/ REGULATORY CHALLENGES OF PROGRAMMATIC ADVERTISING

An introduction to the discussions

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REGULATORY CHALLENGES OF PROGRAMMATIC ADVERTISING
AN INTRODUCTION TO THE DISCUSSIONS

/ *Pedro H. Ramos*

INTRODUCTION

Over the last years, the online advertising segment has seen the rise of many new technologies, focusing on the expansion of the online advertising ecosystem while creating new value chains between advertisers, agencies and publishers. Among the key trends of such scenario, a growth to **programmatic advertising** was seen; this is a strategy used from several technology platforms and complex contractual relationships for automating advertising delivery to a target audience thus reducing publishers' lost advertising inventory.

Upon the expansion of such strategy, new challenges and complexities have been imposed to review these new patterns within the regulatory framework of the Brazilian advertising. Although the market is concerned on how to deal with these new challenges, few analysts have worried about providing a more solid view on the topic so far. There are two choices from the outset: either to introduce these new technologies into the well-established concepts and institutions of our Brazilian regulatory pattern or to understand them as disruptive patterns in relation to the imposed regulation, being faced with the challenge to discuss new relationships, institutes and underlying principles to review such scenario.

Law and Technology – A disruptive relationship

In Law, the concern for social conflicts generated by the new technologies is commonplace as the regulatory fear in Law to respond to such new claims. For example, in the late 1990s and early 2000s, the common practice was for the Judiciary Branch to match marketplace selling and buying platforms with product sellers. Likewise, social networks, such as Orkut, were considered by many judges as content platforms, thus they were matched with traditional news and media websites in their civil liabilities.

Such overall trend is described by scholars as the time when economic and social ecosystem conditions lead to a disruptive moment in the law of disruption, towards a "paradigmatic depletion", in which the legal categories no longer reflect the complexity of social institutions. Such inadequacy is in fact specific to the nature of the Law: laws and regulations are the portrait of certain quandary prior to approval thereof with huge unbalance between the technological innovation and the time for the legislative process. Even laws governing the Internet go through long processes: the first discussions on the Marco Civil of Internet were initiated in Brazil in 2007, but they were approved just in 2014 – seven years during which the Brazilian Internet scenario had been dramatically changed, and now we face new issues to challenge the interpretations of judges and regulators.

REGULATORY PATTERN OF BRAZILIAN ADVERTISING

The advertising activity in Brazil is regulated by a specific regulatory framework, which may be divided into four hierarchies:

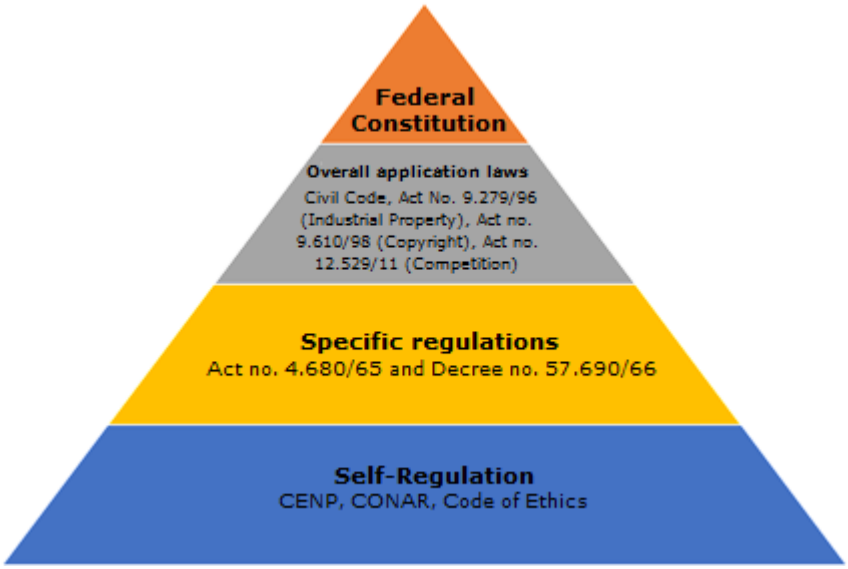
- **Federal Constitution –** the utmost law within the Brazilian legal framework with the essentially underlying principle-related influence on the Brazilian advertising market for it determines the major procedures that should guide advertising businesses

in the country, such as *free speech, free enterprise*, *free competition* and *consumer protection*;

- **General application laws** are norms applicable to all corporate activities exercised in Brazil with direct and indirect influence on the advertising industry, providing for general conduct norms. Within such category the Civil Code is outstanding as it provides for norms such as the good-faith principle and the social function of contracts; act no. 9.279/96 (Industrial Property Act), regulating, together with act no. 12.529/11, free competition and act no. 9.610/98 (the Copyright Act), regulating ownership of intellectual property developed by agencies to the benefit of advertisers;

- **Specific regulations** following the consecrated norms of other countries, especially in Europe, Brazil holds regulations which specifically deal with the advertising market, setting forth rights and duties of players in such sector, being the primary laws in such matter Act no. 4.680/65 and Decree no. 57.690/66.

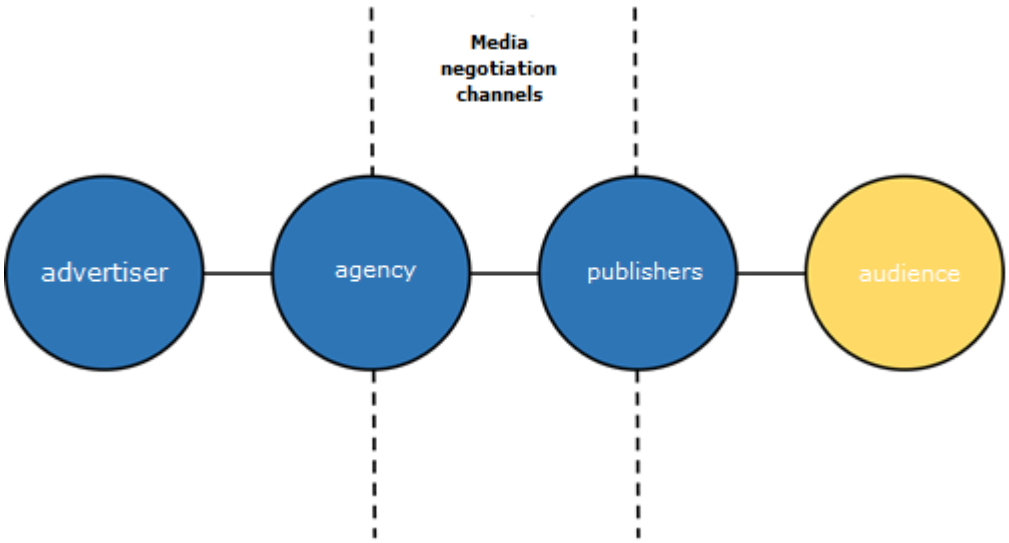
- **Self-Regulation:** Brazilian self-regulation is acknowledged the world over as the most successful. By express legal authorization there are two bodies responsible for governing the specific relations between the players of the advertising market: the Executive Council on Standard Norms for Advertising Activities (CENP), responsible for regulating the technical and commercial market relationships; and CONAR, responsible for inspecting and judging the content of the advertising actions.



The abovementioned framework recognizes a series of stakeholders comprising the industry value chain. By reviewing the norms above, the Brazilian legal framework is noticed for recognizing three roles as critical to the advertising market: advertiser, communication outlet and advertising agency.

Player	definition	legal reference
communication outlet	any means of visual, auditive or audio-visual disclosure, able to convey advertising messages to the audience, provided that the union entities or class representative civil associations, as legally registered, so certify them.	Act no. 4.680/65 art. 4; Dec. 57.690/66, art. 10; and CENP Standard Norms, art. 1.4
Agency	corporation specialized in advertising arts and techniques, which studies, conceives, executes and distributes ads to the disclosing communication outlets, on the order and account of advertising customers for promoting the sale of products and services, disclosing ideas	Act no. 4.680/65 art. 3; Decree 57.690/66, art. 6; and CENP Standard Norms, art. 1.3.

	or informing the audience on organizations or institutions at the service of the same audience.	
advertiser	entity or individual using advertising	Decree 57.690/66, art. 8; and CENP Standard Norms, art. 1.2.



In addition to the previous players, the Brazilian regulatory framework also mentions at least two other characters: the **independent trader,** an individual responsible for conducting the sale of advertising space/time, and who forwards advertising on the order and account of the Advertiser; and the **communication outlet representative,** entity or individual with representation powers to trade on behalf of certain communication outlet with agencies and advertisers.

media bureaus
Another regular character in advertising regulatory discussions is the *media bureau*, known as *closed media center*, with its first appearance in France (*centrales d'achat d'espace*) as of the 1970s, expanding to countries, such as USA, Mexico and Argentina as a response to two market issues: difficulties faced

by smaller advertising agencies in maintaining their own media departments and the funding of smaller communication outlets.

The concept of the bureau was meant to overcome such problems by the following model: the bureaus bought in advance advertising spaces in many communication outlets ("wholesale", defined as the usual term) and then offered such spaces to small agencies, charging an overprice equivalent to their profit ("retail"). Thus, the communication outlet representative was no longer a mere *broker* since it transformed into an *investor*. However, such method also carries its adverse consequences to the market, to the extent that it presses down the list pricing paid to the communication outlets and, on the other side, increases the amount charged from agencies. In addition, full-service agencies lose their power in markets where purchasing centers centralize and monopolize negotiations with communication outlets, putting barriers to competition for broad market expansion, which resulted into the advertising industry in Brazil moving in the opposite direction of the media bureaus ever since the 1st Advertising Congress in 1957.

Such attitude assumed by the market was converted in 1998 into a new version of the CENP Standard Norms, where the concern for competitors was clearly exposed by defining bureaus as entities meant to "*replace certain Advertiser(s) and their brands in the trade and purchase of space/time or service, not considering the Agency(ies) as able to provide the full service and recognized by the Communication Outlet(s) as account owner(s)*" (art. 4.4.1), expressly restricting any purchase and sale of advertising spaces through such entities (art. 4.3). Although CENP has no jurisdiction to *prohibit* certain practices of any bureaus in the country, the Standard Norms define sanctions to the agencies which, at any rate, make transactions with *bureaus*, being subject to losing the registration of their activities.

ONLINE ADVERTISING PATTERNS

Innovation in media delivery has always been guided by a key purpose: efficiently reaching the right audience.

Segregation between publisher content and audience has always been an efficient strategy in advertising – in newspapers, for example, inclusion of ads according to the target audience and the subject of certain section has always been an assumption of efficiency. With the introduction of the commercial Internet in the 1990s, **contextual advertising** was coated with growing relevance: with increasingly specialized content websites, agencies and advertisers trying to *predict* the audience of such websites through disclosed content.

As technology evolved, agencies, advertisers and publishers were searching for more efficient methods for contextual advertising. If the content of a certain page (such as a news website) is regularly changing, or if users can customize such content by their interaction with the website, such as automating the advertising inclusion process, preventing agencies from being required to personally trade, space by space, with each communication outlet. This did not seem to be a problem in traditional media, with few players in each area, but it was definitely a great challenge in the online advertising: in 1997, the web already relied on over 1 million websites, which got to 17 million in 2000.

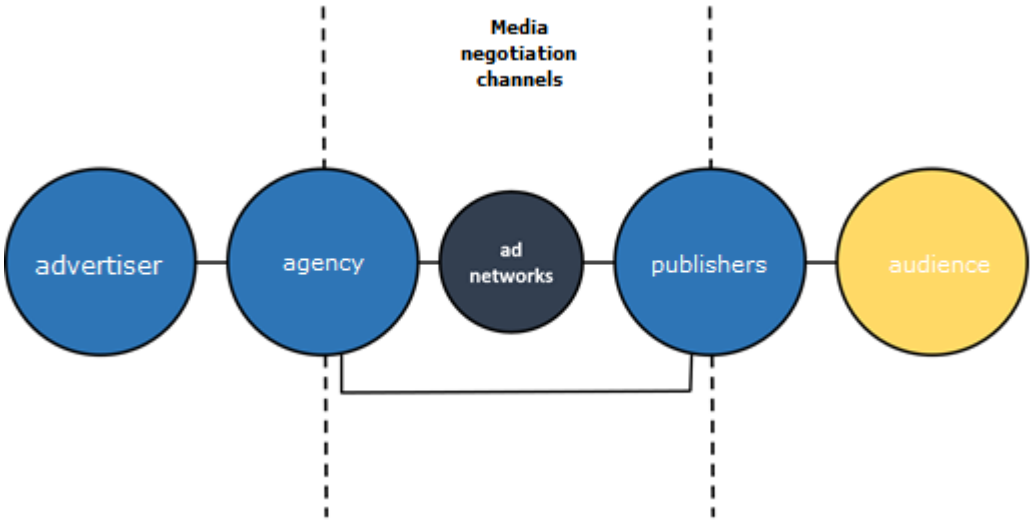
As a response to this challenge, technology tools are developed for the primary purpose of automating processes for identifying content on the website pages and delivering segmented advertising according to the content identified. Using cookies, tags, database managers and other technologies, these tools were not aimed at redesigning the advertising trade process, but only *automating it*. Agencies and advertisers would remain trading the inclusion of their ads directly with publishers; however, such an epic task became unfeasible upon network expansion and process automation tools were now critical to the advertising market.

This pattern had some failures. How to make sure that users reading some news on the Louvre are potential consumers of travel packages to Paris? As a matter of fact, this has always been a risk in traditional advertising: for example, if 20% of the people watching soccer games do not drink beer, then beer advertising is only reaching 80% of its target audience. Reducing such loss percentage was the challenge of a series of companies which developed, throughout the 2000s, **behavioral advertising** technologies, enabling the identification of the user browsing history and processing such information in large databases for segmenting delivery of advertising *specifically* to those users who meet the profiles of certain advertisers.

At this time, there is a model change in relation to the advertising value – solely consolidated upon the rise of programmatic advertising. Quality of the advertising space provided by certain publishers for including an ad (e.g. a website cover, the central banner etc.) increasingly loses importance in pricing. There was no use whatsoever in a central banner delivered to an audience other than the advertiser's target. Thus, more and more publishers, agencies and advertisers began using behavioral advertising tools to increase efficiency in their campaigns, also resulting into major changes to calculation of the sums charged by publishers, upon the rise of pay-per-click (PPC) or cost per acquisition (CPA).

Adnetworks are critical online advertising technology tools, which first appeared in this period. By using large databases, which crossed different platforms and enabled more efficient segmentation of focused advertising, these companies were set-up for automating even more the delivery of behavioral advertising when the number of websites and parties interested in disclosing online advertising was exceeding in 2005, 64 million. The size of such market then brought a new challenge: advertisers wanted to reach several websites, but no agency was able to contract dozens of thousands of communication outlets at the same time; smaller websites, in turn, already representing a huge number of accesses and with the capacity to add behavioral advertising technologies to their webpages, needed to find means to receive advertising from advertisers.

Adnetworks were set up for solving this issue. On the one hand, these are technology companies, providing tools to automate advertising delivery processes according to the profile of the audience identified. On the other hand, they operate like the traditional *communication outlet representatives*: from the time a boilerplate agreement is entered into and the *adnetwork* technology is installed to a website, these companies are authorized to trade advertising spaces of such websites with agencies and advertisers.



In the mid2007, new technologies began to be launched for automating this process even more. Despite the appearance of *adnetworks*, *publishers* were still struggling to sell their less attractive space – using the traditional media nomenclature, the problem here was to *reduce the house ads* of such websites. In such matter, **adexchanges** were created – technologies enabling to automate the sales channel between *publishers*, agencies and advertisers, and which could even be used by adnetworks.

Such technologies operate similarly to a stock exchange: the platform enables space purchasers (agencies and advertisers) to connect with space sellers (*publishers* and *adnetworks*) on a central market (the *adexchange*). The price of such spaces is defined through automatic algorithms based on the rules of offer and demand.

Little by little, these technologies have added even more tools. With the purpose of increasing the result of ad conversions, these tools have begun to identify in real time which users access certain *publisher* and, only after such identification, the ad "pricing" mechanism began to operate. This created the concept of ***real time bidding***.

The logic still recalls a stock exchange, but it strictly follows an auction standard: in an *adexchange* environment, the technology identifies certain user login (e.g. user 1234) to a certain publisher webpage, which relates to the *adexchange*. From then on, the auction is initiated: agencies and advertisers connected with the platform will then review the information they have on user 1234 and if this profile is their brand or product *target*, they can *submit a bid*, i.e. suggest the price they are willing to pay to deliver an ad to user 1234. Once all bids are submitted, the *adexchange* processes the winning bid, the ad of which shall be directly delivered to user 1234. The huge capacity to process data of the *adexchanges* enables such dynamics to take place in a programmed and automated manner, in fractions of seconds and imperceptible to the user.

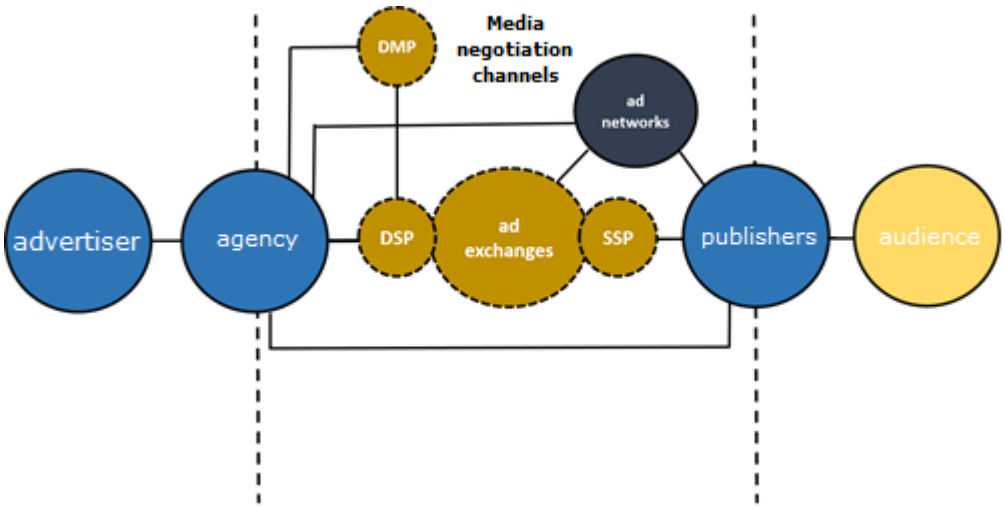
To optimize the decision-making process on *bids* in *adexchange*s and allow connectivity with such platforms, other technologies have come and become increasingly and virtually mandatory for the efficient operation of programmatic advertising strategies by *adexchanges*:

- **DSP (Demand-Side Platform)** is the tool connecting advertisers and agencies to several *adexchanges*, enabling automation of the advertising delivery process and programming the way each bid shall be submitted, according to the profiles identified. Audience information can be added to the DSP tools, for optimizing decisions on each bid;

- **SSP (Server-Side Platforms)** is the technology enabling *publishers* to manage their advertising spaces and Ad Servers, connecting to *adexchange*s and providing tools to optimize the

connection to DSPs and the final advertising delivery to its users;

- **DMPs (Data Management Platforms)** are software platforms that process huge databases on users and audience profiles identified by means of *cookies* and other similar technologies. DMPs can provide intelligence reports directly to agencies and advertisers, as well as it can automatically "feed" DSPs, thus optimizing decision-making processes on each bid submitted in *adexchange*s.



advertiser – agency – DSP – ad exchanges – SSP – publishers – audience

Here we notice that the sales channel provided by an *adexchange* reinforces the change to media purchase and the sale paradigm – which has been chased by agencies, advertisers and publishers for a long time: **the pricing baseline is no longer the location and format of the advertising space, but the audience profile which is to be impacted by the ad**.

Yet, there is no longer advanced purchase and sale and space reservations – as the case of the *bureaus*. *Real-time bidding* technologies provide a sales channel enabling agencies, advertisers and *publishers* to trade **in real time** by means of software tools and algorithms that allow fast individualized decision-making, according to each user. In other words, roles are the same, but now technologies are used to provide for

process automation and decision-making optimization, rendering the digital advertising ecosystem more complex and miscellaneous.

REGULATION OF NEW ADVERTISING TECHNOLOGIES: AN ANALYTICS MODEL

The context provided herein shows that the evolution of the focused advertising models is no longer based only on cookies information, but it also uses complex contractual relationships and large audience-related informational databases. As explained, these techniques along with the *real-time bidding* strategy should not only be a sophistication of the contractual workflow, but a major change to one of the elementary paradigms of the traditional advertising framework: instead of a framework where advertising spaces have a value defined by *publishers*, now the cost of certain space is provided as the function of the *identified audience.*

Thus, the technological evolution of the Internet has enabled the advertising market to finally measure the transactional pricing from the value point of the chain, which is the audience, the receiver of the advertising message. That was a *disruptive* stage in relation to the traditionally designed models upon industry regulations and dramatically changing the approach institutions, which coordinated the advertising market, need for the new legal challenges deriving from such new configuration.

This new scenario should not be faced by the regulation statically. To us, it seems clear that the effective regulations of the advertising industry do not accurately reflect the complexity of such ecosystem and, although the principles and overall guidelines remain important to regulate the relationships between the players in such market, new challenges arise. They must be faced with new analytics lens and cannot be solely based on the attempt to fit new technologies into previous legal concepts, at the risk of rendering such analytics unproductive (many legal concepts developed decades ago are not satisfactory solutions to the problems coming with the new


contractual characters) and limiting technological experimentation in this dynamic sector – carrying out new economic activities that might be positive to the market for the sole purpose of *not being expressly outlined in the regulation* is preventing free enterprise and technological development, which are protected by the Federal Constitution.

To face the challenge, this study proposes a new analytics model to settle the occasional legal conflict resulting from the expansion and consolidation of new programmatic advertising technologies in the country. This model certifies the principle determining and guiding importance of the Brazilian advertising regulatory array, as described in the first section of this study, and is based on four cornerstones to be considered when drafting new industry regulations, which may also serve as a compass to establish legal relationships between the market players:

- **Transparency in commercial relationships**

In the Brazilian regulatory framework, one of the critical rules of the relationship between advertisers, agencies and *publishers* has always been that *publishers* are free to define the prices of their advertising space; even if the prices need to be available in public lists, communication outlets are legally authorized to trade with the different conditions of agencies and advertisers, provided that no anti-competition effects are created (articles 2.2. and 2.3. of the CENP Standard Norms).

Even with such assured freedom to defining prices, the way prices are defined in negotiations involving *adexchange* platforms is not always clear to the contracting parties. While some technology companies charge monthly or annual *fees* for licensing and operating their technologies, many of them associate their remuneration to the volume of transactions carried out by the platform. This type of payment covenant is not illegal but needs to be well-defined in a contract so that agencies and advertisers may clearly understand how pricing of the *real-time bidding* platforms works.

In addition, attention must be paid to whether the payment and pricing workflows of such platforms damages advertising agencies. There is no restriction for advertisers to purchase advertising spaces directly from communication outlets and by means of the sales channel provided by the real-time bidding platforms. Direct relationships between advertisers and *publishers* are also expressly permitted by the CENP Standard Norms (article 2.3.1). However, direct contracting without the support of agencies cannot be based on more beneficial criteria than if there were agencies in the relationship (art. 2.3.a of the Standard Norms), which would result in anti-competition practices. Thus, the same criteria and pricing practiced by *publishers* in *adexchange* platforms needs to be isonomic, regardless of whether the contracting is conducted with or without the assistance of agencies, abiding by the critical role these companies play in the advertising value chain.

- **Strengthening contractual relationships**

One of the problems seen in contracting advertising technology platforms is the obscurity in their agreements, which do not properly define the nature of services provided, obligations of each party and the liability limitations assigned to each of the contracting parties. Additionally, many of such platforms base their relationships on boilerplate agreements. These are often used as a starting point to models practiced by their company headquarters (USA and UK, for instance), and just ignore the Brazilian legislation and contractual practice.

Besides the clear and detailed contracting terms, such agreements are required to clearly determine the legal role of each company. Most part of these activities are related to **technology licensing**, especially access licenses (*Software as a Service*), and the main terms governed by Acts No. 9.609/98 (Software Act) and 9.610/98 (Copyright Act). In those cases, the company liability is restricted to the platform availability and its tools, and the platform is operated by the contracting companies.

However, it is the technology licensor who provides the platform operation service in some models by **providing technology**

consulting services. The provision of these services may also be transferred to other companies, which are not technology owners, but carry the know-how and human structure required to operate such tools.

Such distinction is not a simple over-refinement: in addition to the different contractual liabilities, there are also important consequences at a fiscal level, as well as different exemptions of contractual liability according to the activity carried out.

- **Protection of personal information**

After approval of Act No. 12.965/14 (known as *Marco Civil of Internet*), the Brazilian legislation showed, for the first time, a regulatory concern for the protection of personal information on the Internet, establishing requirements and rights of users in relation to the matter, including:

  - users are to be clearly and fully advised of the gathering, use, storage, handling and protection of their personal information;

  - users' personal information shall not be shared with any third parties, unless otherwise previously, freely and expressly consented by such users;

  - consent on gathering, use, storage and handling of personal information is to be separate from the remaining contractual clauses;

  - personal information may only be used for legal purposes, as specified in the service provision agreement or terms of use, and the gathering of which may be justified; and

  - upon the termination of the relationship between the parties, the personal information provided by the users shall be deleted, as requested by them, except in case of mandatory storage as per the Marco Civil.

The legal complexity of personal information protection and the constitutional urgency imposed for approval of the Marco Civil project were decisive for regulating the detailed rules above, pursuant to a specific regulation to be issued as of 2015. Notwithstanding, the generic text proposed by the Marco Civil brought a series of insecurities to the online advertising market. Some of the challenges involve topics, such as the personal information concept, and whether it comprises only personally identifiable information (PII) or also mere access information as captured by *cookies*; what is the limitation of publishers' liabilities in obtaining the consent of their users regarding data gathering; and the companies which would be obliged to receive and direct requests for deleting users' personal information. To solve these challenges, the advertising industry is required to actively participate in public inquiries, involving the regulation, as well as providing its position with good practice manuals and self-regulation codes.

- **Respect to free competition and restraint to abuses**

Competition is one of the engines of the Brazilian economic framework and one of the underlying principles of the Federal Constitution. In a respectful judgment before the Court of Justice of São Paulo, the Appeals Court Judge, Francisco Loureiro asserted that "*aggressive competition, although aimed at diverting third-party clientele and gaining a better position in the market, is not repressed by the law, being, by the way, inherent to the very operation of capitalism. The Federal Constitution itself encourages new competitors to enter the market attacking third-party clientele*". (Appeal no. 0011397-27.2011.8.26.0566.)

However, free competition cannot be confused with **unfair competition**. The Brazilian constitution, especially through Acts No. 9.279/96 and 12.529/11, represses corporate activities and conducts aimed at limiting, counterfeiting or otherwise damaging free competition or free enterprise. Among the conducts characterized as infringement to the economic order in Brazil, the following are pointed out for the sake of example:

- agreeing, manipulating or adjusting with competitors' prices, production or commercialization or division of market segments under any form:

- limiting or preventing access of new companies to the market;

- hindering constitution, operation or development of a competing company or supplier, purchaser or supporter of assets or services;

- preventing access of competitors to the input sources, raw materials, equipment or technology, as well as to the distribution channels;

- using deceptive means to incite third-party price fluctuation;

- regulating assets or services markets, by establishing agreements to limit or control researches and technological developments, production of assets or provision of services, or to hinder investments intended to production of assets or services or to distribution thereof;

- imposing upon distributors, retailers and representatives, resale prices, discounts, payment conditions, minimum or maximum volumes, profit margin or any other trade conditions related to such businesses with third parties in asset or service trading operations;

- preventing exploitation of industrial or intellectual property rights or technology rights;

- abusively exercising or exploiting industrial, intellectual, technology or trademark property rights.

Such balance is also explicit in the CENP Standard Norms. While the full competition is from the CENP guiding principles (art.

2.1), the Standard Norms also provide "*contracting advertising under antieconomic, antitrust conditions or that imply unfair competition is prevented, and CENP may, in view of such conducts, apply the sanctions as determined in art. 63 of the Bylaws, as well as represent the competent authority, to impose the sanctions outlined in the applicable legislation*" (art. 2.9).

In case of programmatic advertising, this same balance requires careful consideration. On one hand, putting hindrances to the *real-time bidding* activities in the country based on few-supported reviews of their business models could impair the industry technological progress. On the other hand, while such progress could bring benefits to advertisers, their actual practices, especially if there is no transparency in their contractual relationships, could eventually lead to competition abuses, which would damage the regular operation of the sector.

Regulating such balance through generic standards and indistinctively applicable is not always the best way. In Brazil (as in most countries of the world), the so-called *future and incidental control* is applied to curb unfair competition: the free competition, conducts considered as antieconomic are required to go through some analysis criteria and future control by the industry governing institutions. This will avoid rigid and premature interpretations from preventing technological progress in the sector. Institutions such as CENP and CADE (Administrative Economic Defense Council) are strengthened not as bodies for repression to antieconomic conducts, but also as market arranging entities by establishing guidelines and best practices while strictly analyzing each case of complaint.

GLOBAL CHARACTER OF ONLINE ADVERTISING

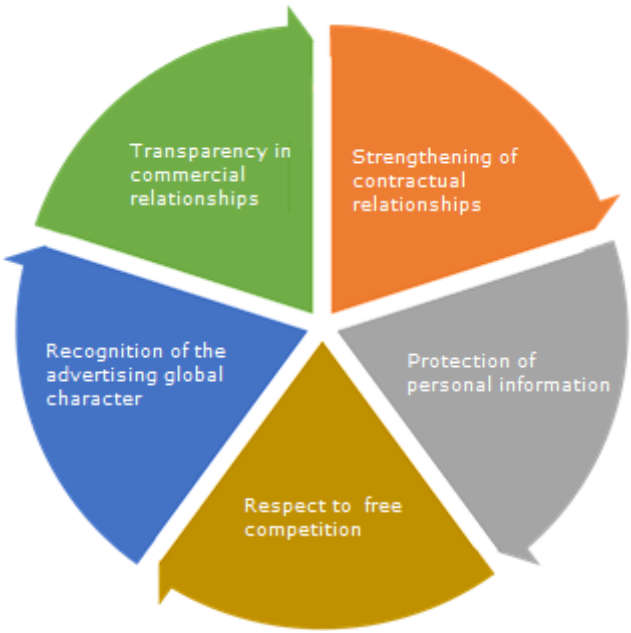
After the separation of the former Yugoslavia in the 1990s, the term *balkanization* was then regularly used in political theory to refer to a process of political fragmentation of nations and states. Legally and especially within the context of Internet regulation, this term has also been adopted to designate

national regulations which, due to their specificities, end up by isolating certain country from accessing a technology or product.

China is a good example of it: *balkanizing* regulations have prevented Chinese citizens from accessing some of the Western Hemisphere's most accessed websites, such as Google and Facebook. Russia is another example: as of 2016, personal information of Russian users shall be necessarily allocated into servers located in Russia – which shall strongly limit cloud computing and programmatic advertising activities in the region.

Although each country has its own market characteristics and sovereignty, the logic of the contemporary commercial relationships is global and networked: the value of a certain technology is directly proportional to the number of accessible markets. From an entrepreneurial perspective, such characteristic is also seen in the possibility that certain product or service may reach an increasingly higher and diverse number of users.

This is a critical care lawmakers and enforcement agencies need to consider when regulating programmatic advertising in Brazil. Upon global increase in the use of such strategy, more advertisers will look to expand these tools in Brazil, and regulations that do not consider this logic could generate, as a consequence, the fast isolation of the Brazilian market. This would also discourage the development of national technologies that may compete with the major foreign tools.



CONCLUSION

The aim of this study was to provide a broad analytics array on how the programmatic advertising strategies should be construed by lawmakers and enforcement agencies. This article is not meant to exhaust all the discussions on the subject under any circumstance whatsoever.

The advertising market must conduct critical and in-depth discussions on the topic, involving companies, associations, academicians and the government. Future studies on the subject must be encouraged, and we believe future studies on such matter must purport to surpass binary discussions on the mere legality of new technologies, acknowledging the complexity of the contractual relationships involved and the diversity of costs and benefits involved among the different players. Technological transformation is constant and necessary to ensure innovation, and reviews which are currently seen as unchangeable and may be reinstated upon the appearance of new technologies. Thus, new studies must be based on a constant symbiosis between the effective regulation, the contractual practices and the way transactions are conducted in the market.