

PINHEIRO NETO ADVOGADOS

AUDIOVISUAL CONTENT: TECHNOLOGY CONVERGENCE – REGULATORY DIVERGENCE

WRITTEN BY

Raphael de Cunto

Ana Paula Bialer Ingham

partner and associate lawyer in the
corporate area of Pinheiro Neto
Advogados

OFFICES

R. Boa Vista, 254/280
São Paulo SP
01014-907 Brasil
Tel. (55-11) 3247-8400
Fax (55-11) 3247-8600

Av. Nilo Peçanha, 11
Rio de Janeiro RJ
20020-100 Brasil
Tel. (55-21) 2506-1600
Fax (55-21) 2506-1660

SCS, Quadra 1, Bloco I
Brasília DF
70304-900 Brasil
Tel. (55-61) 312-9400
Fax (55-61) 312-9444

www.pinheironeto.com.br
pna@pinheironeto.com.br

This article was prepared as a source of information and debates only, and should not be construed as a legal opinion on any specific transaction or business.

© 2004. Pinheiro Neto Advogados. All rights reserved.

Watch TV on your PC, browse the Internet on your TV, listen to the radio in your mobile: all possible due to the technology convergence which has paved the way for information to be carried in several kinds of networks and platforms, at an amazing scale and speed. Such technology convergence has prompted unprecedented changes in socioeconomic dynamics the world over, especially in the telecom, audiovisual and IT industries; the consequences and extent of such impact, for their part, are stirring up heated debates over the need to regulate audiovisual content.

Audiovisual content regulation is a matter of international concern, and the initiative to bring such debate to the Brazilian legal environment – with the draft bill of law creating the National Audiovisual and Movies Agency (ANCINAV) – is a positive measure; noting, however, that in a democratic society, to regulate does not mean to impose censorship or restrictions. To regulate is to organize the industry and create proper mechanisms to foster and strengthen the audiovisual industry without curtailing the freedom of its agents.

Debates over audiovisual content regulation in Brazil should be guided by constitutional principles of freedom of thought, conscience, belief, expression of intellectual, artistic and scientific activity, favoring communication without censorship or prior licensing, among other tenets. As fundamental, inalienable rights warranted by the Constitution are involved, any initiative targeted at content regulation should be treated with care and candor, leaving no room for censorship or other restrictions on the freedom of speech or other constitutional liberties.

Strengthening the audiovisual industry should be one of the driving forces of the regulatory move, and such process must consider not only the importance of cultural diversity, but also the economic relevance (in terms of generation of investments and job opportunities) that such industry represents. The audiovisual industry is at the center stage when it comes to cultural diversity, disclosure of information, building of social values, and the development of a critical mass in society.

This leading role is primarily due to the ability of traditional mass media (open signal TV and radio) to simultaneously reach millions of citizens nationwide.

The open signal TV and radio industries were the traditional mass media vehicles over the last years, playing an essential part in the cultural development, opinion-making efforts and strengthening of democracy in Brazil; however, technology convergence calls for deeper debates over the increasing relevance of new communication media (such as the Internet, pay TV and mobile telephony) as vehicles for content distribution and, perhaps, on the need to regulate the content distributed through such media.

The Federal Constitution mandates that mass media programming (in radio and open signal TV) must favor educational, artistic, cultural and informative contents, promoting national and regional culture and fostering independent production targeted at the dissemination of a regional approach to cultural, artistic and journalistic matter. Under the current draft bill, telecom operators engaging in audiovisual activities (i.e., offering contents to subscribers) will be required to follow the same principles applying to broadcasting entities. It should be noted, however, that the broadcasting and telecommunications industries have distinct business models; hence, even though convergence does bring these segments together, their structural differences cannot be overlooked.

Broadcasting service users play a passive role of merely receiving the content transmitted by operators, with no say on the type of content to be provided. This fact, coupled with free and unrestricted access to these services, justifies the government concerns over the respective content. On the other hand, telecom service users pay for these services and, in most media, must take the initiative of ordering the content they need (such as browsing the Internet or choosing a pay-per-view program), thus selecting the content they intend to access.

The legal imposition of limits on the content provided by telecom operators at the user's request, even on the pretext of promoting national culture, may pose a threat to freedom of information, and arouses fears of a potential relapse into censorship. Another essential distinction is into play: broadcasting services are available to a vast array of recipients free of charge, whereas telecom services are essentially subscriber-oriented (that is, available to users interested in receiving the content offered by a certain operator, having thus entered into a contract to that end). It is not for the government to impose limits on such content.

The distinct nature of broadcasting and telecom services, as well as of the business models designed for each of these industries, makes it impossible to adopt a homogeneous regulation for any and all audiovisual contents. Thus, the adoption of a proportionality test could operate as a way of overcoming the myriad obstacles to regulation of the contents distributed by such different media. This proportionality test would check into the extent at which each user may select and control the distribution of content, as it happened in the UK. The level of concerns with the content aired by a nationwide open signal TV channel simultaneously reaching millions of nationals should by no means be accorded the same regulatory treatment as the content available to a few hundreds of mobile phone users who opted and paid for specific content. Another basic criterion for determining the extent of regulatory action is whether the content is offered free of charge to the general public (as in the case open signal TV), or under a specific contract executed with each subscriber (as is the case of content accessed via mobile; access to the Internet; or the selection of a pay-per-view movie picture).

It is important to find a proper way of approaching the concerns to be addressed in the audiovisual public policy, so as to avoid the risk of bringing excessive regulatory pressure to bear on certain contents and media, which would eventually hinder society's access to cultural diversity and to multiple sources of information by limiting the interest of content producers in developing these activities in the Brazilian territory.

Finally, it should be stressed that such discussions about the regulation of audiovisual content are welcome. However, the draft bill released for public comments is well behind what is expected of a law governing this industry. To make the domestic audiovisual industry grow in economic terms while contributing to cultural diversity and to the plurality of information sources, rather than making it weaker by imposing excessive burdens on content providers, clear-cut rules must be set and effective mechanisms to foster this industry must be laid down, leaving no room for censorship or restraints on the freedom of expression.

São Paulo, December 10, 2004

PINHEIRO NETO ADVOGADOS