

The “Marco Civil da Internet” and Copyright Protection

The recently enacted Law No. 12.965 of April 23, 2014 – commonly referred to as the “Marco Civil da Internet” – has received significant publicity for both its vanguard content and the concerns it raises to certain Internet market players.

The Marco Civil da Internet is not the “Internet Constitution” as it has been coined by some. All rules and principles of Brazilian Law apply to the Internet and proof of this fact is that several provisions of this new law simply repeat constitutional tenets, such as rights to freedom of expression, free enterprise and competition.

Also, the new law’s objective is not to “control” the Internet but to establish/adapt norms for this still newfound virtual world, such as: (i) the protection of privacy by prohibiting access to e-mail content by service providers; (ii) free access to the Web, through the introduction of the concept of neutrality; and (iii) requirement that service provider store user information for a given time period, to enable cooperation with law authorities if necessary.

Although the new law is quite comprehensive it does not detail many applicable rules, which are expected to be addressed through secondary legislation to be issued soon by the Federal Government.

Copyright protection, is also a constitutional principle, applicable to the Web. A topic of major importance – and insufficiently addressed in the Marco Civil da Internet – has to do with copyright violation on the Web. The protection of copyright-protected content by controlling its unauthorized use has been proved challenging due to the unmatched ability of the Web to disseminate such content.

After an initial phase of conflict and uncertainty, Internet market players reached common ground: once notified by rights holders, Internet providers removed the illegal content from the Web. (Will they continue to do so?). The Brazilian courts on the other hand, while rendering erratic decisions at the time when these issues were still novel, sought early on to validate market rules, curbing unauthorized use in instances such as when the parties would not reach an agreement.

Article 19, Paragraph 2 of the new law, provides that enforcement of restrictive rules concerning provider liability for Internet copyright violation will depend on specific regulation still to be issued. Discussions on scope and timing of this rule were particularly heated during the congressional review of the bill.

The rule of Article 31 of the Transitional Provisions of the law, however, clouds what is clear from the aforementioned paragraph -- that until the enactment of a specific law the provider is civilly liable if, when notified by the copyright-protected content holder, it does not remove the infringing content. Such Article provides that until the entry into force of special law, the liability of Internet applications providers for damages resulting from third party-generated content *will continue to be regulated by the copyright protection legislation applicable on the date the Marco Civil da Internet went into effect* relative to the infringement of copyright or related rights.

The copyright law in force – Law No. 9.610 of February 19, 1998 – does not specifically address this issue; at the time it was drafted, it was not necessary due to the incipient stage of development of the Internet.

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
Phone. +55 11 3555 5000

Rio de Janeiro

Praia de Botafogo, 440
15th floor - 22250-908
Rio de Janeiro, RJ - Brazil
Phone. + 55 21 3503 2000

Brasília

SBN Q 1, Bl B, n. 14, Ed. CNC
2th floor - 70714-900
Brasília, DF - Brazil
Phone. + 55 61 2109 6070

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Given that copyright protection is a fundamental and human right, qualified as such by the norms of Brazilian and international law, there cannot be another interpretation of the badly drawn lines of the Marco Civil da Internet which regulates this matter that the Internet provider will be liable for not attending the request of the copyright-protected content holder to remove Web content that violates its rights.

Welcome is the debate on how to reconcile the important process of democratization of culture – initiated in the Digital Age – through stimulation of and investment in cultural production, historically led by the protection of creations of intellectual property. The only certainty, however, is that the solution to this challenging task will not come by accepting that the Web is a lawless environment where everything is permitted.

Simone Lahorgue Nunes
slahorgue@levysalomao.com.br

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
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