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NETS OF MISUNDERSTANDINGS: Streaming Regulation in Brazil and its Ambiguities

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Abstract

The text deals with the proposal, still in discussion, to regulate streaming in Brazil. As has happened with segmented television, it is being debated at the online the institutionalization of legal incentives to audiovisual. This important subject has been conducted unsatisfactorily, with small attention to fundamental problems. The article converge two questions, expecting to think on the action of States through a diagnosis on the contemporary guided towards the ideas of informational networks, space of flux and atemporal time. On the one hand, it deals with the emergence of the proposal and with what has been abandoned, recovering the vision introduced by Ancine on the subject in 2015. On the other, it indicates how a collateral event (the bought of Time Warner by AT&T) can introduce difficulties in the scenario.

Keywords

Information and Communication Technologies; Streaming; Digital Convergence.

Introduction

On 11/2018, the discussion about the Condecine (Contribution to the Development of the National Film Industry) charging on streaming platforms returned to the scene once again. (Possebon, 2018). Discussed some time ago, the subject now had a rather dubious approach. Ancine (National Film Agency) - through one of its boards, not its collegiate - demanded from these ventures information about the activity, with the expectation of paying the tax retroactively. This case had a particularly disconcerting dimension. After all, the Agency itself already had guidelines aimed at subsidizing a possible rule for the segment, which – as hoped - should be sent to the Legislature to decide on the tax.

Such a moment of uncertainty proves to be an appropriate time to analyze such streaming regulation. This article aims to support this discussion, which occurs today in a very unsatisfactory direction and in an inaccurate public debate. The charge of Condecine is undeniably relevant. The tribute feeds the FSA (Audiovisual Sector Fund), the source of much of the national efforts to create content. Its requirement stems from a practical necessity: to adapt the taxation defined by law to the needs of streaming. After all, it is inscribed in the current norms and will need to revert on the segment eventually. However, the objectives of the regulation for the activity far exceed the collection of these values. These resources represent part of a much larger project than this accounting.

This text analyzes themes left aside in the tax imbroglio. It aims to put into perspective the concern about encouraging audiovisual by placing it in the context of the current rules. Streaming cannot be debated without this framework. Still in its infancy, this norm consists of part of a rather extensive project on local creation, also involving support for alternative strategies for the online distribution of content. Understanding this point implies a discussion about the relationship maintained between streaming, the image in a broader context and the contemporary power dynamics. The uncertainty reflected in this narrow discussion brings back an indecision about goals adopted at a certain moment only to be abandoned later.

Grasping this overlooked scenario requires the recovery of a story that, although recent, has been dealt with less attention. With this objective, this article addresses the fundamental issues that motivated the debate, resuming Ancine's deliberations from 2015 until this debate in late 2018. This debate was about the global character of these platforms and the attempts to elaborate ways to deal with this trace in terms of a certain understanding of how to approach audiovisual and the mechanisms to affirm its importance. The task guides the first part of the article, demonstrating the nature of a prematurely forgotten confrontation: allowing national content to be elaborated for such existing platforms, but also the emergence of smaller devices geared to the same material.

From then on, the second part of the text exerts another problematization effort. The course remains the same: the proposal for such a norm is set against a broader scenario, which the text itself seems to ignore. However, the background now refers not only to the history of Brazilian regulation, but to an event that may render it useless. One of the requirements of this jammed law is the expectation of ensuring that all the rules in force in Brazil are valid for streaming. An obvious desire, it strikes in a limit: the fact that some definitions of what constitutes an audiovisual operation is or is not subject to national standards have recently been tested during an operation that could redefine the direction of audiovisual: the purchase of Time Warner by AT&T.

Apparently distant from this case, this acquisition has a decisive importance for the structuring of audiovisual. In our country, this merger is still under discussion due to the impossibility of being carried out due to the limitations on cross-ownership contained in the SeAC (Conditional Access Service) Law, No. 12,485 (Brasil, 2011). But, as has happened at other times, some obstacles, no matter how big, are not a problem: there is always a Joshua to put down Jericho. In an attempt to make buying viable, the defense argued quite ingeniously. He proposed that Turner and HBO content were not produced in our country, and that Time

Warner was a global corporation with only one commercial office in our territory. Being everywhere, the corporation would not be located anywhere. Therefore, certain norms would not apply to her.

Once Anatel decides on such a case - which had not yet occurred until the writing of this article - enforcing all the rules operating in Brazil may imply that this same law does not apply to audiovisual creators who, such as Time Warner, may present themselves as offices of commercial representations. This can become the case for virtually any global streaming operation. SeAC is the standard on which streaming regulation is based, and such a loophole has far-reaching consequences. Enforcing Brazilian laws may run into another decision that goes through its own powers, a disappointing result in the face of a whole set of efforts. The conclusion of this text presents a model by which this broader debate could be ordered, hoping to forward future discussions.

Information networks, flow space, timeless time

Without an adequately understand of the nature of recent power configurations, it is difficult to understand which direction the culture-promoting tasks of certain states can take. One concept is essential: the idea of information networks (Castells, 1996), which describes a morphology whose manipulation allows organizations to take part in a decentralized order and to intervene in multiple locations. The doubts about how to propose incentives for national audiovisual production derive from the uncertainty about the ways to deal with these organized spaces through such networks, dealing with forces that impact a territory due to their connection to mobile administration structures.

In response to the initial fears of globalization, cultural exceptions to the demands for radical liberalization were proposed. The alternative highlighted the particularity of certain products. As a result, this relationship with culture was transformed into a political discussion, legitimizing state intervention and making the defense of a certain cultural heritage viable, extending this concept to audiovisual productions. On the verge, globalization and cultural exception became extremes of the same conflict, in a society in which the dynamics of circulation were reoriented in the face of the consequences of radical integration (García Canclini, 1996; Hesmondhalgh, 2007).

These concerns were radicalized by the consolidation of streaming. Part of a broader media shift that involves relationships that are more complex, the streaming is distinguished by simply exporting content from one country to another. Effectively global, streaming deals not only with this or that corporation installed in a given region, involving mechanisms capable of producing coordination over vast stretches of time and space. There are at stake myriad producers in many places. In different hierarchical positions, they create a content that occupies such platforms and, in some cases, cross towards the systems of segmented televisions of certain countries, moving and back to these global tools (Chalaby, 2012). These are circuits guided by sophisticated technologies, using cataloging and content exposure techniques calibrated by data taken from diverse populations, but managed by these specific corporations (Lanier, 2014).

Approached by some authors (Ladeira, 2014) as an indication of these information networks, the restructuring of audiovisual in progress in Brazil during the transition from conventional broadcast to segmented television was also another moment of expansion. As an indication that segmented television from the 1990's overtook the centrality acquired in the past by national corporations, Globo or Abril's connections with News or DirecTV shaped unheard-of associations, interconnecting various regions in a hitherto nonexistent sync. However, it seems to have been somewhat hasty to associate such prior diversification of audiovisual in Brazil with informationalism. After all, streaming radicalizes the connections contained in these simpler networks, and - most importantly - clearly exposes the reconfiguration of certain categories of understanding.

This concept of networks refers to a form of domination based on the ability to challenge certain preceding dynamics. Despite the tendencies to confuse this organization with the consequences of

globalization (Held et al., 1999), it is a deeper process. Expanding flows between territories has been an important part of that issue, but the question is not just about expanding the circulation of certain items, about making it more intense or faster. It involves the effects introduced by these networks in the reconfiguration of the understanding of reality, reinventing definitions of time and space.

In an environment guided by networks, these categories become a privately resource, managed in a very particular way. Two ideas from Castells that received least attention describe the problem: the concepts of space of flows and timeless time. Of both, the idea of timeless time proves especially challenging. In its definition, it becomes essential to distinguish this organization from the discipline imposed on the temporal fragmentation, which is typical of Fordism, problematizing another type of administration for this input. The interference that is important of thinking will be that imposed not on quantitative management in relation to the moments that are divided into smaller and controllable portions. In contrast, it refers to the quality with which multiple possible directions for the future are worked out.

Timeless time allows us to think of a productive structure in which matters the ability of certain characters to transform the future and to define what lies ahead. This intervention opens up previously nonexistent possibilities. Castells thinks with Schumpeter (1934), problematizing the ability to introduce radical transformations and to appropriate them. At the same time, it expands this finding, problematizing the reorganization for understanding introduced through the probability of constant change. The autonomy for introducing transformations matters not only because of the acceleration over a linearly progressing flow. It involves the radical disruption and the introduction of another horizon, as if this change could be able to provide another dimension, demanding a new way of looking at time.

If act-based interventions capable of redefining the future are distinguished from time-sequence manipulation, it is because this disruptive effect is independent of the planning that has been so typical of an industrial-based society. In their place, what matters is the concerns about the expectations thus produced. The future is constituted by the predictions that are made about it, becoming a variable dimension. Guided by an image constructed about the expectations about itself, the obligation to constantly anticipate the effects of an act becomes important. Through this calculation, present and future coexist simultaneously, as the transformation of the latter from an act in the former becomes routine. The privileged power for certain characters to construct directions that were nonexistent for the future derives from their mastery over these networks, making their ability to control their key points a matter of great importance.

By introducing another form to audiovisual media, streaming platforms trigger this networking morphology, creating a previously nonexistent scenario for media. They present other directions from which such activity could be understood, emerging as one of these differentiations in the definition of the future. Major contemporary acquisitions concern not only to the tendency to concentration. They refer to the need to coordinate actions in very diverse territories, allowing the occurrence of consequences of a particular intervention according to the typical repercussions according to network morphology. Control over the definition of these new directions becomes impossible without proper coordination of such territories. This concentration matters because of the power given to these interventions, allowing this other global organization to become involved an exercise of power of another nature.

At the same time, these results depend on how certain concrete regions interact, since actions taken in some territories have intense consequences for other locations. Concern about how such links are established invokes the concept of space of flows in an attempt to review physical boundaries in societies in which information technologies enable previously impossible connections. Assuming that there is no productive organization that does not require criteria for the organization of space, Castells understands networks as indispensable forms for relations of exchange. In an informational development mode, this coordination involves instantaneous connections beyond physical space. Flows, not places, constitute territories and associate spaces in spite of their concrete separation. These instruments appear

as nodes, command points that allow the execution of the most diverse actions, strategic to trigger links that, through malleability, transform distant resources into items that can be used.

Contradictorily, Castells's own treatment of the media set aside his own theory of time-space. It focused more on the direction of communication, focused on large producers or more fluid dynamics (Castells, 2009). It focused on the progressive indifferentiation between fictional narratives and ongoing events in everyday life, merging both into a "culture of real virtuality" (Castells, 1996). These issues disregarded another issue: the reorganization of conventional boundaries contained in conceptions of fundamental categories, and the attempt of certain countries to cope with this change. In a more intense complexity, it associated the most diverse articulations without the need for a center, presenting to the nations a hard work to deal with this complexity. In Brazil's case, such attempts appear to be dubious and poorly resolved.

An overlooked debate: streaming and Ancine between 2015 and 2018

Despite some trials in 2013, the expectation of a streaming regulation gain intensity in 2015, allowing the publication of some guidelines in 2017. However, despite all these efforts, this norm is still in suspension, and remains so until the end at the moment of completion of this article - with strong odds that it will remain so forever. The indecisions that emerge reflect the difficulty of proposing models able to deal with this contemporary complexity described above. Part of this proposal will be in a document presented by the Superior Council of Cinema (CSC) in 12/2015, with some sharp definitions, after two other previous attempts to deal with the subject. (Conselho Superior do Cinema, 2015; Lauterjung, 2015; Possebon, 2017a, b).

They are bold propositions. Instead of counteracting streaming to multichannel, one imagines continuity between the two. In tune with the principles of *SeAC*, it reinforces the spirit of that text aimed at segmented television, presupposing certain principles that would concern any audiovisual that differs from broadcast. The future norm for online should fit broader image guidelines for streaming. Although it is intended for this specific form of image, the bill should safeguard the display of national content, encourage production, and - perhaps this is the specificity of the moment - allow the existence of diverse and smaller platforms.

This broad orientation made it mandatory to go beyond this or that particular technique. This concern returned to themes already exposed during the discussions about the *SeAC*, despite the much narrower formulation that the law received. That text brought together very different projects, and some of them would eventually disperse at the end. The spirit of the law was less about one particular technology or another. *SeAC* aims to encompass television stakeholders, telecommunication corporations and global content creators, making attention to this or that medium unreasonable.

It was added to this concern the attention to diversity, recurrent in Brazilian policies for culture (De Marchi, 2014). The contention of concentration, a desire repeated several times, becomes an expectation present again. We insist on the defense of diversity in audiovisual, a theme so important in debates about communication and never solved: some will say, never seriously faced. After all, this had always been the main criticism of the constitution of broadcast and the institutionalization of multichannel. The moment the discussion begins, the *Condecine* is an appropriate instrument to achieve this end, becoming part of an increasingly difficult horizon to realize over time.

Combining both concerns, the 2015 discussion recovers the expectation of enabling small streaming operations. Present at *SeAC*, the likelihood of utilizing multi-channel funds raised through *Condecine* was part of these broader concerns, now returning to the expectation of creating both content and platforms. Such an act can be interpreted as an attempt to counter services such as Netflix, difficult global operations that ignore national boundaries, affirming their strength through the ability to both create content and spread it (Keating, 2012).

The concern about taxation is a recurring theme in the debates regarding streaming between 2017 and 2018. However, the terms seem far from the initial concerns. Out of context, they lose part of their strength. In its place, arises a specific attention to formal problems, far from the substantive expectations expounded. On 11/2018, the discussion reflects anxiety about a definition only about taxes, without questioning its purpose. Even more complex, it ignores an ongoing side event at the same instant. Despite the potential acts contained in the AT & T-Time Warner merger, such an event still lacks a more systematic approach in our country, work that is illustrated in the next section.

Local laws, global associations: rules and exchanges in streaming regulation

Subsequent decision consists of a document of 05/2017 (*ANCINE*, 2017b). Prepared from a public consultation ended on 03/2017, it ordered regulatory notice of 12/2016 (*ANCINE*, 2016). In turn, this text retrieved the material of 2015, and, despite the contributions that emerged, endorsed fundamental guidelines, expanding them. The propositions come together in six themes, in proposals about the power exerted by global streaming operations; about alternatives to ensure the presence of national content on these platforms; about the strategies to invest in the production of national content in this context; about the options to expand the visibility of Brazilian productions; and - of course - about taxation through *Condecine*, which ends up occupying two sections of the text.

At all times, the - quite predictable - obligation of all platforms to comply with the rules in force is stated, a concern that is more explicit in the first set of propositions, which, however, does not make the *SeAC* explicit. Interestingly, it mentions only the Internet Civil Framework and the concerns about the use of personal data contained in its article 11, subject, despite its importance, without much attention so far. Affirming the need to comply with the set of laws seems a strategy aimed at safeguarding the main concern of the entity. However, a profession of unspoken faith in *SeAC* is not sufficient without bringing out its terms. For the events that represent concrete complications are others.

These audiovisual norms face certain disturbances introduced in the current order. This discussion seems to have been thought of without presupposing the concrete tendency to administer territories through networks. After all, the AT & T-Time Warner merger triggers a legal discussion that can redefine who should or should not respond to the same laws that streaming regulation sought to assert. It seems difficult to predict the effects of such a judgment, but it does not sound absurd to suppose that its outcome would risk excluding streaming activities from *SeAC* obligations.

Announced in the USA on 10/2016, this operation involved regulatory deliberations in 19 countries, including Brazil (AT&T, 2016). In the US, despite this purchase having faced several barriers, it would end on 06/2018, following the US District Court ruling in Washington that contradicted US Department of Justice recommendations (Lee; Kang, 2018). In Brazil, the legal deliberations on the case consist of the decision taken by Cade, as well as the still pending interpretations of the sectoral rules by *Ancine* itself and, more importantly, also by *Anatel*.

The question was still open during the writing of this text. But the likelihood that such a solution has been considered indicates the indefinite character of streaming regulation in our country. Here, the main barrier to finish the buying stems from a drawback very clearly delimited by *SeAC*. By 05/2014, AT&T had acquired DirecTV Latin America, which included Sky, a satellite operation active in Brazil and several other Latin American territories (POSSEBON, 2014). By owning an infrastructure service, AT&T becomes hindered from owning content corporations: just what it got from Time Warner.

This discussion of cross-ownership between telecommunications operations and content has already proved its strength on other occasions, and most importantly was the review of Globo's relationship with both Net and Sky itself. Now, another extensive clash would begin, in a much more

complex case in the face of the previous event. Cade approved the case in 10/2017 with caveats aimed at avoiding and discrimination in negotiations with other characters, a mechanism widely used and not a big news. However, Cade's decision prefers not to comment on what really matters: the issues contained in the *SeAC*, which the Council understands as the responsibility of *Anatel* and *Ancine* - more specifically, the first agency (Berbert, 2017d, d; Grossmann, 2017).

Although consumed, the business still depended on the approval of the sectorial regulator. Discussions in our country would resume on 06/2018, shortly after approval in the US. Despite the fact that there has already been a fairly long-running debate, it returns to the instruction phase in both agencies (Amaral, 2018). By then, *Ancine* had already issued a technical note opposing the merger due to the concentration it could impose (ANCINE, 2017a; Berbert, 2017b). Punctually addressing the *SeAC*, *Anatel* had also made an announcement, issuing two documents. One of them, on 04/2017 (ANATEL, 2017a; Berbert, 2017e), had been presented by the technical area; the other by the Specialized Attorney's Office in 2017/2017, one with a different position from the previous one (ANATEL, 2017b).

The difficulties of the agreement are due to an indecision that could discard a separation institutionalized through *SeAC*. Now the case deals not only about protecting certain national producers from the interference of some operations of infrastructure. The 2011 law had been tailored to protect national content creators from possible investments by telecommunications groups operating in Brazil (Telmex and Telefónica) and interested in audiovisual production. But this merger now forces *SeAC* to deal with a different context from the one for which it was created. After all, drafted in another context, the standard now imposed barriers against a global corporation.

There is something recurring in rules constructed through patrimonialism. In a different scenario from the one that they were designed for, these norms introduce strange barriers and uncertainties that are difficult to get around. Certainly, a decision by *Anatel* favorable to the purchase will undo a prior balance, making possible combinations previously avoided. This decision may set aside for the first time the protection built for these national producers. But the future is on hold. On 08/2017, *Anatel* issues a precautionary measure preventing any association between Time Warner and Sky. The document was a response to a request from Abert and Abratel, who had requested something much more complex: for *Anatel* to comment on the regulatory issue prior to CADE's assessment (Berbert, 2017a, c).

Thereafter, any association between AT&T and Time Warner in Brazil is prohibited, despite the completion of the US purchase. If *Anatel* approves the acquisition on favorable terms for AT&T and accepts Time Warner's arguments, such a stance would have consequences for all active content creators in our country, including - why not? - those involved with streaming. For the defense, Time Warner operating in Brazil consisted solely of a commercial office, negotiating programming rights without allocating resources to effectively creative work. Therefore, if their efforts for audiovisual production occur outside our country, the owner of HBO and Turner would not be a company based in Brazil.

Consequently, it would not be possible to apply the cross-ownership requirements, as the norm would only deal with companies operating here. If *Anatel* accepts this argument, it would not be absurd to suppose that any enterprise capable of presenting itself in the same way would evade *SeAC*'s obligations. Since the requirements on investment in domestic production refer to terms included in this same law, in addition to such obligations involve this same separation between national and international enterprises, it would not be absurd to suppose that these other requirements could be discarded. This solution can become the best way to make *SeAC* harmless without destroying it. If the norm can be ignored at this very essential point, it can also be set aside at any other.

From this point, one can go back to the creation of norms regarding streaming as suggested by *Ancine*. This long digression allows us to glimpse the consequences that the interpretation of this case may have on the problem that concerns this text. Contradictorily, the obligation to enforce all Brazilian norms would result in the chance of ignoring each one of them: or at least the most important. If Brazil

understood international streaming corporations as programming efforts that take place elsewhere, a powerful loophole would be created by discussing the incentive mechanisms and their application. This proves that there is something more at stake than just the distance from its initial assumptions, as described in the first part of this article.

Because of the intertwining of these issues, validating the spirit of *SeAC* demands attention to certain events that are interrelated, but whose association still needs analysis. The justification for defending national content requirements refers to such a rule, but the most recent understanding in relation to it contains a contradiction whose result may go far beyond the purpose for which such law had been created. The defense of national content coexists with an unconvincing separation between creators and infrastructure operators, whose abandonment risks leaving aside exactly what should not be discarded. These are questions that arise when dealing with contingently written texts, losing their purpose when it must deal with broader problems, which are difficult to sustain in the face of contemporary complexity.

Final Considerations

Streaming regulation in Brazil needs to be recovered in what really matters: as part of a broader project for the creation and diffusion of national content, hoping to insert a certain territory into a global space for the circulation of images. This spirit guided the appropriation, in the online, of the incentive rules that was important for the multichannel. However, these are not the terms of the recent discussion. Limited as it is to a debate on taxation, the subject loses its substantive dimension, becoming a dispute about formal subjects. The case becomes more serious in the face of the morphology of networks and the power it offers to the intervention of those who control interactions in vast dimensions of space, essential to order expectations for the future.

The situation gets worse due to other ongoing interactions, with direct consequences for such a project. Its nature mirrors the operation of the categories of time and space as worked by Castells. The case AT&T-Time Warner will prove essential in the definition of streaming. However, this power to coordinate vast dimensions meets the specifics of a standard. Part of the attempt to assert the autonomy of a certain State, such a law turns out to be limited due to its own inconsistencies. Seems misguided the choice to treat this creator not as a content corporation, and its consequences go beyond such a particular acquisition. Going beyond itself, the case may produce further unfolding future conflicts. Even worse, the way this norm is organized makes it unfit to deal with these incongruities. It seems debatable whether the definition adopted for streaming is the most accurate, and not only in relation to the problem addressed here.

A question not explored here, but one that certainly deserves to be raised refers to the treatment offered to broadcasters in the document prepared by *Ancine* in 2017, proposing to exclude then from the regulation to be proposed for streaming. This creates another weird kind of tension, a regulation that would treat half of the industry. On the one hand, the proposal sounds coherent because of the limited way in which audiovisual regulation has always been addressed. Excluding broadcast would make sense for political reasons, and when one would think in terms of national content quotas. After all, why waste time discussing a predominantly Brazilian group of creators when it comes to understanding how to treat global corporations?

On the other hand, there seems to be an undeniable expectation in other countries to bring streaming networks closer to streaming. Evidence of this attention consists of new interventions in the time-space present in acts such as the purchase in 2016 of *Telefé*, the Argentine television network previously owned by *Telefónica*, by *Viacom* (*Telefonica*, 2016). In Brazil, there are constitutional limits preventing the sale to international corporations of anything larger than a share that is quite distinct from control. A change in the Brazilian Constitution is not simple, but it does not seem impossible either.

Understanding how global images are made will no longer ignore a concrete trend: the chance for broadcasters to become the property of international groups.

Another problem refers to the growing attention of very diverse characters in relation to smaller material: the content that, in Brazil, is equivalent to the so-called “youtubers”, and that has become part of a professional environment (Lobato, 2016). Several acquisitions - Disney’s purchase of Maker Studios on 03/2014, Machinima by Warner Bros on 11/2016 - indicated the expansion of these corporations into a hitherto internet-specific territory, making this association between old and new a concrete theme. The typical content of this network becomes part of an environment that is not distinguished from other articulations. This makes it necessary to safeguard incentive policies also for this kind of image, an assumption of importance worthy of attention.

These are tangled, complex themes that illustrate the difficulties at play. It seems concrete the interest of the most diverse characters in a diversification for the image that reaches the streaming of the most diverse directions; if the attention to encouraging initiatives from certain territories indicates one of the few alternatives for an autonomous presence of this region in this global space; if the norm for streaming dubiously addresses the efforts from which it itself was justified; if the current legal discussions do not consider some cases of probable impact on a debate which is not only limited but is still being held; if all this is true, it is important to revive certain background terms that can guide this process.

Leaving aside these complexities means underestimating the relevance of audiovisual, against all evidence. Diverse forces have acted in many directions, bringing about transformations necessary for public debate. If it were not enough to have to worry about the scarcity itself in the creation of films and series, indispensable themes in an interpretation of the Brazilian production, there are other issues even more difficult to deal with. The imitation of excess, this attempt to deal in Brazil with the speed of expansion worldwide in the quality and quantity of images has become a problem that also refers to internet-specific content, for which there seems to be no tools to deal with.

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