

Same Region, Two Different Rulings on Fake News at the Internet

Fernando Pedro Meinero

Recently, two criminal court decisions investigating the spread of fake news show the difficulty of determining the scope of national court jurisdiction over the internet.

In Argentina, Google was successful in reversing a decision that determined the deindexation of a person's name from search engines hosted outside the country. In this case, the searcher associated a person's name with crimes of possession of drugs and weapons, something that proved to be false. But in Brazil, Twitter and Facebook were forced to globally block the access of investigated people to their respective accounts. These people are investigated for participating in the dissemination of defamatory publications through these internet platforms against members of the Legislative and Judiciary.

Although these are decisions taken in the context of criminal cases, the issues raised by them reflect difficulties that also arise in civil cases. Both decisions were taken against companies that have branches in the countries where the courts exercise their jurisdiction - Argentina and Brazil, but they see differently the scope of that jurisdiction for the fulfillment of an order outside the territory.

On the one hand, the idea that the imposition of removing content or access implies an obligation to do so outside the national territory. Therefore, this decision, in order to produce effects outside the territory, should pass through the control mechanisms of international cooperation, since otherwise there would be an invasion of foreign jurisdictions. Not to mention the issues that arise from the point of view of the applicable law, according to what each State considers as a defamatory act and what is the limit of freedom of speech.

On the other hand, the understanding that this obligation to comply, imposed on a company with legal personality in the country, based on national legislation, must be fulfilled by that company, regardless of where and how it will become effective.

In this way, speculations about an eventual violation of foreign sovereignty are eliminated, as well as with regard to laws that may eventually consider such publications to be non-defamatory and just an exercise of freedom of speech.

This divergence exposes, in essence, issues related to international jurisdiction, applicable law and international legal cooperation, the three traditional pillars of Private International Law, and the challenges that the ubiquity of internet impose to this field of study.

Case no. CPF 8553/2015/4 / CA3 “C., E. - provisional measure - 1st Panel of the Federal Criminal and Correctional Chamber - Argentina

Last June 16, 1st Panel of the Federal Criminal and Correctional Chamber - Argentina - Appeal in Case no. CPF 8553/2015/4 / CA3 “C., E. - provisional measure”, decided in favor of Google Inc. in a case concerning fake news.

The giant of the internet appealed a decision that extended a provisional measure determining the removal of the indexation of a content in the search engine. The content - proved to be fake - referred to an alleged arrest of Enrique Santos Carrió in Mexico for drugs and weapons possession. He is the son of Elisa Carrió, an important figure in Argentine politics, currently serving as National Deputy.

The questioned order extended the restriction to domains hosted outside the national territory, namely: www.google.com, www.google.com.es and www.google.mx.

In its allegations, Google argued that, by virtue of the principle of state sovereignty, the implementation of that measure would represent a violation of the sovereignty of other states, which would affect services subject to foreign law. The company understood that the restrictive measure should be directed at the sites that published the fake news, and not at the search engine that, according to the company, is a mere intermediary between the users and the publishers.

Also, according to Google, the removal of the contents of www.google.com would require the deletion of them on global servers, which would represent that an Argentine judge could decide about the information that can be accessed worldwide. In turn, it believes that this type of measure constitutes a serious threat to freedom of expression and the right to seek, receive and disseminate

information freely.

The Court, granting the appeal, understood that the categorization of the news as fake is typical of the activity of the intervening court. However, these categorizations cannot be imposed on foreign jurisdictions, except through judicial cooperation mechanisms that do not violate their legal order. In its understanding “the core of this controversy concerns the principle of the territoriality of the law, which prevents the possibility of taking for itself the prerogative to prohibit the global dissemination of certain contents published by the press, whose disclosure would be prohibited under the local regulatory framework, but its circulation may be authorized in the context of another territory, according to the legal provisions and the categorization that this content could be granted ”(in free translation).

By this basis, the Chamber decided to leave the proposed precautionary measure ineffective, understanding that, if it so wishes, the judge *a quo* may request measures of judicial cooperation from foreign authorities and thus limit the dissemination of such news.

The full text of the decision can be found here (in Spanish).

Criminal Investigation no. 4781 from Distrito Federal - Brazil. Justice Alexandre de Moraes (Monocratic Decision), Supreme Federal Court, Brazil.

On the other hand, we find in Brazil a decision that went in a very opposite direction if compared to the previous one.

In the context of the Criminal Investigation no. 4781 from Distrito Federal - Brazil, the Supreme Federal Court investigates the existence of organized use of accounts on social networks to create, publish and disseminate false information (commonly known as fake news). On May 26, 2020, Alexandre de Moraes, Minister of the Supreme Federal Court, ordered the blocking of Facebook, Twitter and Instagram accounts belonging to a group of allies of Jair Bolsonaro, current President of Brazil. Such profiles would be used to commit crimes against honor in concurrence with criminal association (typified in the Penal Code in arts. 138, 139, 140 and 288) and crimes against national security (typified in Act 7.170/1983, in arts. 18, 22, 23 and 26). Specifically, the investigation refers to attacks to the Supreme Federal Court and the National Congress.

Some of those investigated, however, evaded the order, changing the location settings on the sites, as if they were publishing from other countries. Therefore, on 07/28/2020, the said magistrate provided that the aforementioned social networks must block for access from any IP (Internet Protocol), from Brazil or abroad. To guarantee compliance, he imposed a daily fine of R \$ 20,000.00 for each unblocked profile.

Twitter announced that it would comply with that decision, though it would appeal.

Differently, Facebook Serviços Online do Brasil Ltda. stated that it would refuse to comply with that decision, alleging its illegality. Thus, it would maintain the access of those investigated and the possibility of posting by accessing to the accounts abroad, allowing the viewing of content in the national territory. Facebook argued: “We respect the laws of the countries in which we operate. We are appealing to the Supreme Federal Court against the decision to block the accounts globally, considering that Brazilian law recognizes limits to its jurisdiction and the legitimacy of other jurisdictions”.

In view of this declaration, Minister Alexandre de Moraes issued a new decision, which raised the daily fine to R \$ 100,000.00 for unblocked profile.

In his reasons, the Magistrate understood that “like any private entity that carries out its economic activity in the national territory, the social network Facebook must respect and effectively comply with direct commands issued by the Judiciary regarding facts that have occurred or with their persistent effects within the national territory; it is incumbent upon him, if deemed necessary, to demonstrate its non-conformity by means of the resources permitted by Brazilian law”. Then, he understood that “the blocking of social network accounts determined in this case, therefore, is based on the necessity to stop the continuity of the disclosure of criminal manifestations, which, in particular, materialize the criminal offenses found in this investigation and which continue to have its illicit effects within the national territory, including the use of subterfuge permitted by the social network Facebook”. Finally, he argued that “the issue of national jurisdiction over what is posted and viewed abroad is not discussed, but the dissemination of criminal facts in the national territory, through news and commentary by accounts banned.”.

After this decision, Facebook informed the observance of the global blocking of

the investigated accounts.

Fernando Pedro Meinero is Professor of Private International Law at the Universidade Federal do Pampa, RS - Brazil.