One of the most wrestled with subjects in the Brazilian ICT industry is network neutrality regulation in the Brazilian Internet Civil Mark, a legislative project which defines principles, guarantees, rights and duties on Internet use in Brazil. The law project, numbered 2126/2011, authored by the executive and related by Deputy Alessandro Mibon (PT-RJ), is currently in the Chamber of Deputies. In addition to establishing very important regulatory marks, like user privacy and civil infractions typification and liability, the proposition introduces an awfully polemic question for service providers: the need for further network neutrality regulation.

The largely accepted definition of net neutrality is attributed to Professor Tim Wu, a net neutrality guru, who states that “Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites and platforms equally. This allows the network to carry every form of information and support every kind of application. The principle suggests that information networks are often more valuable when they are less specialized — when they are a platform for multiple uses, present and future.”

Net neutrality is not a new subject in Brazil. In 2009, the Brazilian Internet Steering Committee (CGI.br) published resolution CGIbr/RES/2009/003/P – Principles for the Governance and Use of the Internet, which in the 6th principle — Neutrality of the Network — states that “Filtering or traffic privileges must meet ethical and technical criteria only, excluding any political, commercial, religious and cultural factors or any other form of discrimination or preferential treatment.”

Similarly Anatel (the Brazilian Telecommunications Regulatory Agency) defined network neutrality in a new proposal for the Multimedia Communications Service Regulation (the main regulation for broadband communications, not published yet) stating that “it is forbidden for the service provider to perform any traffic blocking or discriminatory treatment of any kind of traffic, such as voice, data or video, independently of the technology used; the prohibition established in the caput of this article does not impede the adoption of blocking measures nor traffic management that are shown to be indispensable to ensure the safety and stability of services and support networks.”

The Brazilian Internet Civil Mark states in its 3rd article the principles that will govern Internet use discipline in Brazil and affirms network neutrality as one of them, confirming the need for further regulation. Thereof, it defines net neutrality in its 9th article, specifying that the entity responsible for transmission, switching and routing has the duty to treat any packet of data in an isonomic way, without any differentiation by content, source or destination, service, terminal or application, being forbidden any discrimination or degradation of the traffic which is not a consequence of technical requisites necessary to the suitable service provision, according to the regulation.

Pursuant to this brand new legislative proposition, traffic shaping — the practice of delaying data packets to keep service quality blocking heavy users, or assigning traffic privileges for commercial partners (for example, the mobile carrier which favors its own app store slowing the traffic of its contenders) — will be definitely and expressly prohibited.
At this point, it’s important to remark that neutrality is not the question. The question is whether to regulate net neutrality or not. Representatives of the civil society presented a proposal to Deputy Alessandro Flibon to eliminate the clause that requires future regulation of net neutrality claiming regulation will limit something that must be open and free. Moreover, the question starts to enter the juridical field: some principles, like human dignity, do not need to be regulated. Everyone knows what they really mean.

Another argument favorable to net neutrality non-regulation is that as a public place, a space to be shared by everybody, the Internet should have the least regulation possible. To impose constraints on its use is like defining the number of people who can occupy a public square and where they should stand. Furthermore, the central problem rests in civil society’s fear that new regulation defines situations that can enable traffic management or blocking (as in Anatel’s network neutrality concept) and that these regulated situations could be used to disguise traffic shaping, blocking or privileges.

There are arguments that support net neutrality regulation. The first is that regulation permits supervision of its fulfillment by the executive power. (In the Brazilian case, Anatel would be the competent public body for such task.) It’s quite impossible to supervise a principle because it becomes interpretative and many interpretations will be allowed, according to the Brazilian legal system. It’s suitable to note that two main understandings can come about.

The first one, according the Brazilian General Telecommunications Law (Law 9,472 of 1997), is that Anatel is responsible for “deliberating on the administrative sphere regarding the Telecommunications legislation and about the silent cases” (Art. 19, XI). The second emanates from the judicial power. These two interpretations can differ and editing a regulation could avoid this disagreement that generates legal uncertainty for Internet users. It’s important to note at this point that Anatel has announced a way to change its net neutrality concept as stated in the public consultation for the new Multimedia Communications Service Regulation, in order to be coherent to the Brazilian Internet Civil Mark.

Another view that could benefit net neutrality regulation is the discussion about what a technical or ethical requisite is and what it is not. If the technical or ethical aspects are not well illustrated, the Internet user will be penalized. For example, will a carrier be allowed to sell different broadband data rate connections? Is it a technical question or is it a commercial, contractual one? Can an Internet service provider prioritize data traffic from a public hospital (imagine a video conference for a remote surgery) instead of an online bookshop? Is this an ethical traffic selection (as allowed by the Brazilian Internet Steering Committee) or must it be forbidden?

The concern of defective regulations does not justify the complete absence of norms. The Brazilian Internet Civil Mark is still under discussion and has impressive participation from civil society. Certainly, this same society will contribute vastly to net neutrality regulation.

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Note: This article does not express Anatel’s official opinion, does not represent any of the board of directors members view nor constitutes any previous judgment of any ongoing process.

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One Response to “Reality Check: Network neutrality and the Brazilian Internet Civil Mark”

Paulo Silveira says:
May 24, 2012 at 1:01 PM

Very good your article when we analyze the problem that is happening in the USA where

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Comcast is prioritizing the band’s service com o Xfinity over the Xbox. And from a consumer point of view, the cap is not terrible in and of itself, but it can be a tool used to protect an ISP’s pay TV business or their profits absent robust competition in the market. In the current stage of technology with the convergence of all platforms for delivery of video content (OTT) using the second screen will create a problem of bandwidth prioritization. The FCC Chairman Julius Genachowski said that “Business model innovation is very important and there was a point of view a couple of years ago where there was only one permissible pricing model for broadband. He did not agree as reported in the GigaOM article.” The bigger question is whether or not he agrees to practices that would exempt an ISP’s traffic from their own broadband cap, as Comcast is doing with its Xfinity service over the Xbox. And from a consumer point of view, the cap is not terrible in and of itself, but it can be a tool used to protect an ISP’s pay TV business or profits absent robust competition in the market. As he is in favor of a new model asking price started questions about how those caps are set and what they have impact on consumer behavior. Because it’s not like that consumers have much choice in their broadband provider. This is an issue that must be very detailed when a specification of network neutrality regulation by the Anatel.