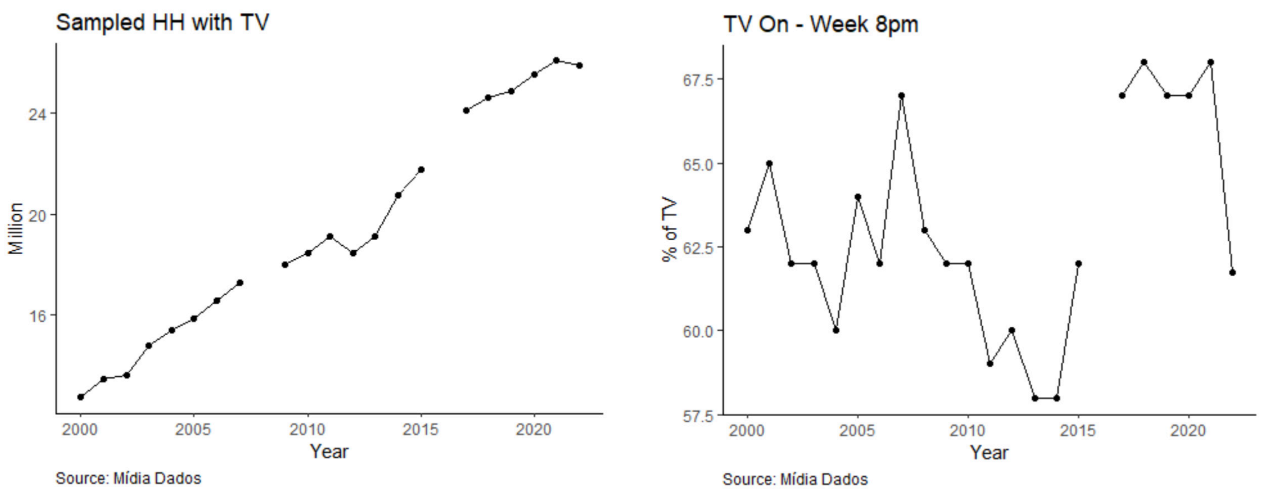
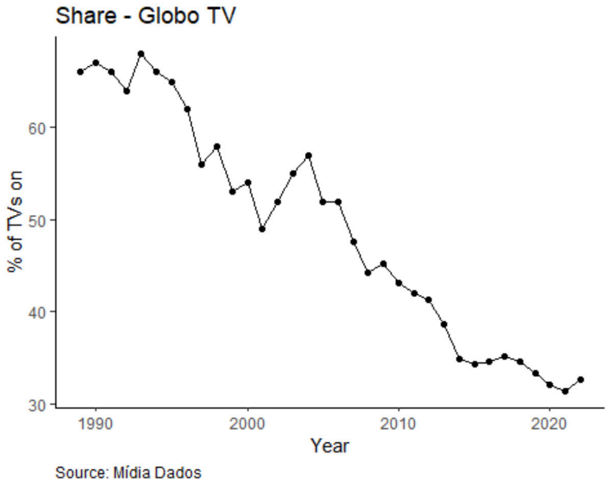


Figure 3



On the other hand, Figure 3, shows the concentration of TV viewership has declined. The ratings for TV Globo, the largest TV network in Brazil, have fallen from about 65% in 1990 to about 30% in 2020.

Internet

Even though individual-level data does not go as far back as information on other content delivery platforms, the broad trends for the internet are consistent with what has been seen before.

First of all, there is a marked increase in the number of internet users from 2015 to 2022, with a plateau of about 160 million in the past three years, as shown in Figure 4, below.

This means there has been notable growth in the extensive margin—that is, people starting to use the internet in the past five years. There also has been an increase in the intensive margin, which is the number of people using the internet to consume and produce more content, as shown in Figure 5, below. Social media usage shows a similar increase.

These results indicate a steady change in the content consumption patterns of Brazilians, away from the traditional platforms of TV and print and toward internet platforms.

Content Production

RAIS data was used to investigate how content consumption changes affect content-producing industries, including editing and printing services for newspapers and magazines, which comprise the CNAE (*Classificação Nacional de Atividades Econômicas*) sector 221.

Following an increase in the number of firms and workers throughout the 1990s and the first decade of the 21st century, in the 2010s there was a decrease in the number of firms and workers in the sector. This coincides with the decrease in the number of newspapers and magazines

Figure 4

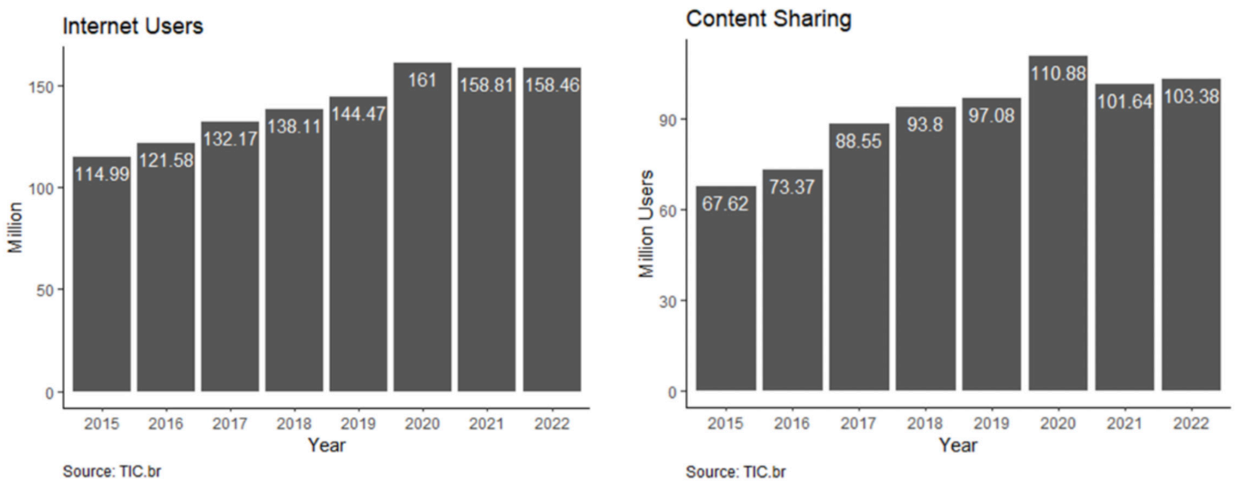


Figure 5

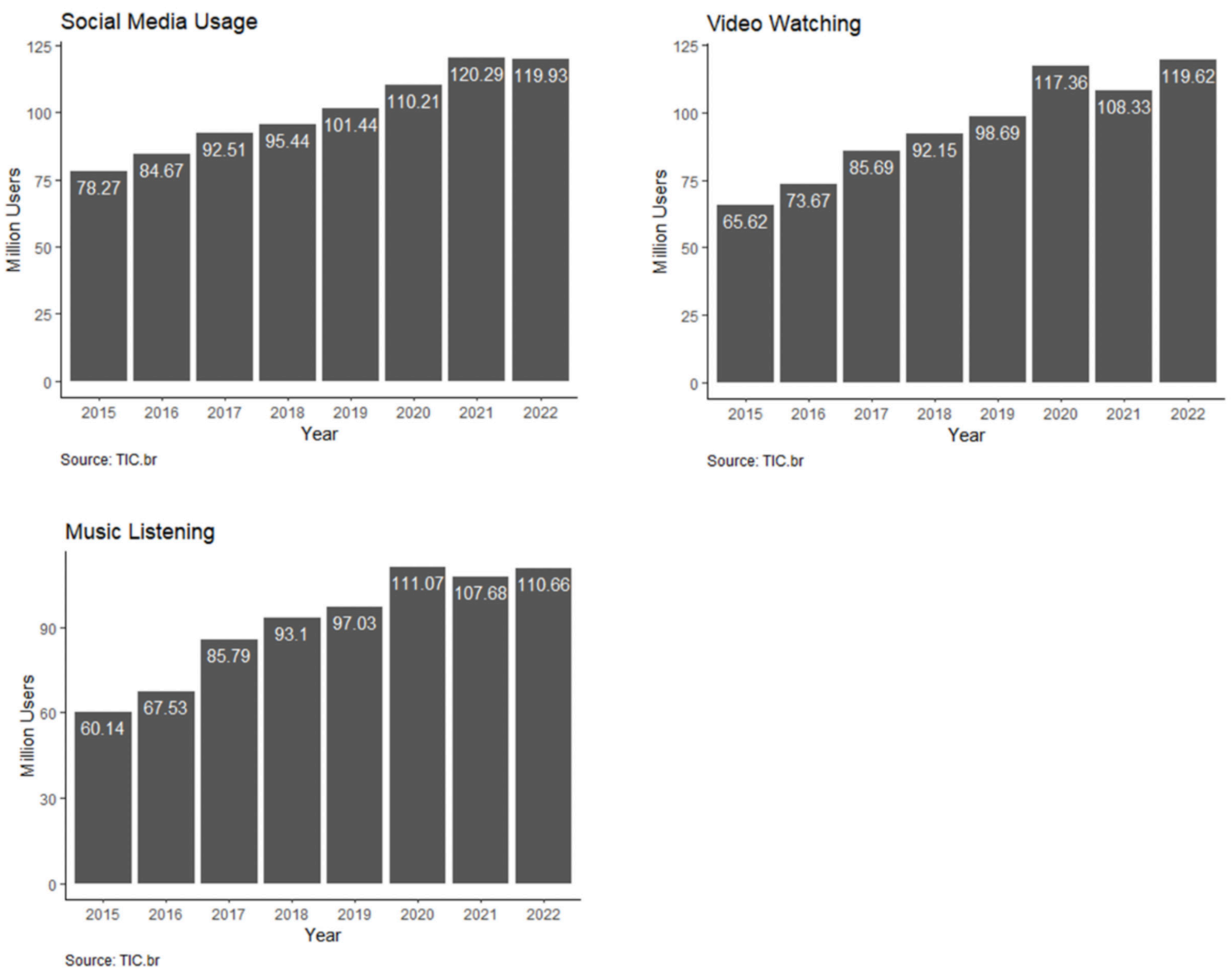


Figure 6

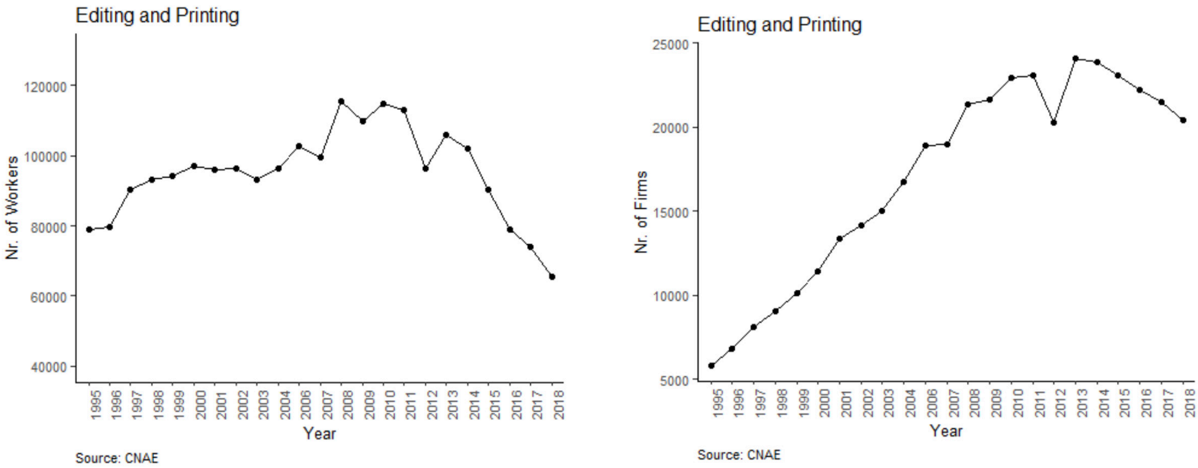
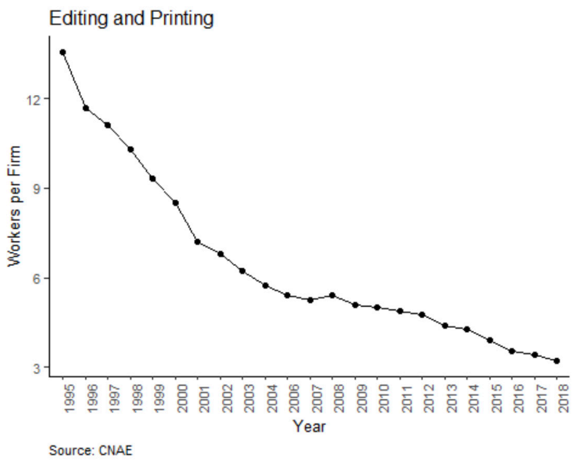


Figure 7



as well as the increase in the number of internet users. The average firm size has also decreased.

Figure 7, shows the editing sector has shifted toward smaller firms, with fewer integrated companies in the sector.
Sector 921, cinema and video activities, includes the production, distribution, and projection of cinema and video. The numbers of workers and firms are shown in Figure 8, below:

Consistent with cinema and TV, which do not show a decrease in the number of TV sets on nor a decrease in the number of movie tickets sold, there is no decrease in the number of workers in this sector but, rather, an increase.

Figure 8

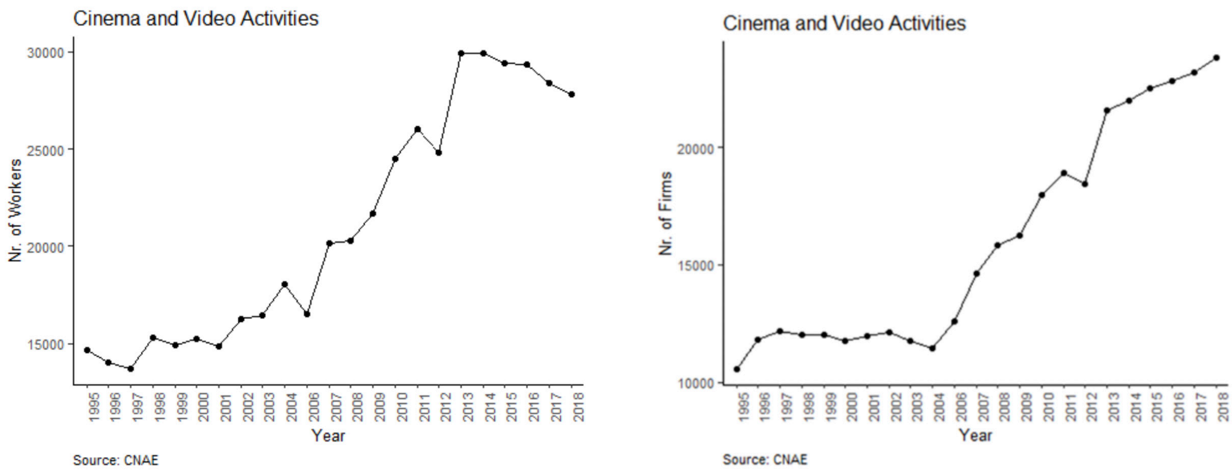
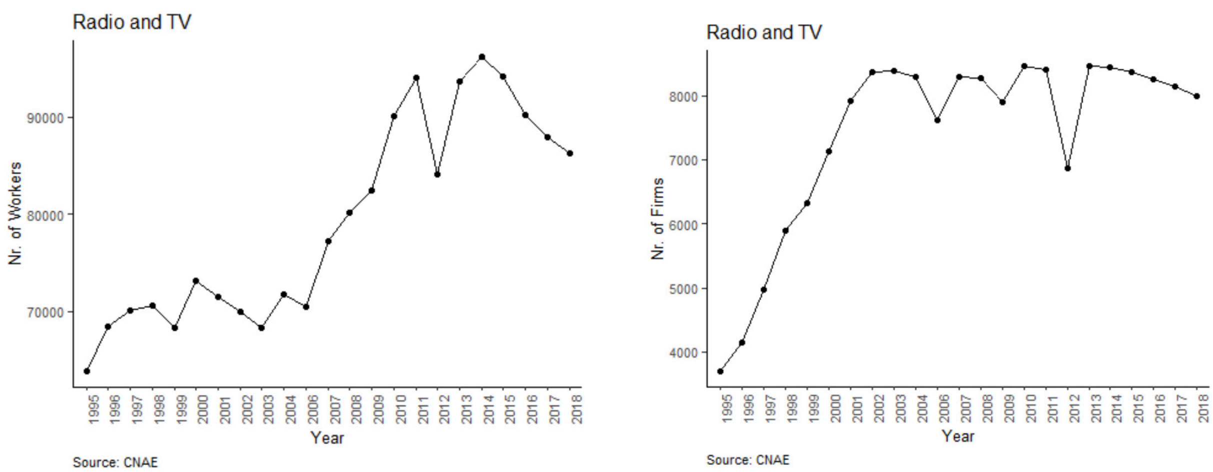


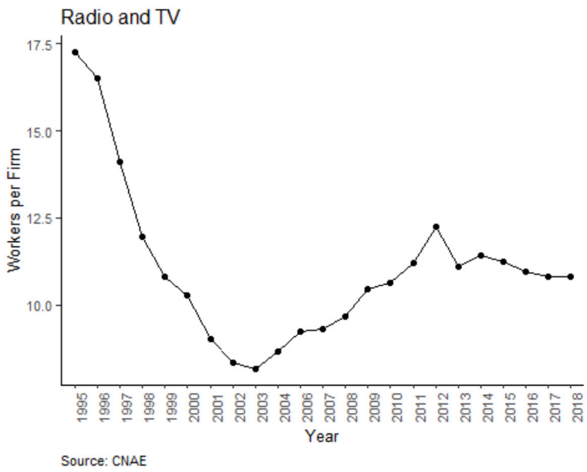
Figure 9



Finally, in sector 922, radio and TV activities, Figure 9, below, shows an increase in the number of firms and workers in the mid-1990s and a decrease from 2013 to 2018. However, in the middle of the period, the number of firms increases earlier than the number of workers. The average firm size has mostly remained the same since the beginning of the 2010s.

These results lend support for the following conclusions: The increase in internet content consumption has affected most of the written-content-producing sector, as shown as in the editing and printing sectors (Figure 1). The audio- and visual-content-producing sectors seem to have been less affected, but even they have stopped increasing after the mid-2010s. Therefore,

Figure 10



the discussion of content liability could be especially important for the health of the written-content-production industry.

PLATFORM LIABILITY – AN ECONOMICS POINT OF VIEW

This section focuses on what the field of economics might say is the optimal liability regime for online platforms., based on the work of Helberger et al. (2018)[5], Buiten et al. (2020)[6], and Lefouli and Madio (2022)[7]. The general objective is understanding how to design internet service regulation so that all parties are incentivized to devote the socially optimal amount of resources to reduce harm.

It is a feature of most legal frameworks that users who upload illegal or harmful content on an online platform may be liable for their actions. The first question to address is whether online platforms should bear any responsibility for the content they carry on their networks.

The second question to address is about efficiency and minimizing the costs of prevention, detection, and removal of illegal material. The implication is that the burden of prevention should be on the "least cost avoider"—that is, the party that could avoid the damage with the least cost, whether that is the platform, users, or injured parties.

The most straightforward argument supporting a liability regime for online platforms is that the platforms benefit from the services they provide. If their business model delivers profits for their owners but also negatively affects users by hosting certain third-party content, there is a presumption the platforms should be liable for these negative effects, just as a factory should be held responsible for repairing the damage its pollution has caused. A difference in the case of online platforms is the harmful content posted could also degrade the experience for users and harm the platform, creating incentives for the platform to devote resources to prevent this. However, it is not clear whether the harm to the platform is equal to the harm to users—one can think of cases where the platform could benefit from hosting harmful material.

Regarding the efficiency of the liability rule, the starting point is to identify which party —users or the platform—is the "least cost avoider," focusing on the costs for the online platform to detect and remove illegal material. Such costs depend on the business model of the platform, the platform size, and the type of illegal material. Social media is vulnerable to terrorist content and hate speech, video and music sharing platforms could face copyright infringements, and marketplaces could be afflicted by counterfeits and other illegal commercial practices.

The cost structure for online platforms to deal with illegal content depends on the extent to which the activities required can be automated. For instance, social media may need actual employees to review content and flag it as illegal. Automation also implies potential economies of scale: Large platforms could defray the high fixed cost of developing or acquiring software tools to identify illegal content across a much larger user base. Besides, having many users and a larger volume of generated content could also improve the efficiency of such software tools. Smaller platforms do not have this advantage and may have to resort to manually reviewing content at a much higher cost per unit of illegal material. If a liability rule implies higher costs of doing business for online platforms, this could make it harder for smaller platforms to enter the marketplace.

There may be a trade-off between static and dynamic considerations for firm entry and exit when designing liability rules. If the costs of compliance are low and the expected benefits are high, the dynamic considerations are probably not that relevant. But if the liability rule imposes high costs on market participants, the dynamic considerations could be relevant, and it may be efficient to have a threshold for some obligations.

In terms of the costs for the users, victims of hate speech and discrimination have limited means to prevent the harm—they usually don't have control over the parties infringing on their rights, don't know who these parties are, and are unable to contact these parties. Their main options are either notifying the platform to have the content removed or suing the offending party for damages.

Either way, the users face costs. It may be impossible or impracticable for victims to identify or sue any of the direct infringers due to the anonymity of the infringer, the cross-border context, or merely due to enforcement inefficiency. Litigation costs could be prohibitively high, particularly if victims face a high burden of proof, and they could be even higher if the defendant is in another country. Since online hosting platforms allow for transactions with strangers across much larger geographical distances than in the offline world, victims of harm that is caused in the context of activity or transactions on online platforms often do not have practical methods to enforce their rights against infringers.

These considerations indicate users alone are not the "least cost avoider"; besides, there are good prima facie arguments that platforms should have some degree of liability for content they carry. But the efficiency considerations also indicate the regime should give some consideration to the interplay of liability rules and entry barriers, so these rules do not lead to further domination of the market by the incumbents.

An efficient liability rule needs to balance the costs of detection and removal for online hosting platforms with the potential benefits of their activities. The liability system should not discourage these socially beneficial activities altogether. To the extent that liability would induce hosting platforms to abandon or limit their services, liability would negatively affect not only the hosting platforms but also the users of the hosting platforms' services.

Business models that provide free services or content may not be sustainable when hosting platforms are subject to liability, since revenues may not cover the expected damages payments. Finally, online hosting platforms generally do not produce content, but they make important choices about that content. Liability for illegal content would, in many cases, require online hosting platforms to make judgment calls regarding the content they host. This, in turn, raises concerns regarding censorship and discrimination.

Two extreme solutions should be avoided when determining the liability of online hosting platforms: a full liability exemption and strict liability. A full liability exemption is not appropriate because hosting platforms should be encouraged to cooperate on the detection and removal of illegal content.

A strict liability rule, in contrast, places a considerable burden on online hosting platforms to "police the Internet," which is necessary for efficiency, as well as managing censorship concerns and access to information. Plus, there is some evidence that there might be some over-removal of content when platforms are liable for content.

Most of the relevant literature is about US Digital Millennium Copyright Act (DMCA) takedown notices,[8] a legal mechanism used by copyright holders to request the removal of infringing content from websites and online. The paper closest to the issue is by Matias et. Al (2020)[9], which uses data from Twitter (now X) users following a DMCA takedown notice. The authors report that accounts that received a DMCA takedown notice reduced the number of tweets they post daily.

Challenges Ahead – General Principles for a Liability Regime

In designing regulation that incentivizes all parties to prevent harm , the legal regime to tackle illegal material on the Internet should be guided by the following three regulatory principles:

- The liability regime should efficiently share the burden for the detection and removal of illegal material online among the different actors (providers of material, platforms, injured parties) involved.
- The legal liability regime should be principles-based to be easily adaptable to technology and business models, which evolve quickly and often in unpredictable ways.
- There is no one-size-fits-all liability rule for all types of platforms and all types of harm, given the differences in costs and benefits of controlling illegal material online.

These principles must be applied in the context of the existing Brazilian framework. One way to incorporate these principles is to create rules that, in line with Helberger et. al (2018), require platforms to create conditions that allow individual users to comply with their responsibilities.

A regime of liability exemption should be linked to an infrastructure that allows for effective detection and removal of offending content, consistent with internet market conditions.

With respect to the version of the "notice and takedown" regime, an improvement would be implementing more user-friendly, easier-to-access mechanisms for notices, and those mechanisms should be more clearly communicated to the users. Secondly, effective rating or reputation mechanisms should be encouraged when they can decrease the asymmetry of information on platforms. Fiala and Husovec (2022)[10] provide evidence of the effectiveness of such mechanisms. Their research shows that an external dispute resolution mechanism that is subject to a particular fee structure can significantly reduce overcompliance by providers and improve the accuracy of their decisions, largely thanks to content creators taking initiative. Once illegal content has been detected, online platforms should act expeditiously, especially when the harm can be serious and quickly inflicted and when they are notified by an enforcement authority or a trusted flagger.

Another issue, specifically related to the Brazilian experience, is consistency with international norms on the subject and learning from the experience of more advanced jurisdictions. Adapting solutions already in place in the United States or the European Union, or allowing platforms to comply with these rules in accordance with Brazilian law, could be effective.

Finally, no liability regime will move the content-producing and consumption patterns back to what they were in the 2000s. The regime must take into account that the industry is changing and will continue to change.

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