



**VOICE OR
CHATTER?**
CASE STUDIES

Marco Civil vs. Copyright Reform: A Comparative Study, Brazil

AUTHORS

MARIANA VALENTE
BEATRIZ KIRA
JULIANA RUIZ

AUTHORS

Mariana Valente is the Director at InternetLab, São Paulo, Brazil. She is a PhD candidate of Sociology of Law at the University of São Paulo.

Beatriz Kira coordinates the Policy Watch area at InternetLab, São Paulo, Brazil. She is also a Masters of Law student at the University of São Paulo.

Juliana Ruiz is a researcher at InternetLab, São Paulo, Brazil. She is also a member of the Center for Analysis and Research in Legal Education at USP (CAPEJur).

Research Support: Paula Pécora & Felipe Mansur
Translation: Ana Luiza Araujo

Research coordination team

Lead Researcher: Anita Gurumurthy
Research Associates: Deepti Bharthur & Nandini Chami
Design: Deepti Bharthur & Swati Mehta
Editorial Support: Swati Mehta & Dara Casey

This report is the outcome of a collaboration between IT for Change and InternetLab, Brazil under a research project titled Voice or Chatter? Using a Structuration Framework Towards a Theory of ICT-mediated Citizen Engagement.

This research has been produced with the financial support of Making All Voices Count. Making All Voices Count is a programme working towards a world in which open, effective and participatory governance is the norm and not the exception. This Grand Challenge focuses global attention on creative and cutting-edge solutions to transform the relationship between citizens and their governments. Making All Voices Count is supported by the U.K. Department for International Development (DFID), U.S. Agency for International Development (USAID), Swedish International Development Cooperation Agency, and Omidyar Network (ON), and is implemented by a consortium consisting of Hivos, the Institute of Development Studies (IDS) and Ushahidi. The programme is inspired by and supports the goals of the Open Government Partnership.

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1. Executive Summary

Public consultations are not a novelty in Brazil. Overall participatory processes have been on the rise in the country since the promulgation of the Brazilian Constitution in 1988, after over two decades of military dictatorship characterized by strikingly top-down decision-making. Relevant online participatory processes, however, were inaugurated in Brazil only during the late 2000s.

In 2009, the Brazilian Ministry of Justice partnered with an academic organization, CTS / FGV (Center for Technology and Society of the Getúlio Vargas Foundation), to build a platform for a public consultation about a draft bill on Internet user rights. The draft bill was called an “Internet Bill of Rights”, or *Marco Civil da Internet* (Rossini, Brito Cruz & Doneda, 2015). The consultation process was considered highly innovative, nationally and abroad, and mobilized a wide range of interested sectors (corporate, government bodies, civil society, academia, individuals).

Just one year later, in 2010, the Brazilian Ministry of Culture, after having spent two years promoting open discussions in different cities, with multiple stakeholders from the industry, academia and from civil society, put in place a similar process of public consultation for improving the copyright legislation (a process they called “Copyright Forum” - *Fórum de Direito Autoral*). Both experiences were working toward the same institutional goal: to map arguments, commentaries and insights, and use them as inputs and as legitimization strategies in the traditional lawmaking process. These two processes, which have been strikingly different in many ways, are the subject matter of this case study. By tracing their historical antecedents (examining the specific citizen engagement mechanisms deployed) and their outcomes in terms of citizen participation we will compare and contrast the consultative process of the Ministry of Justice’s *Marco Civil* with the one initiated by the Ministry of Culture for Copyright Reform. Besides stressing the differences, we also examine the common ground between these two processes, specifically, their rationale for adopting the institutional innovation of online citizen consultation in lawmaking processes. The case study used the different paths the two public consultations followed as a point of departure, probing into their differences and commonalities.

After the public consultation and other institutional measures, *Marco Civil* was finally approved by Congress in 2014. By contrast, the bill resulting from the public consultation on Copyright Reform was never even taken to Congress. The intention of this paper is not to establish deterministic causalities for these dissimilar results. Rather, it is to contribute to the understanding of the differences that might have led to them. Comparing an experience that “went right” with one that “went wrong” raises hypotheses about the impact that different factors might play in a participatory process, such as (i) the preorganization of the interests and stakeholders of the matter in discussion, (ii) the intentions and capabilities of the state agencies leading the participation processes, (iii) the technical decisions behind the construction and maintenance of the consultation platforms, (iv) the political context in general, in particular, surrounding the matter of consultation, as well as other factors to be explored.

2. Rationale & Context

In the redemocratization process that followed the period of military dictatorship (1964-1985) in Brazil, new institutions were designed, and with them the necessity of mobilizing stakeholders to make these institutions legally, politically and administratively viable. During the constituent assembly for the drafting of the new constitution (Federal Constitution of 1988), Brazilian civil society was energized and, once the constitution was approved (establishing the legal framework and the decision-making venues required for the election of governing coalitions) it was able to promote significant institutional innovation by joining forces with political reformists (Wampler & Avritzer, 2004). Showing that civil society organizations and social movements found it necessary to

link themselves to the political society, generally through reformist parties in order to establish the necessary support for institutional innovation (Wampler & Avritzer, 2004, p. 291).

In this sense, Brazilian scholars have identified a trend of participation processes being constructed predominantly from the government level to the civil society level, especially over the past decade and a half - a period in which Brazil has been governed by left-wing coalitions (Abers, Serafim & Tatabigiba, 2014). More specifically, the two public consultation processes under analysis here took place during a period of economic growth and political openness to inputs from civil society (the government of former president Lula). During this period, the executive government made use of authoritative resources to make political processes more permeable to social participation. At the same time, the increased financial capacity of the state made it possible to allocate resources to invest in dialogue channels between the government and civil society.

To the international reader, it might be important to highlight the meaning of the election of Lula for two terms (2003-2006, 2007-2010) and that of Dilma Rousseff for the next two terms (2011-2014, and 2015-2016, aborted by an impeachment process), and therefore (almost) four terms of Workers Party ("*Partido dos Trabalhadores*", or PT) administration. PT was founded in 1980, while Brazil was ruled by a military dictatorship (1964-1985), as a conglomerate of left-wing activist forces that, even with their internal dissent, were able to organize the Brazilian progressive field around themselves for two decades. Post redemocratization, Luís Inácio Lula da Silva (Lula), a former unionist and the most prominent figure of the party, ran for every single election, from the first direct presidential elections in 1989, until 2002, when he won with a watered down version of PT's original program, for a term starting in 2003. History starts getting less linear from here, due to what has been called a subsequent bureaucratization of the party (Secco, 2011) and to a political scandal of corruption raised against it in 2005, that led to the arrest of some of its leaders in subsequent years, and of the fragmentation of the progressive forces. Lula was re-elected despite the scandal. The popularity of his administration also led to the subsequent election of Dilma Rousseff, who was impeached in 2016 and substituted by her vice-president, who did not belong to PT but to a party with which it was in coalition, PMDB. This new administration is committed to a conservative agenda.¹

It is during the PT administrations that analysts locate a higher degree of permeability of the federal government, as well as other states and municipalities governed by left-wing coalitions during the period, to Brazilian social movements, who, counting on historical ties, adopted the strategy of occupying positions in the government for the advancement of their goals. When friends, allies and partners in activism became employees of state, personalized connections between state and non-state actors were facilitated. A study by D'Araújo (2009, p.117-119) demonstrates that the Lula administration period (2002-2010) was the first time in Brazilian history that labor union leaders occupied high government positions on a large scale. In his first mandate, 26.2% (16 ministers)² of all his ministries had been part of a labor union organization, and, in his second, 15.8% (6 ministers). This marks a change in all other administrations since 1985 the percentage had never been higher than 9% (4 ministers), observed during the Itamar Franco mandate (1992-1994). Besides this, a high percentage of Lula's ministers kept close relations with social movements (43% and 45%, in each mandate) (D'Araújo, 2009, p. 120). Negotiations were then very likely to happen in informal meetings, not only inside ministries, but also during dinner parties or other spaces external to state institutions (Abers, Serafim & Tatabigiba, 2014).

The presence of former civil society members within the structure of several government sectors bodies led to different experiences and results, depending especially on the historical relations between the civil society groups and state actors. State administration bodies were, to different degrees, transformed into spaces of activism, in which the activists would continue to defend plans they had been building on previously. Many of these former activists came from having successfully

¹ Lincoln Secco's account of the history of the party is considered to be the most complete and accurate study of its kind. See (Secco, 2011)

² It is important to note that the number of ministries might vary from mandate to mandate, since there might be the suppression or creation of ministries

led protests and personalised closed door negotiations at the municipal level (Abers, Serafim & Tatagiba, 2014).

Drawing from their work interviewing such professionals (which 'professionals?'), Abers, Serafim & Tatagiba (2014) show that, commencing with the Lula administration, activists and representatives of the social movements also acted as consultants in specific projects and informal meetings and that meetings with NGOs representatives, professional organizations, and members of the academia were held regularly.

The last decades of the Brazilian experience, therefore, defy certain pre-established ideas, for instance, that bottom-up social change will derive only from a conflicted relationship between state and civil society; in fact, what the above mentioned practices seem to indicate is that if political projects are shared, collaboration may take place (Abers, Serafim & Tatagiba, 2014). It is important to stress, however, that, more recently, critics have also pointed out to downsides of this relationship, such as the demobilization of civil society (the "cooptation" of social movements by progressive governments, or of their neutralization – see discussion in Fiori, 2007, Machado, 2009, or Sampaio Jr, 2006) and attendant difficulties in re-mobilizing after the Workers Party administrations faced their national crises. Either way, the two public consultations under examination took shape, and are to be understood as part of a time period marked by a relatively higher engagement of the Brazilian state with civil society.

3. Methodology

This case study is part of the *Voice or Chatter / Making All Voices Count* project, which, under coordination of IT for Change from India, is an effort to understand, comparatively among 9 countries from 4 continents, the impact of ICT-mediated citizen engagement on governance structures and processes. As part of the comparative effort, one of the frameworks we were suggested to work with was that of Giddens' structuration theory, adding to it other theoretical frameworks or viewpoints that speak to local factors, so that we could best describe the participatory processes in accordance with the objectives of the comparative study and yet maintain a comprehensive and critical account of our object. According to Giddens, structure is a sum of "rules and resources, organized as properties of social systems" that exists only as structural properties (1984, p. 25); it is also medium and outcome as it is created through process. Thus, social life is perceived as process and not as product. Elements of this theoretical framework are used as reference for understanding the cases under study. Considering the context explained above, and important Brazilian scholarship in the area, our analyses of both processes we describe here (the public consultation about the *Marco Civil da Internet* and the one about Copyright Reform) are informed by interpretations of participation and the interplay between social groups and governmental institutions in the past two decades. In the cases under scrutiny, the consultations were the result of demands from civil society, but civil society groups themselves were being constituted in the process as well. One framework that was particularly interesting was the work of Rebecca Abers, Lizandra Serafim and Luciana Tatagiba. These scholars have been studying different cases in which participation in Brazil has been constructed from the government level to the civil society level, and analyzing factors that count for differences in the processes and their results. We also use Giddens' concept of agency (inseparable from that of structure), to think not only about those who wanted to participate in these public consultations, but also those who were able to participate, that is, had access to them - in terms of even having heard of them, of being able to access the Internet, or of appropriating the technical terms that both public consultations entailed. Not every individual could overcome all those steps, and voices of very few people were heard in the end. Thus, following a Giddensian approach, it was also important to identify how agents engaged in their actions in the processes under review. We understand that the particular characteristics of the platforms also produced results in the way participation occurs, at the same time that the construction of the platforms embodies certain values and conceptions about how

participation should work, what sort of participation was expected from citizens, by those who formulate the participation processes etc.

Our approach to analyzing these participation processes was thus focused on one hand, on the role played by different agents engaged in ICT-mediated citizen engagement, and, on the other, the new informational and communicative structures and their uses. We made an effort to grasp the conditions common to both cases, and those that were different in order to shed light on decisions taken by the respective government agency promoting these initiatives, the technologies adopted or developed, dissemination strategies, and how proposals were picked up afterwards. We sought to answer questions such as: how transparent was the process of receiving proposals from citizens and turning them into policy? Did the leading institutions publicly justify the choices they made? How did other factors, in spaces that are less porous to citizen participation (ironically, the Parliament, in our case, as will be developed on later), interact with the processes analyzed, in shaping the policy in the end? How did choice of technical methods influence participation of a diverse set of voices?

Did the institution carrying out the process take measures to promote diversity?

To answer these questions, we carried out a secondary literature review of the online public consultations that were part of the *Marco Civil and Copyright Reform*, and conducted remote interviews with policymakers involved in the two processes, as well as one developer who was responsible for coding and designing the two platforms and make adaptations according to demands perceived during the consultations. It should be noted that the difficulty in obtaining direct access to stakeholders and raw data due to the political crisis that transpired while we undertook this research (and drastic changes in government personnel with whom we had a rapport) was compensated by access to very complete second hand materials.

4. Analysis/Results

4.1 Process Overview

Both, the Marco Civil and the Copyright Reform public consultations were innovative experiences in the use of ICTs for improving citizen participation in lawmaking. These initiatives involved processes of planning, designing and setting up of digital platforms which experimented with direct voice channeling and an indirect (centralized) procedure of gathering suggestions for decision making. A general description of these phases is provided below, relying mainly on information provided by informants, who spearheaded the processes in the public institutions, and on recently produced literature about these experiences, mainly Brito Cruz (2015) and Silveiras (2014a and 2014b).

4.1.1. Marco Civil da Internet

In June 2009, the then President Luiz Inácio Lula da Silva formally initiated the process of building an Internet Bill of Rights and designated the Ministry of Justice for this task. The Secretary of Legal Affairs in the Ministry of Justice (SAL/MJ) was assigned a supervisory role. Legislative elaboration within the Executive was one of SAL/MJ main attributions, which was a decisive factor for the choice of this body as head of the process within the federal government (Bruto Cruz, 2015, p. 51).

The project for the collaborative development of the *Marco Civil da Internet* was formally launched on October 29th, 2009, a joint effort of several federal administration bodies: SAL/MJ, the Secretary for Strategic Matters (SAE), and sectors of the Ministry of Culture. Besides the public administration partners, a key role was played by a research center called CTS-FGV (Center for Technology and Society, Getúlio Vargas Foundation), since that had been closely following and debating the legislative propositions around cybercrimes, and leading the idea that the Brazilian Internet needed

a bill of rights instead of new criminal laws (Brito Cruz, 2015, p. 20). Also, at the time, it was the most important and perhaps the sole academic institution devoted to the subject in the country, and counted on a large enough team of researchers to offer specialized technical support to the Ministry of Justice.

A technical cooperation agreement was hence formalized between CTS/FGV and the Ministry of Justice. Another reason for the choice of CTS seems to have been the fact that its then coordinator was Ronaldo Lemos, who was considered the flag bearer of a civilian approach to Internet regulation (Brito Cruz, 2015, p. 53).³

According to Silveiras (2014b), the construction of the consultation was marked by the need to not depend on the public budget, while at the same time achieving a large diversity of perspectives from society. To combine both, the path chosen by SAL was that of building a social participation tool through the Internet. SAL had previous experience in working with implementation of participation mechanisms in the process of the elaboration of norms - one of its moots was "democratizing the legislature." The idea to use new technologies was already circulating within the entity.⁴ Members of SAL had already, even before the idea of the public consultations, debated the democratization of legislative production and models of public participation with new technological bases (Brito Cruz, pp. 51-52).⁵

When the platform for consultation was to be developed, it was actually the Ministry of Culture which hired a tech team, under the scope of an agreement with the United Nations Development Programme (UNDP) to improve the already existing portal *Cultura Digital*. *Cultura Digital* (<http://CulturaDigital.br>) was a platform financed by the Federal Government which had been set up with the objective of enabling debates on public policies in the domain of culture and technology. Its architecture was conducive to hosting the blog based public consultation process on the *Marco Civil* (Brito Cruz, 2015, p. 61): amongst the official portals owned by the federal government, it was the only one that permitted the insertion of comments directly by users, without moderation. At that time, government websites, which previously allowed for citizens' comments in many sections, had already begun to shift to their current policies, that is, no direct commenting is permitted, as a rule (Cordova, 2017).

The *Marco Civil* consultation process consisted of two phases, the first one held from October 29th to December 17th 2009, and the second one from April 8th to May 10th 2010 (Brito Cruz, 2015). In the first phase, the objective was to use the contributions to create a base text for the construction of a preliminary draft of the bill. The debate was structured along the following axes: 1) individual and collective rights, 2) intermediary liability, and 3) guidelines to government. For each axis, the government listed out "issues of attention", on which the participants could comment.

SAL/MJ's managers of the public consultation indicated that the participatory process sought to "complement" the legislative powers of the Brazilian state institutions with arrangements that enabled hearing and contributions from citizens. That is, the idea was not for the participatory format to replace the role of elected deputies and senators, as the draft bill would still undergo the "traditional" path of the legislative process (Brito Cruz, 2015, p. 56). SAL/MJ also understood that opening the discussion about the draft did not imply delegating the elaboration of the draft to third

3 Nolasco points that Ronaldo Lemos was identified as the front runner of the proposal for an Internet Bill of Rights, presented in an article in 2007: "from Lemos' article, the discourse surrounding a bill of rights for the web began to circulate. If, before, the movements were towards blocking or altering the draft bill proposed by Senator Eduardo Azeredo, from there the pressure for a civil bill of rights began" (Nolasco, 2014, p. 79)

4 An interview made by Brito Cruz revealed that one of the references used for the elaboration of the platform was the online public consultation about the structuring of armed forces in New Zealand, made through the Internet on a tool similar to the one used in the case of the Internet Bill of Rights (Brito Cruz, p. 62): <http://www.police.govt.nz/news/release/3370.html>; and <http://www.stuff.co.nz/47127>

5 As Daniel Arbix, former SAL head of office, reported in an interview to Brito Cruz, "the participation was seen as value in itself at that time. [...] To all people in that moment there was a great belief that the participation is a value in itself and that it should be maximized. And the new technologies would open a tremendous opportunity for this" (Brito Cruz, 2015, p. 54)

parties. Managers involved in the project highlighted that the idea was never to create a *collaborative* proposal, in the sense of joint construction of the text, but in fact to open up a space for the text proposed by SAL to be debated by the participants. That is, even though SAL proceeded with the premise that the inputs received would contribute to the elaboration of a more coherent and adequate bill (both for the Internet and the Brazilian society), the prerogative of writing the draft text was the Secretary's (Brito Cruz, 2015, p. 63).

After receiving and analyzing the comments in the sections proposed in the first phase, the Ministry of Justice put together a preliminary draft bill, consisting of 34 articles, divided into five chapters: 1) Preliminary provisions; 2) Rights and guarantees of the users; 3) Provision of connection and Internet applications; 4) Role of Public Authorities; 5) Final Provisions (Silveiras, 2014a). The second consultation phase started, inviting comments to be made directly on the preliminary draft bill.

In the process of elaboration, collection of contributions and thematic consolidation of the future draft bill, CTS-FGV had a relevant role, even if under the coordination of SAL/MJ. The two teams met regularly to systematize the contents posted and organize the presented arguments. These meetings shaped most of the text. However, it is important to point that the more polemic final decisions about the text were not made together, but exclusively by SAL/MJ. Although SAL administrators perceived CTS as the main academic stakeholder in the discussion, as well as holding an important role of contextualizing and systematizing the results or suggesting further steps, the final word was always the Ministry's (Brito Cruz, 2015, p. 67).

In order to expand participation, the Ministry of Justice decided later on to consider the contributions received by means other than the online platform. Officials of the Ministry understood that otherwise important contributions would be ignored and missed. Administrators of the consultation were afraid that merely relying on the platform would not be enough to cover all possible contributions to the text. They felt that accepting offline contributions and even online ones, but off-platform, could add to a greater plurality of voices. Therefore, content posted on social networks, like Twitter and blogs, texts sent via email and speeches made in events and seminars during the period of the consultation were also considered during the formulation of the draft text (Brito Cruz, 2015, p. 72).

The majority of comments received on the *Marco Civil* platform were posted by citizens, not by organizations. NGOs and class associations, such as those representing users or other categories of citizens for the public interest, participated in a more sustained manner than private companies, who concentrated their inputs only in the last days of the consultation, therefore avoiding further discussion and criticism by others (Brito Cruz, 2015).

Altogether there were 133 participants in the first phase, 118 citizens and 15 entities (mainly class associations and NGOs). During the second phase, 245 participants were identified, 150 citizens and 14 entities. In addition, 2 citizens and 21 entities submitted comments by e-mail; and 34 diplomatic representations were sent directly to the Ministry of Justice, after an express request by the Brazilian Ministry of Foreign Relations. At the end of the process, the *Marco Civil* Consultation received over 2300 inputs altogether (across the two phases). There were more than 123,000 visits to the website, with 686 comments in the first phase and 1295 in the second stage, with 1981 contributions to the text (Brito Cruz, 2015).

4.1.2. Copyright Reform

The necessity of reforming the Brazilian Copyright law of 1998 came from a diagnosis shared by Ministry of Culture officials and civil society stakeholders that identified a significant gap between copyright protection and the context of new technologies. This assumption was also in consonance with the international agenda of addressing copyright legislations inadequate to protect works enabled by the digital age. This debate, worldwide, has branched off into two very different paths (and hence the term copyright wars, that characterized many of the discussions on copyright at the

start of the 2000s): one that has been termed copyright maximalism (Litman, 2001; Boyle, 2008), championed by the Clinton's administration's taskforce (IITF) to establish new interpretations and new rights to defend cultural industry interests on the new spaces of the Internet, and another, which was against the maximalism agenda, known as the A2K approach or the "access to knowledge" that advocated for what was understood to promote users rights in the digital environment.

In Brazil, in addition to the concerns about the need to revisit existing copyright legislation which were being raised in the international arena, two other matters relating to incidents that took place between 2005 and 2006 were also flagged: the escalation in criticisms directed at the Central Bureau for Collection and Distribution – Ecad (the Brazilian collecting society for music royalties for public performance rights), due to a perceived corruption and centralization of decisions and resources within a handful of powerful labels and publishers, and the strategies adopted by the Brazilian Association of Reprographic Rights (ABDR) of suing academic directories, professors and students for photocopying full or partial books. Although Ecad had been heavily criticized since its inception in 1973, according to Silveiras (2014a, p.142), an important turning point happened in 2005, when, in a government ceremony held at the Planalto Palace (the official workplace of the President in Brazil), representatives of Ecad charged for music royalties, which was seen within government as an extremely arrogant posture. In the case of ABDR, its practices engendered a reaction among civil society organizations, and set off a movement called "Copying Books is a Right" (Silveiras, 2014b, p. 8). In the face of these issues, the administration decided it was time for reforms, reckoning that existing legislation was inadequate and also disproportionately penalized everyday practices, such as the use of photocopies in universities or the public showing of a movie in a school for educational purposes.

Marcos Souza, Director of Intellectual Rights in the Ministry of Culture (sector responsible for subjects related to copyright) between 2009-2011 and 2012-2016 (Silveiras 2014a, p. 227) argued that, at the time of those controversies, there was an internal administrative discussion on changing the Copyright Law by the means of a Provisional Measure (*Medida Provisória*). Provisional Measures are acts by the President which are temporary but legally binding as soon as they are issued,⁶ and which can subsequently be enacted as law through legislative power. The idea was contested by the then Minister of Culture, Gilberto Gil (2003-2008), because a Provisional Measure would be too authoritarian and it would be preferable to hold a discussion with various stakeholders first (Silveiras, 2014a, p. 227).

It is important to point out that Gilberto Gil promoted many changes in the public cultural sector while Minister. According to commentators, before Gil, the Brazilian government severely neglected the implementation of public policies aiming to promote culture, (Varella, 2014, p.14) except for a few partnerships and policies on tax incentives to the private sector. With Lula's election, the Ministry was reformulated, and Gil is said to have catalysed a shift in the mentality of the institution, promoting the acknowledgement and valuing of all artistic and cultural forms (Varella, 2014, p. 173). The State went from being a passive to an active agent in this process. Gil was also an avid defender of free software and advocated for open access culture, through measures such as becoming a political sponsor for Creative Commons (CC) licenses, publicizing them as a democratic tool for culture and licensing the Ministry's materials under such licenses (Valente, 2013, p. 156). His successor, Juca Ferreira (2008-2010), was aligned with Gil's vision, which helped continue these efforts.

In 2005, the Ministry of Culture promoted the First National Conference of Culture. The First Conference's aim was to create a new model of public policies for the promotion of culture with the aid of civil society and various government branches by elaborating the directives of the National Culture Plan (*Plano Nacional de Cultura*). The National Culture Plan, regulated by Law n.

⁶ The Federal Constitution, art.62, defines the boundaries for such act. After such an act is issued, it may be subjected to Congress's scrutiny if the Congress deems necessary.

12.434/2010, laid out 53 goals and strategies in order for the public administration to promote and stimulate cultural activities, one of which was to hold events and meetings that would enable participation in the development of policies on the part of private agents, cultural and academic institutions (Varella, 2014, p. 179).⁷ During the conference, the demand for copyright law reform was also raised by civil society stakeholders (consumer rights NGOs, musicians, academics and lawyers).

Thus, a National Forum for Copyright was created, and various public and open debates were held between December 2007 and December 2009 (Silveiras, 2014a, p. 142). The key self-proclaimed, objectives of the Forum were to hear representatives from as many segments as possible on the issue of whether the government diagnosis about the inadequacy of existing copyright legislation was correct and to collect contributions that would feed into the development of a more adequate new law. So, during those events and debates, proposals were collected, and the Ministry developed a preliminary draft bill establishing modifications to the 1998 Copyright Law.

Thereafter, the bill was taken to an online public consultation. It outlined changes in three main arenas:

1. For authors, the bill aimed at providing them with a higher level of control over their own works, and also proposed the creation of the Brazilian Institute of Copyright (IBDA)
2. For citizens, the proposed changes were aimed at expanding Limitations & Exceptions (L&E), with the explicit objective of promoting balance in Brazilian copyright and enhancing access to culture and knowledge.
3. For investors, the bill sought to stimulate new digital business models (Silveiras, 2014b).

The platform *culturadigital.br*, which was used for the purpose of discussing the draft bill, was first open to contributions (1st phase) between June 14th and August 31st of 2010. In order to participate, one had to create an account on the platform, and contributions could be made by both collective or group entities and by individuals. On each provision of the draft bill, one could comment and suggest if the provision should be removed, altered or kept as it was. A second phase of the debate took place between April 25th and May 30th of 2011, and major changes in the format were implemented.

4.2. Key findings and institutional challenges

The formulation of both draft bills analyzed here faced three distinct group of challenges, as categorized by Brito Cruz (2015): *infrastructure*, an *enabling discussion environment* and *responsiveness*. The first challenge was related to the necessary resources for the creation of the online platform, considering that its establishment needed not only technical, but also bureaucratic and human resource infrastructures. In addition, it was essential (in both initiatives) that a specialized tech team be in place in order to manage the public consultation and to establish channels of communication, to ensure a smooth process that would enable the consolidation of the text of the preliminary draft bills with inputs from different sections of society (Brito Cruz, 2015). In both consultations, the team of tech experts responsible for the development and maintenance of

⁷ The First Conference was divided in two phases. The first one can be divided into three axes: (a) the virtual conference; (b) sectoral seminars with cultural institutions and movements; (c) conferences with different government sectors. In the virtual conference, the goal was to collect proposals in a public forum. From September to November 2005, there were pre-conferences with sectoral representatives. According to Varella (2014, p. 119), there was intense and diverse participation, even if some felt that the format of the seminars was too rigid and the discussion too fragmented, which made the Plan less complete (Rubim, 2008, apud Varella, 2014). The Ministry of Culture's public managers who conducted the seminars do not seem to agree with this criticism. In the second phase, the suggestions which were collated were taken into consideration to elaborate the directives of the Plan.

the platforms were consultants of the Ministry of Culture, and they were hired under an agreement with the United Nations Development Programme (UNDP) (Cordova, 2017).

The second set of challenges (*enabling discussion environment*) showed itself to be more complex: it involved thinking through the forms of participation that would be accepted on the platforms. It also involved debates around the division of the subject matter into more embracing general themes, so that specific forums of discussion could be used according to the demands of each matter. Finally, there was the dilemma on whether or not to accept contributions sent from outside the official consultation platform (Brito Cruz, 2015).

Lastly, there was the *responsiveness* issue: whether to create tools like content analysis or automatic flagging of certain posts to give attention to the comments received, and decide whether or not to reply to them. Also, decisions regarding having separate themes under the same consultation, whether or not to release preliminary draft bills for comments, or whether that would mean evidencing beforehand the government's stance on certain points (Brito Cruz, 2015). In the case of MCI, in order to address this issue, SAL opted for dividing the consultation in two phases, as already mentioned. The first one gathered general contributions related to three different axes, while in the second phase, the government provided a draft text for participants to comment upon.

The design of the participation platform showed itself to have an impact on how participation would occur, as in whether participants would just submit their contributions or debate with each other, as we will clarify later on. This aspect was not so relevant in the development of the platform for the *Marco Civil*, mainly because of the tight deadline, but the quite relevant the case of the Copyright Reform platform, building on the evaluation of both positive and negative aspects of the Marco Civil consultation (Cordova, 2017). Beyond this, a technical body to put the platform online was needed. SAL's idea was to release it as a blog, programming its structure on the Wordpress platform (Brito Cruz, 2015, p. 67). The timeframe presented by the technical IT body of the Ministry of Justice for the development of a platform, however, did not meet the project's schedule established by SAL, which then had to seek another solution. The alternative identified was to host the consultation on the website *culturadigital.br*, under the responsibility of the Ministry of Culture, which was already online and functioning (Brito Cruz, 2015, p. 61).

In the case of the *Marco Civil*, as stated, the idea of using an online public consultation was a political strategy to invert the agenda that had been placed before Congress at that point. As reported by Brito Cruz, the genesis of the civil rights framework for the Internet is linked to mobilization against another bill aimed at regulating the Internet in Brazil, PL 84/1999, authored by the Deputy Luiz Piauhyllino (PSDB), whose rapporteur in the Federal Senate was Senator Eduardo Azeredo (PSDB-MG). This proposal, in the wake of a series of draft laws under analysis by the Brazilian Congress at that time aimed at regulating the Internet, using a criminal law as their entry point. The text defined criminal offenses on the Internet, brought in new surveillance obligations, and granted "superpowers" to law enforcement agencies to curb conduct on the Web. This perspective worried representatives of organized civil society, academics and companies who campaigned to defend the idea of a civil rights framework to regulate the Internet (Brito Cruz, 2015).

With that objective ahead, SAL chose to design an instrument that would allow social participation through the Internet, in order to increase the democratic character and the legitimacy of the legislative process *vis-a-vis* social demands (Brito Cruz, 2015). This choice led to many criticisms. On the one hand, some people argued that it would jeopardize the tripartition of the powers and pointed to problems regarding lack of representation. It is a concern that is voiced, regarding public consultations in general, for example by Best & Krueger (2015): according to them, participation through the Internet could exclude a certain audience, or produce a determined opinion that does not reflect the public view. In the Brazilian context, one argument in favor of this position is that a large part of the population is excluded from the Internet – it was only in 2013 that the number of Internet users surpassed the threshold of 51% of the population (TIC, 2013). What is implied in this

position is that online participatory processes would not be able to reflect diversity in the way traditional representation did.

On the other hand, proponents of the proposal for online consultations felt that it did not cause a rupture with the system, but complemented the legislative process through expanding popular participation. Schultz (2014) argues that, in spite of the fact of the parliament's central role in lawmaking, the tendency in cases of more complex matters is that social participation would be valuable, since it can encourage a wider production of knowledge about subjects discussed in Congress.

In addition, to try to address the obstacle of translating a legal discussion into accessible language, especially to a possibly uninitiated and diverse audience of Internet users, the option adopted by the MJ was to use the consultation in a Wordpress platform, that, due to its simplicity, capacity to arrange documents in a reasonably organized system of annotations and remarks, proved a more accessible format (Brito Cruz, 2015, p. 64).

The consultations on Copyright Reform took place after the collective elaboration of *Marco Civil da Internet* and was greatly inspired by it. In a way, the fears and insecurities regarding the effectiveness and legitimacy of the online public consultation process were overcome. In fact, the experience with the *Marco Civil* was considered positive by the officials in charge of conducting the public consultation on Copyright Reform within the Ministry of Culture, especially Marcos Souza (Director of Intellectual Rights of the Ministry), who specifically requested the development of a similar platform, but also offered inputs that ultimately improved the process (Cordova, 2017).

4.3 Citizen engagement

In order to understand the implications and inferences of this case from the standpoint of transformative state-citizen engagement, it is important to grasp for both cases, the profiles of those who participated, which voices were considered, and how the citizen-government relationship unfolded.

In the case of *Marco Civil*, the guidelines for the consultation were better suited for collaboration between participants, without any provision for censorship or prohibitions, and followed a model of collating insights under key thematic areas. Thus, the contributions were assembled according to themes, which directed the users and also encouraged them to raise the quality of the arguments brought into discussion (Brito Cruz, 2015). The rules for contributions made through the *culturadigital.br* platform were previously established by specific sectors of the Executive Branch and shaped the debate within the platform. These rules came from two sources: the guidelines and terms of use of the public consultation itself, elaborated by its managers, and the terms of use of the *culturadigital.br* page, the website where the consultation was hosted (Brito Cruz, 2015, p. 68).

The consultation guidelines clarified that the platform's aim was not to be a chat room, or even a debate forum, but a qualified discussion environment, in which opinions posted should be adequately justified. The guidelines document also expressed a concern about ensuring thematic relevance of the debates, instructing participants to post their contributions "in the respective appropriate sections of the website, referencing to the pertinent topic in that section", even though many themes had connections among themselves, explaining that "comments posted in the wrong thematic section may not be considered" (Brito Cruz, 2015, pp. 68-69).

The terms of use of the *culturadigital.br* website were longer and presented more specific rules, befitting a discussion forum. The text explained that accepting the document was a requirement for the participation in the debates and that, when accepting the terms, the user recognized that every contribution would be used in the debates (Brito Cruz, 2015, p. 69).

The Copyright Reform consultation, as already mentioned above, was divided into two different stages. Each one took place in a different political context, which had a direct implication on the design of the platform and, thus, on citizen engagement itself. During the first phase, citizens could engage with each provision of the draft bill, by either commenting, informing an opinion or suggesting if it should be removed, altered or kept as it was. This method allowed the participation of a great number of ordinary people, as they did not need a technical background to participate in the process. This choice, on the one hand, led to a higher amount of participation, but, on the other hand, imposed difficulties with respect to the systematization of the data collected. While one of the main characteristics of the consultation was the variety of participants, providing interesting contributions (Silveiras, 2014a, p. 152), the government team responsible for this task faced some difficulties when processing the data and trying to build a consensus out of the opinions and suggestions received (Silveiras, 2014b).

According to Cordova (2017), the interface of the first phase of the Copyright Reform was more user-friendly than the MCI's. Marcos Souza, the then Director of Intellectual Rights and the official in charge of the process within the Ministry of Culture, explicitly asked developers to ensure that the platform was more horizontal than that of the MCI, so that the voice of ordinary people would have the same weight as entities' voices. One of the issues was that it was ensured that a citizen posting on the platform would always see the original draft text being commented on. One other feature was that the text was divided into several pages, so the user would not have to scroll all the way down to find an article. It also featured a 'search' box through which people could look for a particular term, section, article or paragraph, even if this content was not on the same page the user was currently on. When inserting comments, the user had to indicate if it was for, or against, that section. If against, the user had to write a justification and insert tags in the post. In the first phase (from June 14th until August 31st 2010), participation was open to anyone interested to contribute, but it was necessary to enter their taxpayers' unique number (CPF, for natural persons or CNPJ for entities) as a way of identification. Those features made it so that the interface was user-friendlier, what enables the participation of the ordinary citizens and not only of industries that rely on professionals dedicated to analyzing a long and complex text and discussion, and also that positions had to be justified and were therefore more engaging.

According to the interview held with Cordova, participation in the Copyright platform was more horizontal, which favored the debates. The requirement of justifying opinions made the discussion more robust in contrast with the MCI consultation. In many of the MCI's contributions, users simply stated that some paragraph was "terrible" or "stupid", but did not present arguments to support such views. One downside of the Copyright consultation platform according to Silveiras (2014a, p. 147) was that even if the comments were more robust, it was not possible to reply directly to a comment.

Also, an interesting mechanism used in the first phase was an API (Application Program Interface) that tracked the IPs (Internet Protocols) of the comments. This tool did not directly promote diversity, but made it possible to identify from where the comments were coming. From the data collected by the API, the civil society group *TransparênciaHacker*⁸ was able to identify users and came to the conclusion that Ecad (the collective management agency to which we referred before) and Ecad's partners had flooded the consultation with negative comments without necessarily identifying themselves as such.⁹ That is, pretending to be different users, Ecad posted several equivalent suggestions.. Therefore, IP tracking increased the transparency of the consultation.

⁸ *TransparênciaHacker* is a civil society activist group composed of people from different backgrounds, such as programmers, developers, journalists, public managers, designers etc. The group is organized mainly in a discussion list (<https://groups.google.com/forum/#!forum/thackday>), in which its members seek to articulate ideas and projects using technology for society's interests. For instance, one of this projects is called "SACPSP", by which complaints made to the São Paulo Mayor Office are systematized. According to Cordova, this group is not as active nowadays.

⁹ According to <<http://consultalda.thacker.com.br/uma-leitura-dos-dados-gerados-pela-consulta-publica-da-nova-lei-de-direitos-autorais/>>, last accessed Jan 27, 2017

In contrast, during the second stage of the Copyright Reform public consultation held in April of 2011, a different method was employed, which limited the scope of participation. This time, individual persons and entities were treated differently: each person had to fill a very complex form in order to participate, while institutions had to submit their inputs through a formal document sent to the Ministry's physical or electronic address, and those documents were not made available to the general public (Silveiras, 2014b, p.11). In addition, in the individual participation modality, one had to present concrete arguments demonstrating the need for modification or improvement by justifying it with local or international legislation. This more rigid form of participation led to a decrease in the number of contributions and the number of participants, since only those possessing legal knowledge were able to provide their inputs.

The shift in political context explains the choice for another round of contributions and changes in strategy. When, after the end of the first phase, undertaken by the Ministry of Culture headed by Gilberto Gil and Juca Ferreira, the draft text of the Copyright Reform was almost ready to be sent to Congress, on January 1st 2011, after the election of Dilma Rousseff, the Ministry of Culture gained a new head, minister Ana de Hollanda. This political shift raised concerns amongst the supporters of the Copyright Reform, since de Hollanda was considered a supporter of Ecad's interests.¹⁰ Leading representatives of the civil society decided to write an open letter to her and to the then President Dilma Rousseff, flagging their concern. In Hollanda's first month in office, she removed Creative Commons licenses from the Ministry's website, which was considered by some as a sign of opposition to the "free culture movement", understood to be a vector of the Copyright Reform in the country. In the following months, Marcos Souza, one of the main masterminds of the reform, was dismissed from his post of Director of Intellectual Rights.

In an interview held in 2013, Marcos Souza criticized the complete change in the format of the second consultation. According to him, the new design made the debate impossible, provided for insufficient data analysis and lacked in responsiveness to society (Silveiras, 2014b). It became a requirement that contributions would have to be based on factual and legal aspects (Silveiras, 2014b, p. 11) – the user would have to fill specific fields in order to have the proposal sent. Therefore a legal background was required in order to engage effectively. This resulted in the decrease of contributions from 7863, in the first phase, to only 178 in the second phase (76 from natural persons and 92 from legal persons). The whole consultation was clearly directed to a narrower public, one that was already engaged in the discussions of copyright and therefore was not engaging to a wider public or to the civil society who was beginning to engage in these topics as representing the users. There were no actions to engage this public, as compared to a previous phase, in which several events were held with different publics, to gather the opinions of and engage those who were not involved yet. Comparing the first and the second phase, one can draw the conclusion that the second consultation followed a pattern which is very similar to many in-person consultations (offline), in which contributions are made by a small number of participants, of a more homogeneous profile, that is, who possess the social and political resources to participate. Thus, in the second phase, the full potential and benefits of online consultations were not properly explored. (Silveiras, 2014b).

4.3. Government responsiveness to participation

As stated above, the results for the two processes were strikingly different. One of the questions to be asked in order to better understand how this happened relates to whether the participation spaces constructed for these processes were in fact being used by the population, and to what extent the public consultations contributed to the empowerment of the agents involved in the process, i.e. in the capacity of the agents to achieve desired outcomes.

¹⁰ Several news outlets were referring to this radical shift and reflecting different views on it. An example is "Mudanças no Ministério da Cultura", in <http://link.estadao.com.br/noticias/geral/mudancas-no-ministerio-da-cultura.10000040327>

In the *Marco Civil* process, the Ministry of Justice had the position of taking a final decision regarding what the final text of the draft bill would be, as the coordinator of the three stages of the process: i) elaboration, contribution gathering and thematic consolidation of the future bill; ii) platform management; and iii) political articulation, inside and outside of the government, with the intention of disseminating the public consultation and encouraging the participation of interested citizens and social groups. CTS-FGV (Center for Technology and Society, Getúlio Vargas Foundation) was also an important actor, although the more polemical final decisions on the text were taken by the Ministry of Justice. The process of managing the platform from the technical point of view was carried out outside of the Ministry of Justice, by an expert team in the Ministry of Culture, which gave the technical aid necessary and hosted the webpage for the process on its portal *culturadigital.br* (Brito Cruz, 2015; Cordova, 2017).¹¹

In fact, the process of technical administration of the platform was a huge challenge faced by SAL and the participation of the Ministry of Culture was key. This is because the bureaucratic processes of the government sector create barriers and delays in processes of institutional innovation, which, in this instance, was that of building technological tools, and the public sector culture and established norms could make the whole process of designing and redesigning the platforms excessively inflexible. (Brito Cruz, 2015, p. 60).

SAL (for *Marco Civil*) developed a methodology for the analysis of the comments posted directly onto the platform, by dividing them in the following way: theme in question, person who posted the content, and degree of “repercussion” generated – which was measured by counting the number of replies and rejoinders of other participants (Brito Cruz, 2015). The axes made available in the first phase were allegedly inspired by the Federal Constitution and the set of recommendations presented by The Brazilian Internet Steering Committee (CGI), in a document entitled “Principles for governance and use of the Internet”. Both texts worked as procedural bylaws, to guide the discussions among citizens, establishing parameters for future participatory experiences through the Internet. These were provisions related to human rights such as freedom of expression and privacy, to access that is universal and allows for innovation, to a governance committed to participation and diversity, and to the need of developing standards that are inter-operable.¹²

After the drafting of the final text by the Ministry of Justice, it was debated among the ministries involved until a consensus from the Executive branch was achieved (Office of Internal Affairs, Ministry of Planning, Ministry of Communications and Ministry of Science and Technology). The bill was then sent from the Presidency’s Office to Congress, where it was numbered 2126/2011. In the Congress, the bill went through important changes. When the bill 2126/2011 was being discussed in the Chamber of Deputies, one view was that the text generated too many controversies with very different sectors, which would make its approval unfeasible. For the text to be approved, rapporteur Alessandro Molon (PT-RJ) led a negotiation with several key actors. One of the most important changes was the insertion of data retention provisions (the obligation of ISPs and OSPs to store user connection and traffic data, respectively), deferring to the opinion of investigation agencies (like the Federal Police). The second major change was that copyright issues were deliberately excluded from the bill due to pressures from the entertainment industry sector. One of the greatest resistances to *Marco Civil* came from groups holding copyright and related rights, with strong lobbying power, and they got themselves an exception for copyright cases in the intermediary liability rules that could affect expedited removal of content that the industry wanted to see implemented (see Papp, 2014). This meant that even after the *Marco Civil* public consultation and the text that came out of it, many dimensions of the bill were still altered, something that turned some of its previously passionate defendants against the *Marco Civil*.¹³ Evidently, amendments

¹¹ According to Cordova, since 2004, the official government websites are not allowed to receive comments, due to a security policy. So the Ministry of Culture sponsored the platform *CulturaDigital.br*, with the goal to promote direct participation. *Cultura Digital* hosted both public consultations under review here

¹² See <https://www.cgi.br/resolucoes/documento/2009/003> (Portuguese)

¹³ For instance, see here Pablo Ortellado, a São Paulo University Professor, criticizing some changes made to the final version of the *Marco Civil*, such as the clause on data retention : <http://www.huffpostbrasil.com/pablo->

made by the Congress are representative of how norms shift can be traced to power. The discussion about the *Marco Civil* went beyond the public consultation and went to political processes where powerful lobbies could influence its final shape. Online participation, it seems, had a positive outcome; it did bring public attention to the subject and created a proper field for discussing the matters regulated, but the voices of the participants of the consultation were not the only ones heard (Silveiras, 2014b). In Congress, industry lobbies and investigation authorities were heard and their opinions were given more importance than what had been assigned through the open consultative process, leading to important changes in the text.

The mobilization around the text of the project resulting from the public consultation had effects beyond the law itself. Entities and actors from civil society and academia who engaged and contributed to the process defended the democratic slant of the text, although the final version did not cover all the demands of all sectors, and they also began to enter a new domain of activism, organized in defense of the digital rights. Alliances formed in that context have lasted and continue to guide discussions about the scope of the Legislative, Executive and Judicial branches. These initiatives can be represented by the *Coalizão Direitos na Rede*, the *Observatory of the Marco Civil da Internet* and the blog *Deu nos Autos*, which analyzes judicial decisions related to the Internet.

Regarding the processing of the information gathered during the first Copyright Reform consultation, the Ministry of Culture chose to analyze it through the making of a report that listed the text of the law in effect at the time (Copyright Law n. 9.610/98), the alterations proposed in the draft text, a description and analysis of the contributions made to specific issues, and ended with a final proposition. The processing of information was divided among the public officers, with the aid of the Ministry's legal counseling area, in a procedure that went from July to December 2010. The experience was considered a success and efficient for the processing of the obtained data (Silveiras, 2014b). The report, however, was never publicly made available, so no direct feedback was given to participants regarding which contributions were incorporated into the bill (Cordova, 2017).

After processing the data gathered during the first phase of the consultation, the Ministry of Culture released an internal spreadsheet with all the contributions, and proposed a the final version of the text as a result of the analysis of each topic. It was then sent to the Interministerial Group of Intellectual Property (GIPI), for other Ministries related to Intellectual Property to deliberate upon and approve the proposal in its totality. A report that analyzed the total of 7863 contributions was also released to the GIPI, revealing, according to informants, that the inputs had come from 843 individuals and 149 institutions. As for the opinions expressed in the contributions, 1315 agreed with the proposed draft pieces of text on the first phase, 1347 partially agreed and 5201 didn't agree with the proposition¹⁴ and wished that the text remained as it was before (Silveiras, 2014b).

On August 11th 2011, the new contributions (made in the second phase) were analyzed and the final text of the bill was sent to the GIPI. In September 2012, Ana de Hollanda left the Ministry and was replaced by Marta Suplicy, who was then a Senator for the Workers Party and who, despite not having been directly connected to cultural public policy before, was more aligned with the visions of the previous Ministers (Gilberto Gil and Juca Ferreira), and, although did not see the issue of copyright as a priority, showed a more supportive approach to the previous reform. She held a meeting with activists and hired Marcos Souza back in his previous position, as Director of Intellectual Rights (Silveiras, 2014b).

However, the reform did not progress much further, as its text was never analyzed by the Congress for various reasons. The Congress was already dealing with polemic projects between 2012 and 2014, such as the *Marco Civil da Internet* bill, and it was not interested in dealing with another issue before the 2014 elections. Also, regulation of collective management, one of the main items in the

ortellado/privacidade-marco-civil_b_5035369.html?utm_hp_ref=brazil

¹⁴ It was verified that a large number of contributions against the changes had very similar content lacking justification, that were identified as coming from Ecad's (the collective management entity) IP address (interview with Marcos Souza)

Copyright Reform agenda, was passed into legislation in a separate manner, supported by minister Marta Suplicy, in 2013 (Valente & Mizukami, 2014). This law incorporated some elements present in the text from the public consultation, but its approval in Congress and the final elaboration of its text were not a participatory process open to many stakeholders in the sector – the majority of those who had participated during the public consultation were not a part of this process. If on the one side the approval of this law was a partial accomplishment of that text that had come out of the first copyright public consultation, it can also be said that stakeholders involved with the aspect of collective management were not as motivated to press for further reforms, and a more comprehensive reform lost an important amount of its initial supporters.

As for the differences found between the consultations, one could mention the production of the documents with the data analysis of the consultations. In the *Marco Civil* process, a compendium of the contributions was made public. In the first stage of the Copyright Reform, a report problematizing the contributions and the positioning in each section was made available to the general public (Silveiras, 2014a, p. 147). However, in the second phase of the Copyright Reform there was less transparency: only a synthesis was released and the full contributions from entities were not made available to the public. The website of the queries was also different: only the first phase of the copyright law reform was hosted on the same domain as the *Marco Civil* (*culturadigital.br*), with an open source structure and a closer contact between the developer of the platform and the organizers of the public consultation. Regarding similarities, the design of both consultations focused on amplifying voices and participation, taking into consideration guidelines on access to information (Silveiras, 2014b, p. 12).

5. Conclusion

The online public consultation processes described above, the development of *Marco Civil da Internet* and the Copyright Reform, paved the way to allow more direct participation of the society in the legislative process. They were both unprecedented direct democracy experiments in Brazil. The attributes of the Internet allowed a two-way flow of information, which improved the debate and the transparency of the processes analysed. In both cases, the online platforms made it easier to identify the actors and their opinions and also enabled the overcoming of bureaucratic barriers. Moreover, the consultations allowed the organization of society in matters of their interest and the aggregation of knowledge online, available not only to these two processes, but for the construction of other legal texts subsequently (Silveiras, 2014b).

Our case study showed that technical choices influenced the participation of a diverse set of voices, and, in specific, in the “right to be heard”. Firstly, as some critics have stated, participation through the Internet can exclude those who do not have access to the Internet. In 2013, according to the research done by TIC Domicílios, only 51% had regular access to the Internet. On the other hand, even with the access barrier, more people would be able to directly participate in the consultation than during the regular legislative process. Given the nature of the whole process, it can be considered as a complement to the legislative activity through popular participation, instead of a rupture. The option of enabling comments and threads was important for the development of debate and discussion in both cases. In the case of the copyright public consultation, by comparing the results of the first and second phase, it was possible to conclude that excessive requirements diminished participation. Also, tracking the IPs may have seemed an excessive privacy breach for some, but it made it possible to check if the comments were really being made by different people or if they had a common source or group.

Nonetheless, our data collection did not point to the existence of publicly available documents / reports which could directly assess the impact of the participation in drafting the bills, nor provide a feedback to participants showing to what extent the contributions made on the platforms were incorporated to the final versions of the bills. This lack of responsiveness in closing the loop could

be seen as a flaw in both processes, suggesting a lack of transparency in the process of turning participation into policy. We believe this aspect could be improved in future experiences.

In general, however, participatory processes are experiencing a decline in Brazil. After the euphoria at the beginning of the last decade, the opening of political processes to relevant social contributions is increasingly rare and becoming more formal, or not generating real impacts on government policies. The country is currently going through a significant political and economic crisis. The discussion around participation (and e-participation) has also dimmed in the last few years in Brazil, which could be a consequence of the current crises in our democratic system, or of a progressive distancing between social movements and government, and the lack of proper translation into norms of forms of online participation.

For instance, in the first semester of 2016, a public consultation on a regulatory instruction behind the collection and distribution of royalties for copyrighted works in the digital environment was launched by the Ministry of Culture. InternetLab followed the consultation and the subject was very important, yet the consultation was not successful: it was not publicized enough, and a significant amount of contributions were angry rants about the government and did not tackle the issue at hand.

Moreover, the composition of the Brazilian Congress is the most regressive since our democracy was reestablished, which can jeopardize new experiences of ICT-mediated participation. The larger proximity between government and civil society has been built in progressive governments. In this sense, it is still uncertain whether the repertoire of the state-society interaction can survive less progressive administrations. Abers, Serafim & Tatagiba (2014) suggest that, even with the huge changes in the political situation, a relatively stable set of options, coming from many decades of activism, might stand available, even if its contents and capacity to influence political decisions float through time (Abers, Serafim & Tatagiba, 2014). This argument is likely to undergo a major test in the near future.

References

- Abers, R., Serafim L. E. & Tatagiba, L. (2014). Repertórios de Interação Estado-Sociedade em um Estado Heterogêneo: A Experiência na Era Lula. *Revista de Ciências Sociais*, 57, 325-357.
- Brito Cruz, F. (2015). Direito, Democracia e Cultura Digital: A Experiência de Elaboração Legislativa do Marco Civil da Internet (Masters dissertation).
- Boyle, J. (2008). *The Public Domain*. New Haven e Londres: Yale University Press. P. 54-5. Available in <http://james-boyle.com>.
- Cordova, Y. (2017). Interview held by InternetLab's research team.
- D'Araújo, M. C. (2009). *A elite dirigente do governo Lula*. Rio de Janeiro: CPDOC.
- Lamsal, M. (2012). The Structuration Approach of Anthony Giddens. *Himalayan Journal of Sociology & Anthropology*, 5, 111-122.
- Litman, J. (2001). *Digital Copyright: Protecting Intellectual Property on the Internet*. Nova York: Prometheus Books.
- Machado, E. (2009). Governo Lula, neoliberalismo e lutas sociais. *Lutas Sociais*, n.21/22.
- Papp, A. C. (2014). Em nome da Internet: os bastidores da construção coletiva do Marco Civil. (Graduation thesis, University of São Paulo). Available in https://issuu.com/annacarolinapapp/docs/em_nome_da_internet.
- Pinassi, M. O. O lulismo, os movimentos sociais no Brasil e o lugar social da política. *Revista Herramienta*, Buenos Aires, 2009.
- Nolasco, J. (2014). Acessando a rede: um olhar sobre a formação da agenda para regulação da internet no Brasil. Dissertação de Mestrado. Fundação Getúlio Vargas.
- Rossini, C., Brito Cruz, F. & Doneda, D. (2015). The Strengths and Weaknesses of the Brazilian

- Internet Bill of Rights: Examining a Human Rights Framework for the Internet.
- Sampaio Jr., P. de A. (2006). Brasil: As esperanças não vingaram. *OSAL, Observatório Social de America Latina*, ano VI, n. 18. CLACSO, Buenos Aires, Argentina.
- Secco, L. (2011). *História do PT (1978-2010)*. São Paulo: Ateliê das Letras.
- Silveiras, R. (2014a). Consultas Públicas para o Marco Civil da Internet e Reforma da Lei de Direito Autoral: A Relação Entre Direito, Internet e Estado na Contemporaneidade (Masters dissertation).
- Silveiras, R. (2014b). Marco Civil e Reforma da Lei de Direito Autoral: A Relação Entre Sociedade e Estado no Meio Cibernético. *1º Fórum do Programa de Pós-Graduação em Sociologia*.
- Turner, J. (1986). The Theory of Structuration. *American Journal of Sociology*, 91, 969-977.
- Valente, M. G. (2013). Implicações Políticas e Jurídicas dos Direitos Autorais na Internet. (Masters Dissertation, University of São Paulo).
- Valente, M. G. & Mizukami, P. N. (2014). Copyright Week: What happened to the Brazilian Copyright Reform?. Available in <https://creativecommons.org/2014/01/18/copyright-week-what-happened-to-thebrazilian-copyright-reform/>.
- Varella, G. (2014). *Plano Nacional de Cultura : direitos e políticas culturais no Brasil*. Rio de Janeiro: Azougue.
- Vitale, D. (2004). Democracia Direta e Poder Local: a Experiência Brasileira do. In: Coelho, V. S. P.; Nobre, M. (Org.). *Participação e deliberação: Teoria democrática e experiências institucionais no Brasil contemporâneo*. (239-254). São Paulo: Editora 34 e DRC (Development Research Centre on Citizenship, Participation and Accountability).
- Wampler, B. & Avritzer, L. (2004). Participatory Publics: Civil Society and New Institutions in Democratic Brazil. *Comparative Politics*, 36, 291-312.

Annex 1: Comparative Table

	Marco Civil da Internet	Copyright Reform
<i>Was it approved?</i>	Yes	Not even taken to Congress
<i>Responsible bodies</i>	Ministry of Justice	Ministry of Culture
<i>Justification</i>	To invert the agenda that was in place in Congress and to construct a “normative preliminary elaboration” of a responsive type.	To adapt the Brazilian legislation to the new technologies and as a consequence of the strong critics on Ecad’s work and the movement “Copying Books is a Right”
<i>When was it launched?</i>	October 29th 2009	June 14th 2010
<i>Majority of participation</i>	Citizens	1st phase: Citizens (843 citizens to 149 legal persons) 2nd phase: Legal persons (92 legal persons to 76 citizens)
<i>Was it transparent?</i>	Yes	Partially 1st phase: Yes 2nd phase: No
<i>Number of contributions</i>	1981	8041

