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ABOUT THIS NEWSLETTER

TMT Bulletin is a newsletter on technology, media, telecommunications and internet. Our Technology, Media and Communications Practice Group gathers knowledge from different areas to provide a holistic approach to the most complex legal issues brought by our clients. From telecommunications and audiovisual regulatory matters to tax, labor and intellectual property, Brazil is not a country of simple answers; an approach taken by a global company in another jurisdiction may need to be considered from surprising new angles.

Please note that this mailing is meant for general informational purposes only and should not be relied upon as legal advice on any specific deal or matter. If you need more information, please contact our [lawyers](#) or visit our website at www.pinheironeto.com.br.

We hope you find this publication informative.

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*Changes to ANATEL's
regulatory agenda for
2016*

The Board of Directors of the National Telecommunications Agency – ANATEL announced on June 24 certain changes to the Agency's regulatory agenda for the rest of this year. The regulatory agenda indicates the matters deemed strategic by ANATEL and that it intends to review during a 2-year period; the current agenda covers years 2015 and 2016.

Among the approved changes, ANATEL defined as a top priority project for the semester starting on July 1st the definition of the new telecommunications regulatory framework. This review is expected to result in the migration of the fixed-telephony concessions to a simpler private regime, as well as to simplify the process for granting of licenses to provide telecommunications services in general.

Why is this important?

ANATEL has been studying a comprehensive review of the Brazilian telecommunications regulatory system since 2015 and the project gained the express support of the Ministry of Communications (currently named Ministry of Science, Technology Innovation and Communications) earlier this year. Finalization of the review is much awaited by carriers and investors alike, especially as regards the concession regime. Limitations of the concessions (such as an expiration date and restrictions on the use and sale of assets) are often remarked as the main obstacle for investments in the sector. The issue gained even more attention on June 20 when carrier Oi, the largest fixed-telephony concessionaire in terms of users, filed for judicial reorganization.

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Fixed broadband data caps: latest developments

Following the intense debates previously reported in this bulletin regarding data caps on fixed broadband plans, ANATEL decided on June 8 to prepare a Regulatory Impact Report (*Análise de Impacto Regulatório – AIR*) addressing the possible effects of a decision permitting or not the implementation of data caps by ISPs.

For purposes of preparing the report, ANATEL will request contributions from several entities of the civil society, including public and private entities such as the Ministry of Science, Technology Innovation and Communications, the Federal Public Prosecutor Office, the Brazilian Consumers Office (SENACON), the Brazilian Institute for Consumers Defense (IDEC), the Brazilian Bar Association (OAB), the Brazilian Internet Steering Committee (CGI), the Brazilian ISPs Association (ABRINT), and the Brazilian Internet Association (ABRANET). ANATEL will also invite members of the academic community and law, economy and math experts to provide their contributions. ANATEL is further expected to schedule public hearings on the matter.

The report will ground ANATEL's final decision on whether ISPs may reduce speed, discontinue connection and/or charge overages after full consumption of fixed broadband data packages.

In the meantime, ANATEL's provisional measure issued on April 22 that prohibited ISPs to impose data caps until an ultimate regulation to the matter is enacted remains in force.

Why is this important?

The ability to impose data caps may have significant impact not only on the consumers and the ISPs' business models, but also on all OTTs whose services depend on the availability of fixed broadband services.

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*Federal Prosecutor
Office debates foreign
capital restrictions on
media websites*

On June 8, the Institutional Council of the Federal Prosecutor Office finalized a discussion on an issue that has been much debated in the last years: if companies that carry out media activities through the internet should be subject to same foreign capital restrictions imposed by the Brazilian Federal Constitution for “journalistic companies”.

The heart of the controversy lies on the fact that the Federal Constitution did not define “journalistic companies” when establishing that at least 70% of the voting capital of these companies must be held by Brazilian citizens, individuals who have acquired Brazilian citizenship within a period longer than 10 years, or companies incorporated under the laws of Brazil and with a head office in the country. Restrictions also apply to the intellectual guidance (including editorial responsibility, selection and direction of programming/content) of the journalistic companies, which must be held by native Brazilians or individuals who have acquired Brazilian citizenship within a period of more than 10 years. The same article of the Federal Constitution establishes that a special law will regulate the business of electronic media, but no regulation was ever enacted.

Traditional media associations have always defended that websites that carry media activities should be deemed journalistic companies for these purposes. In 2010, the Brazilian Association of Television and Radio Broadcasters (Abert) and the National Journals Association (ANJ) filed a formal complaint against Terra Networks Brasil Ltda., an internet news aggregator portal that is controlled by the Spanish group Telefonica, arguing that it should be considered a journalistic company and, thus, was in breach of the constitutional restrictions on foreign capital. The case had been initially shelved on the grounds that “internet specificities exclude it from the scope of article 222 of the Federal Constitution” and that “within the internet environment, the State cannot exclude [a player] due to nationality”. But the position was not unanimous within the Federal Prosecutor

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Office and the case was reopened by the Revision and Coordination Chamber.

The Council now decided that said restrictions should not apply to internet portals that aggregate news (as it is the case of Terra). The decision was grounded on the fact that internet portals did not exist when the Federal Constitution was enacted and, thus, were not considered within the concept of journalistic companies at that time.

Why is this important?

The decision settled a controversy within different divisions of the Federal Prosecutor Office. Although it is not binding on courts, it certainly creates a precedent that will be taken into consideration if the matter is ever disputed in court. It should be noted that Terra is a news aggregator only, with no editorial activities. It is not possible to determine at this point if the Federal Prosecutor Office's position will be the same in relation to websites that have an editorial role.

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*Copyrights vs.
Technological
Innovations*

The Superior Court of Justice - STJ will decide whether the author's express consent is necessary to make available, on the internet, a copyrighted work previously released as a paper-based publication (magazines, newspaper).

Abril, one of Brazil's biggest publishing companies, decided to make available on the internet, free of charge, all the library of its magazine *Veja*, since its first edition in 1968. Given that, the journalist, cartoonist, writer and *Veja's* collaborator Millôr Fernandes sued Abril, claiming that the new format of the files (electronic files instead of paper-based magazine) violated his copyrights, since he had never authorized his work to be published by Abril on the internet.

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The case was dismissed in the Lower Court. The Judge understood that the work available online was exactly the same as the one the author had been paid to produce in the magazine, without any modification. However, in view of the appeal brought to the Higher State Court, the decision was reversed and the Court granted the action, based on the grounds that the author has to expressly authorize the publication of its work on a new format.

Abril appealed to the STJ and claimed that by making its library available, free of charge, for the whole population, it fulfills a service of public usefulness, which was followed by many other magazines, journals and newspapers all over and now is a global trend.

Why is this important?

The case raises an extremely relevant issue: how is it possible to balance artist's copyrights with technological innovations? The STJ is expected to set new boundaries for this.

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ICMS on ad space over the Internet - Injunctions releasing the requirement of full guarantee for tax enforcement disputes

As previously reported in this bulletin, there is a dispute in Brazil on whether the sale of advertising space is subject to a 5% municipal tax on services (ISS), to the 25% State tax on communication service (ICMS) or if no tax is applicable. The State of São Paulo tax authorities issued Infraction Notices against a number of relevant companies in the past 3 years charging ICMS over the insertion of advertising on the Internet, with the imposition of very high penalties (50% on revenues), plus interests.

Some companies disputed it with an unsuccessful outcome in the administrative sphere which took the disputes to the Judiciary. According to the tax enforcement legislation, the taxpayer --as opposed to

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an administrative dispute-- must present full guarantee (cash, bank letter, assets) to have the right to initiate a judicial dispute on a tax matter.

Recently, however, the São Paulo's Court of Appeals granted injunctions for a couple of companies authorizing the ICMS dispute without any guarantee for the high penalties applied by the authorities and with reduced interests, limited to SELIC (official rate of the Brazilian Central Bank) as opposed to the São Paulo interest rate.

Those decisions represent a significant decrease of the amount in dispute and allow the taxpayers to continue litigating the matter in the Judiciary without such a high burden.

Why is this important?

These are important precedents for players in advertising industry, which have been dealing with constant attempts by State and Municipal Tax authorities to increase the tax burden on dissemination of advertising.

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