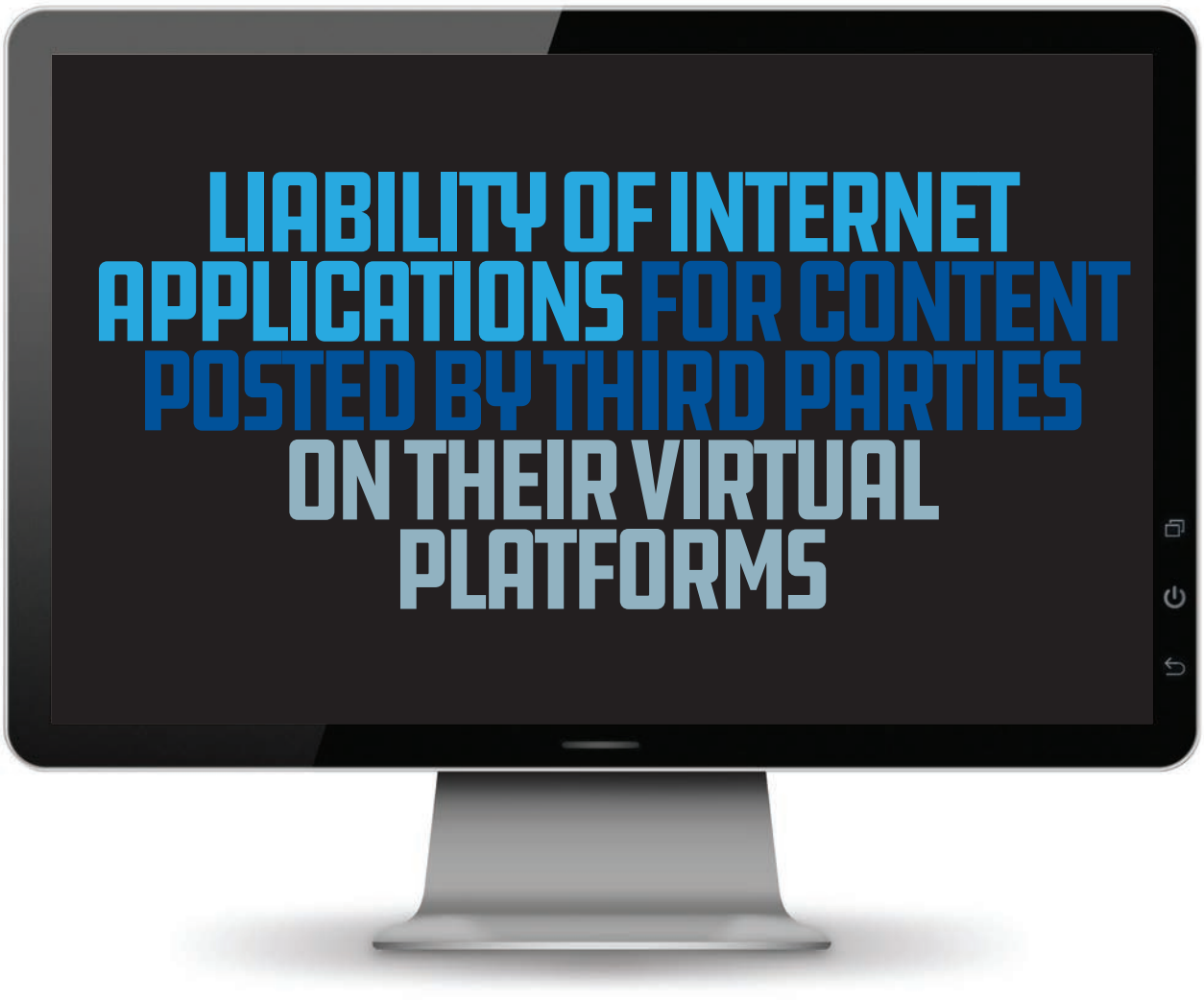

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INTRODUCTION: CONTEXT OF INTERNET APPLICATION PROVIDERS IN BRAZIL

Certain companies' business activities include providing electronic space for sellers to advertise their products and services to interested third parties and perform, through the electronic platform, the formalization of the respective contracts. They are known as online marketplace service providers.

In online marketplaces, users interested in buying or selling products or services exchange data and information, negotiate values and set deadlines for payment and delivery of goods or completion of services. It is a service that brings potential business partners together and facilitates businesses between the users.

While there was no specific statute ruling the activities of online marketplace service providers, there were doubts in the Brazilian legal system regarding the liability of online marketplace service providers for illegalities existing and committed within the electronic space by the users of the marketplace services without any interference from the provider. For example, liability in the case of users inserting illegal content in the online marketplace or advertising or selling services or products which are controlled or prohibited.

In the absence of a specific law, the issue of the internet service providers' civil liability eventually had to be solved by the Judiciary, in the various concrete cases that reached the courts of appeal, especially the Brazilian Superior Court of Justice.

By weighing the principles of freedom of expression and the inviolability of people's privacy, the Court understood that it would be impossible and illegal to impose on the online marketplace service providers the obligation of monitoring content created by the marketplace users in advance of its inclusion in the marketplace, under penalty of unduly restricting the freedom in the internet environment.

The Superior Court of Justice also emphasized that such prior monitoring of content is not an intrinsic activity of the type of service provided by online marketplace service providers, and for this reason, one cannot presume that such providers assume

the risk of damages generated by the insertion of illegal content by users. The Court concluded that the providers' liability is subjective and only in case of omission. This means that the providers may only be held liable in cases where, after being notified of the existence of illegal content in their electronic platform, they delay or fail to delete such content (STJ, in AgInt AREsp n. 931.341/SP of 2021, in AREsp 484.995/RJ, of 2015).

LIABILITY FOR OMISSION. NO NEED FOR PRIOR CONTROL. MCI REGULATED SUBJECTIVE LIABILITY FOR OMISSION.

Consolidating the understanding of the Brazilian Superior Court of Justice, the Brazilian Civil Framework Law for the Internet ("MCI") enacted in 2014 expressly established that, regarding content generated by users, internet service providers have what is called in Brazilian law subjective liability for omission. In other words, internet providers can only be held liable for damages arising from content created by users if, after a specific court order, they fail to take action to make the content unavailable, within the technical limits of their service and within the specified period (article 19, paragraph 1).

The MCI aims to guarantee the users' freedom of expression and prevent any type of censorship, in harmony with the foundations of the regime of internet use in Brazil: free speech and the free expression of thoughts.

In addition to the understanding, reflected in the decisions of the Superior Court of Justice and in the MCI, that internet application providers have no obligation to create prior filters to prevent the inclusion of illegal content in their platforms, the MCI sets forth that a court order for the removal of digital content from the internet should contain, under penalty of nullity, a clear and specific identification of the content indicated as infringing and allow an unequivocal location of the material. This means that the party that feels aggrieved must indicate in detail the harmful content, so that the judge may issue a specific and precise order. The Brazilian Superior Court of Justice decided that such specific and precise indication of the content by the injured party must be made through the indication of the URL (Uniform Resource Locator) or the specific code of the content inserted in the platform. A judicial order for the provider to exclude content not specifically identified by its URL would be seen by Brazilian courts as akin to censorship.

The duty of the providers to search their platforms and websites for infringing content has been removed by the law and the Courts, and it is currently understood that it is the applicant that is qualified and capable of accurately identifying the contents that, in the applicant's view, would violate the applicant's rights.

The exception to these rules is the cases involving a violation of privacy resulting from the undue use of images, videos or any other material with nudity or private sexual acts. In such cases, the illegal content must be removed after notification by the offended – there is no need for notification by a judge – with the URL information (article 21). In such cases, the Superior Court of Justice already has strong precedents.

THE COPYRIGHT ISSUE (ART, 19, §2, MCI) - THE UNDERSTANDING OF THE COURTS AND THE DIFFERENCES IN LIABILITY

The MCI has not regulated the internet application provider's responsibility for the protection of copyrights. Even though it was generally established that the internet application provider would be held liable when it failed to remove the content created by a user after being notified by a judge, the MCI, in respect of copyrights, only sets forth that the matter depends on the enactment of specific legislation, which will have to respect the right to free speech and other guarantees provided by the Brazilian Federal Constitution (article 19, paragraph 2, MCI).

In this scenario, matters involving copyrights must take into consideration, not only the MCI, but also the Brazilian Copyright Law, enacted in 1998. However, because the Brazilian Copyright Law does not deal with questions of copyright in the internet, the superior courts will have to define how to articulate it with the MCI.
It is important to note that there is no indication that the Brazilian Copyright Law will be updated soon. The consequence is that there will be uncertainty in this matter until significant decisions are issued by the Superior Court of Justice. So far, the courts are implementing MCI's general rule, that the internet application provider must remove the content after being notified by the court with the URL information.

CONCLUSION

The MCI entrenched the Court precedents that decided the liability of Internet Application Providers regarding illegal content.

Internet Application Providers are held liable only if they fail to remove such contents after judicial notification, containing specific indication of that which must be removed (URL), except in the case of violation of privacy with the use of images, videos or any other material with nudity or private sexual acts, which must be removed after notification with the URL information by the offended, without the need for notification by a judge.

As to copyright violations, Brazil does not have specific legislation regarding violations committed in online marketplaces, which leaves to the courts the analysis of each case individually.

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