



CONCENTRATION, DIVERSITY AND PLURALISM

Old and new *gatekeepers* on the Internet

Concentration in the digital ecosystem,
the new role of intermediaries and
their impact on freedom of expression, access,
diversity and pluralism on the Internet



Introduction¹

This document summarizes a research which main aim was to identify if, as it happens in the traditional media system in Latin America, in the digital ecosystem there was also concentration as well as companies with dominant position, and which was its impact on freedom of expression and human rights. In this regard, we asked ourselves if the existence of the Internet meant that the principles of diversity and pluralism were still meaningful -as principles and as problems, eventually- in the freedom of expression agendas of the region.

OBSERVACOM developed a series of actions to find evidence of these situations and their effects on the exercise of rights, trying to identify emergent issues, opportunities and challenges from a public interest perspective. These included interviews with the main players of the sector (telecom players as well as Internet companies), an intense intervention in international forums and working meetings to gather inputs for the report as well as to strengthen the bond with relevant players who have vast experience in the field of digital rights.

The scenario discovered shows the consolidation of economic and political power of few transnational corporations in important sectors of the digital economy and the presence of new challenges for social actors concerned about the protection and promotion of freedom of expression on the Internet.

In addition to revealing evidence of the strong and concentrated telecommunications market and its impact on network connectivity and net neutrality, the report also includes important findings and considerations on the new role of the main intermediary companies or Internet platforms, which hold a key position in the current stage of development of the digital ecosystem and the free flow of information. This condition places them as private gatekeepers of the social networks, sharing platforms and search engines that -through algorithms and policies that embody private regulation- have been transformed into enablers as well as threats to freedom of expression, with a strong influence in diversity and pluralism of information and opinions that users access.

While for the telecommunications sector there are precedents of state regulations and even concrete recommendations issued by international organizations to prevent or correct the problems regarding freedom of expression (the principle of net neutrality for instance, and the requirement of specific national regulation), the challenges of how to regulate the intermediaries -or not to regulate them- to guarantee a free and open Internet, and which should be the role of the State, have become topics of strong debate at international level that the report collects and to which we want to contribute , sharing our main findings, conclusions and recommendations to guarantee full freedom of expression in the digital ecosystem, and a free and open Internet.

¹ This publication is the executive summary of a more extensive report entitled "Concentration in the digital economy and its effects on freedom of expression", made for the Ford Foundation





There is a strong concentration on the Internet, too

The existence of monopolies and oligopolies within the traditional media is a reality in the Latin American region, as evidenced by numerous academic studies and documented by international organizations such as UNESCO. Nevertheless, when asked if concentration exists on the Internet, many believe the question is badly posed. The arrival of the Internet implied the elimination of obstacles to produce, disseminate and find such a wide range of information and opinions that it would seem anachronistic and irrelevant to even mention the idea of "concentration".

However, according to data and evidence revealed by the OBSERVACOM investigation, the processes of concentration and the constitution of dominant positions are also found in the new digital ecosystem. This is happening among Internet Service Providers (ISPs) and telecommunication companies, as well as among the associated OTT service providers or intermediaries, and in key areas related to freedom of expression and the right to information.

This accumulation of power is not only a result of the success of services and goods provided to users, but also the characteristics of a "network economy": the global scale of the business, the ability to raise capital for the necessary investments, and the mergers or purchase of other competing or complementary companies, among others. The dispute over the radio spectrum and the Internet of Things (IoT), and especially the ability to monetize the resulting *big data*, seem to point to processes that are deepening the current level of concentration.

Concern over concentration in the area of OTT services is justified, and beyond aspects of economic competition, given that several of the business corporations that have significant market power and a dominant position on the Internet are owners of platforms that enable the free flow of information and other relevant content such as social networks, search engines, communication applications and video sharing platforms. In this concentrated environment, the potential risks to access, diversity and pluralism of ideas and information that have already been mentioned become exacerbated.

To make matters worse, evidence shows a tendency towards greater concentration in the hands of a few transnational corporations as a result of the very dynamics of the current business model used for the Internet. This has happened both for reasons related to the success of the services and goods provided, as well as the global scale of the business, the ability to obtain capital for necessary investments, and the merger or purchase of companies, among others.



Traditional anti-trust regulatory mechanisms fall short of dealing with these problems, especially from a human rights approach, which requires analyzing the issue of concentration not only from an economic perspective, but also as an enormous power that has an impact on our democracies and is opposed to the principles of access, diversity and pluralism.

Some facts and facts:

- The region is home to a limited number of large telecommunications companies that have cornered the telecommunications market, including the provision of Internet services. The two main firms are América Móvil, with its main office in Mexico, and Telefónica, with its headquarters in Spain.
- In five of the main countries in the region - Argentina, Brazil, Chile, Colombia and Mexico - the CR4 concentration index for the mobile telephony market is 100. In the ISP market, it is 100 in Argentina and Mexico, while in Brazil, Chile and Colombia it is on average 90.
- The aggregate result hides, in reality, a situation of dominance by three stakeholders (the case of Chile, Colombia or Argentina) or even less as is the case of Mexico, where the two main stakeholders have a participation of more than 90 percent.
- In the telecommunications sector, mergers and acquisitions by telecommunications companies have increased, representing a trend towards greater concentration.
- Platforms or intermediaries have also exponentially increased their participation in the digital economy and in their economic results and profits.
- Part of the dominance exercised by Google and Facebook on the market has been maintained with acquisitions of services that compete directly or indirectly with them. Google has made more than 200 acquisitions since 2001; Facebook has made 62 since 2005.
- Although there are many search engines available, Google controls a monopoly service, which concentrates between 93 and 97 percent of all information searches in Latin America.
- An increasing number of interventions have been taken by the European Commission against Google and Facebook due to their abuse of a dominant position and anticompetitive practices. However, in Latin America there have been no similar initiatives in that sense. The debate about the power of the main Internet companies in democracy, which has formed part of the public agenda in the United States and Europe, has not yet been installed in the countries of our region.





Old gatekeepers, open access and net neutrality

Telecommunications companies continue to play a key role in ensuring the right to the Internet and other basic communications services, as it is impossible to use the “network of networks” without the physical infrastructure and trafficking through the networks and technologies that they provide. Consequently, where there is no coverage and/or affordable prices and a quality service (whether through technologies that provide fixed or mobile broadband), the population is excluded from the possibility of exercising fundamental rights. This is why the main characteristic of the sector should be one of a universal and public service.

Moreover, the same position occupied by such (private and public) companies in terms of Internet access, places them as “gatekeepers” with enormous potential power over the free flow of information and the functioning of a free and open Internet. Such is the case if they apply a non-neutral treatment of the contents and services distributed through their networks, or partial access to the Internet is offered. The existence of a very concentrated market of telecommunications companies -in some cases maximized by being natural or de facto monopolies- aggravates this risk for freedom of expression.

Some facts and facts:

- Network neutrality is guaranteed generically in several Latin American countries, however a large part of legislations depend on inconclusive legal supplements and political decisions. In addition, systematic monitoring of practices that violate net neutrality is still weak, which makes it difficult to follow up this issue in the region.
- Studies highlighted in this report affirm that, as a general rule, regulations have an irregular nature and include exceptions that "in practice and in different ways, have rendered this principle irrelevant or unenforceable".
- Failure to comply with the principle of net neutrality increases with the cases of vertical integration that occur more frequently in the telecommunications sector, due to the possibility of an ISP favoring the traffic of services or contents pertaining to companies of the same group.
- Threats to freedom of expression due to the fragmentation of the conditions of Internet access in the region are also due to commercial practices that offer free access to certain services (e.g. zero-rating) and connectivity projects (such as free basics), creating a kind of "walled gardens".
- The practice of zero-rating is the main case of neutrality violation in Latin America.





New gatekeepers, private censorship and freedom of expression

Without intermediaries, it would be humanly impossible to enjoy the enormous potential available in the network of networks. Companies that provide platforms and applications on the Internet play a key role in terms of access to an open and free Internet, given the task they perform as intermediaries between users and the content available on the network.

These intermediaries no longer represent just technical supports and "transit highways", but often affect the contents that circulate through them. Not only are they able to monitor all the contents produced by third parties, but also intervene in them, ordering and prioritizing their access and, therefore, determining which contents and sources of information a user can see and which not. They can also block, eliminate or de-index contents -which can be declarations protected by the right to freedom of expression-, as well as user accounts or profiles. These actions are often forced by external pressures from government authorities or other private stakeholders, but also due to decisions taken by the intermediaries themselves.

Algorithms are responsible for key decisions about the contents we can access, facilitating or hindering access to the content on the Internet. Algorithm design and the use of forms of artificial intelligence that select the contents that we can view in terms of preferences with the aim of leaving a person "satisfied" and "comfortable" can have good intentions and be a successful commercial strategy to attract users, but are not necessarily compatible with diversity and pluralism, fundamental requirements for the proper functioning of a democratic society.²

Such access that is conditioned to content, as well as the removal of content considered "inappropriate" or "offensive" -in the opinion of the companies themselves and their "moderators"- are carried out with a lack of transparency and due process in terms of the decisions taken or right of appeal. The main companies in the sector do not even publicly report how much content they have decided to withdraw. All of which distances them from international standards on legitimate restrictions on freedom of expression, including the Manila Principles on Intermediary Liability.

International organizations for the protection of freedom of expression have begun to warn about this problem. UN Rapporteur David Kaye stated that "It is all too common for private companies to censor, conduct surveillance, or enforce other restrictions on freedom of expression, often under pressure from governments, but sometimes on their own initiative." For IACHR Rapporteur Edison Lanza, "the lack of transparency in the decision-making process

² The impact on the US presidential election campaign, the results of searches for information and views on Jews and the Holocaust, or the removal of photos of the "napalm girl" and semi-naked Brazilian or Australian native peoples are some of the more well-known examples.



by intermediaries often disguises discriminatory practices or political pressures that determine the decisions of companies".

In a Joint Statement on fake news, meanwhile, Rapporteurs for Freedom of Expression were "appalled by some measures taken by intermediaries to limit the consultation or dissemination of digital content", such as "content elimination systems based on algorithms or digital recognition". These mechanisms, according to the Rapporteurs, "are not transparent, violate minimum standards of due process and/or unduly limit access to or dissemination of content".

The growing impact of intermediaries as a gateway to the information content available on the Internet has also generated a change in the flow of resources within the digital economy. This would seem to be indirectly affecting diversity and pluralism, and is having a negative impact on the economic resources received by producers of traditional information content, especially those that have high fixed costs, such as when undertaking investigative journalism and the provision of hard news.

This situation generates risks for freedom of expression –as confirmed by the evidence presented in this report- that can be ordered as follows:

DIRECT IMPACT ON FREEDOM OF EXPRESSION:

Exclusion, censorship and fragmentation

Removal, de-indexation or blocking of content due to pressure from the State and private actors

Removal, de-indexing or blocking of content due to own decision of the company

Priority given to informative content, ideas and opinions

Priority given to cultural contents and diversity

Fragmentation of public debate and silencing of diverse voices (bubble effect)

INDIRECT IMPACT ON FREEDOM OF EXPRESSION ON THE INTERNET:

impact on sustainability and diversity of content producers

Transfer of advertising revenues from newspapers to intermediaries

Transfer of national resources towards centralized economies

Some facts and facts:

- Alphabet (Google) and Facebook -and their associated services and platforms- have been confirmed as the most relevant companies to guarantee or hinder the flow of information and freedom of expression on the Internet. In the cultural dimension, video on demand applications such as Netflix, and music streaming platforms such as Spotify, also have a significant impact.



- Pressure exerted by state authorities and the private sector (in particular for the protection of intellectual property rights) on these and other intermediaries remains the main reason for online censorship in Latin America.
- Requests for information about users and withdrawal of content are growing in the region. In some cases (for example Google) the proportion of requests from governments in response to court orders has grown.
- Requests related to state surveillance and that encroach on user privacy are growing, and raise concern as to how they are creating a silencing effect due to inhibition.
- There is growing evidence of direct interventions by intermediaries, without external pressures, in the free flow of information, ideas and opinions that circulate or are accessed through their platforms.
- The recording and monitoring of content removal following decisions taken by the intermediaries has not been undertaken systematically by Latin American civil society.
- The algorithms of social networks and search engines are based on criteria that are not transparent and that affect diversity and pluralism, relegating and concealing certain information or opinions, as well as generating a segmentation of public debate.
- Google has been accused of the biased or discriminatory prioritization of its search engine, both from the point of view of human rights issues and commercial competition.
- Some platforms, such as those that offer video on demand services, use algorithms that can inhibit the display of national content, affecting cultural diversity.
- Intermediaries do not detail in their transparency reports the withdrawal of content due to their own policies, made on the basis of monitoring carried out by the companies themselves or from complaints received from other users.
- News organizations have witnessed a significant decrease in online and offline advertising revenues in recent years. There is a growing allocation of commercial advertising in the different Internet services, and a part of this can be explained by the transfer of economic resources previously allocated to traditional media.
- Online advertising has grown sharply, but these economic resources have been mainly captured by two companies in the digital ecosystem: Google and Facebook, strengthening their concentration on the Internet.
- Press organizations have tried to adapt to the new business models to overcome advertising losses, but the ability to carry out investigative journalism and provide hard news is financially threatened.
- However, Google and Facebook have voiced their concern regarding the sustainability of journalism, and have promoted (mainly Google) collaborative actions with journalistic companies, particularly in the area of the development of new business models, monetization of online newspapers, data use and tools provided for applications and technical solutions used by newspapers.



The streaming and online sales model for cultural goods and services has generated structural inequalities for creators and artists throughout Latin America. Although local consumption is considerable, it is mediated by applications located in countries of the global North and generates economic losses that can affect the conditions of creation, with negative impacts on cultural diversity.



Internet access continues to be an underlying problem in Latin America

Analysis of the current development of the digital ecosystem, and the conditions to exercise freedom of expression, reveals advances never before seen in the history of the human race. Significant growth among Internet users has been witnessed in Latin America, with a great facility to produce and publish information and ideas, along with access to platforms and applications that facilitate communication and the conditions necessary to exercise the right to freedom of expression.

However, it goes without saying that the virtues and potentialities of the Internet can only be exploited by those who have access to it. Yet still, 60 percent of the inhabitants of our planet are disconnected. Although considered as a fundamental right in order to exercise other human rights, access to the Internet is far from universal, the excluded being poorer families and those who live far from urban centers.

There is still a large gap in Latin American countries between citizens' access to the Internet within countries -according to socioeconomic levels or geographic location-, and between the countries of the region and the developed nations of the OECD. Even today, millions of people still have no access to an affordable and quality Internet in our region, and this is the main barrier to a full exercise of freedom of expression and the right to information in the new digital environment.

The gap in Internet access that exists between developed nations and others, and also gaps within the same nations, remains the main problem for freedom of expression and the right to information in the digital environment.



Platforms and algorithms neutrality should also be a basic principle of the Internet

Inter-American standards include the principle of net neutrality as an indispensable condition for freedom of expression on the Internet. The objective is, as mentioned above, to ensure that "freedom of access and choice of users to use, send, receive or offer any



content, application or legal service through the Internet is not conditioned, directed or restricted by means of blocking, filtration, or interference".

The same principle should be extended to other intermediaries - that is to say not just ISPs – and with the same purpose of ensuring diversity, pluralism and access to a free and open Internet. This is important because many of these platforms - and the algorithms they use - are increasingly responsible for fundamental decisions about the content that people access.

The level of potential or real interference with Internet content places a huge responsibility on intermediaries who -and if no democratic regulation is in place- in fact become a form of private regulators never witnessed before. This situation is aggravated by the weakness of democratic states to regulate phenomena that transcend their administrative boundaries.

The concept of "neutrality" also holds true for these actors of the digital ecosystem, as OTT service corporations have the potential to affect freedom of expression "by conditioning, directing or restricting" content "through blocking, filtering, or interfering" if they do not act in a neutral way with respect to the information and opinions that circulate through their platforms and applications.

That this ability to be a *gatekeeper* lies in the control of a physical or virtual layer of access, should not affect the principle that gave rise to the notion of net neutrality and placed it as a key issue in the agenda for freedom of expression of the Internet. In fact, there is no indication of systematic and widespread evidence of a violation of freedom of expression based on political or ideological reasons on the part of ISPs to identify a serious problem for this fundamental right, and to conclude that it was a basic principle which should be regulated through the adoption of national laws.



Private-sector regulation, the role of the States and democratic governance

The real possibilities of access, diversity and pluralism in a free and open Internet are concentrated among a few intermediaries or private corporations, whose platforms and services -for example social networks- occupy the role of new public spaces. All this takes place, however, in the absence of accountability. So to what extent is it possible to impose public obligations on private stakeholders?

A central argument is that human rights must have horizontal effectiveness. Member States have to respect and promote human rights in their vertical relations with citizens. But also companies, in their horizontal relationships with users, are obliged to respect such rights. The United Nations Human Rights Council (UNHCR) expressly acknowledged this obligation in 2011 by approving the "Guiding Principles on Business and Human Rights".



This perspective is also justified when it is confirmed that the main platforms have a significant market power, and offer services that can be considered essential. Their market share and impact on essential services such as searches, social networks and audiovisual platforms endows them with an undeniable public dimension and requires, at the very least, regulations that guarantee diversity and pluralism.

The level of potential or effective interference on Internet content places an enormous responsibility on intermediaries, which in reality has transformed into a form of private regulation never seen before. This situation has been aggravated by the (objective) difficulties related to jurisdictional aspects, and the weakness of national States to regulate global phenomena that transcend their administrative borders.

Furthermore, the lack of transparency in terms of the regulations and criteria on which these algorithms are based, together with the absence of adequate mechanisms of due process when making their editorial decisions, has turned intermediaries into private stakeholders that have become judges on decisions without any legitimacy or enabling legal framework.

Even though there are problems involved with finding a suitable form of regulation for OTT services, along with the risks of abusive State interventions, it is not acceptable to give up the search for democratic rules for the functioning of our societies, even in the digital environment.

Self-regulation is part of the response to these challenges as long as it is carried out with respect for the international human rights framework and is compatible with standards such as the UN Human Rights Council's "Guiding Principles on Business and Human Rights." The terms of use and codes of conduct adopted, for example, should not establish rules that are contrary to freedom of expression.

The more self-regulation and better business practices, the less need for State intervention, which is a desirable approach. But this cannot be the only solution. We should not privatize the democratic game rules of our respective societies. The market alone is unable to guarantee the freedom of expression of all people or the existence of inclusive democracies.

On the other hand, trying to resolve the asymmetries between comparable services by eliminating all regulations from sectors that are now regulated, would be a serious setback in a democratic society and in the conquest of fundamental human rights, as well as representing the wavering of the obligation of States to protect such rights. For example, this might mean removing all the obligations and compensation of those companies, and eliminating the guarantees for effective protection of the rights of the people before them.

The scope of some of the economic or administrative regulations could potentially be simplified or revised as long as it is strictly necessary and does not lead to a reduction in the protection of human rights.

Faced with the fear of abusive State intervention and all forms of censorship, the best antidote is the one that the agencies of the Inter-American Human Rights System and the United Nations have developed to guide the protection of rights: regulations must comply with international standards for freedom of expression in order to be legitimate. There should be no difference in the way we address regulatory discussions regarding the Internet and OTT services.



The telecom vs OTT debate and the independence of civil society

The growing importance of intermediaries in the world economy and their fundamental role in the exercise of human rights such as freedom of expression and the right to information is undeniable. Moreover, their appearance has triggered a robust dispute between the most important economic agents of the two main sectors of the digital ecosystem - telecommunications and Internet companies - for the control of the profits of the new economy, which has translated into regulatory debates.

The decline in the economic results of the former –more acute in recent years- and the exponential growth of revenues of the latter, has led the telecommunications companies to question existing unequal conditions from, among others, a regulatory and tax point of view: this has also had an impact on the agenda for freedom of expression. It is inevitable to note, in addition, that this economic conflict has led to repercussions for people and their rights.

The central themes of this debate have been related to competition, investment or taxation. These are undoubtedly important aspects, but such an economic focus limits the way such a complex and vital matter for humanity and the rights of people is approached.

Much of the debate about net neutrality and regulatory asymmetries stems from, or is influenced by, disputes between major transnational corporations. In addition, the current development of the Internet and the increasingly important role of OTT service providers also strains the role of the State and the issue of national sovereignty, as well as the democratic forms that must be adopted to protect the right of the people in the new convergent scenario, while creating an environment that guarantees the development of a free and open Internet.

All of this represents a strong challenge for civil society organizations to adopt positions from an independent perspective,³ even if we do not yet have all of the answers and solutions. As a result, more independent research and data is needed, and not just the inputs provided by companies, experts or *think-tanks* of the parties in dispute.

³ Although in some cases these positions may coincide with the interests of one of the parties. The case of the net neutrality debate is an example of the confluence of positions, which are not always based on the same reasons and interests



The Latin American Observatory of Regulation, Media and Convergence (OBSERVACOM) is an initiative of the Libertis Foundation, a regional non-profit, professional and independent think tank, made up of communication experts and researchers committed to the protection and promotion of democracy, cultural diversity, human rights and freedom of expression in the region.

More information at www.observacom.org

