




Research Report

Bits and Film: Policy For Digital Platforms in Media and Audio Visual Markets in Brazil



**Mariana Valente
Maria Luciano**

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Authors

Mariana Valente is co-Director of InternetLab and a PhD candidate in Sociology of Law at the University of São Paulo, Brazil.

Maria Luciano is Researcher at InternetLab and is currently pursuing a Master's in Law at the University of São Paulo, Brazil.

Research coordination team

Principal Investigator: Anita Gurumurthy

Co-investigators: Deepti Bharthur, Nandini Chami

Editorial Support: Shruti Sunderraman, Deepti Bharthur

Design: Purnima Singh

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1. Executive Summary

Over-the-Top (OTT) services have been exponentially growing over the past few years in Brazil. The arrival of major video streaming services in Brazil, dating back to 2011, has caused controversy among different players in the country's audiovisual market. Cable service companies argue that they face unjust competition, since digital platforms operate under looser legal regimes. According to them, this would result in an outbound flow of revenues generated from Brazilian subscribers of OTT services to their headquarters in the Global North, without any of the contributory obligations that apply to cable services.

Platforms, in turn, defend regulations that do not restrain innovation and new business models. National independent producers, whose businesses has developed impressively over the last few years, mainly due to market reservation policies for production and programming and government investment (through levies imposed on different market segments related to video) worry that these new business models favor large foreign media producers. The National Film Agency (Ancine) and the Ministry of Culture in Brazil have taken on the task to regulate VoD platforms, mobilizing all the players involved in an effort to seek regulatory consensus.

Meanwhile, national infrastructure problems and inequalities remain an obstacle to universalizing VoD services. Connectivity in Brazil remains geographically and economically unequal, and such inequalities reflect in audience makeup, which could impact content production and programming and the audiovisual market as a whole.

By tracing discussions, collecting empirical data and interviewing different players to capture their interests and motivations, we analyzed what is at stake with respect to VoD regulation in Brazil - and the different concerns around platformization of the audiovisual market. As key conclusions of this study, we noted that:

- a) Over time, the regulatory discussion has focused more on taxation and set aside more complex discussions around diversity policies, such as quotas and prominence of national and/or independent content, which has dissatisfied a few national players from the audiovisual market on the one hand and has been said to offer legal certainty and provide incentives to VoD players on the other. Traditional national policies that have fostered independent content (national content "quotas") are being challenged by platforms' business models (Eg., algorithm recommendation systems).
- b) The taxation policy involves sensitive negotiations, since it has been constructed in Brazil as a means for the audiovisual market to cross-fund independent productions and support national audiovisual production. To this point, as a consensus has not been found, VoD platforms are currently not subjected to the same obligations imposed on other stakeholders of the exhibition market. This also has to do with lack of clarity regarding such services' legal nature.
- c) Platforms have changed the production and creative processes for audiovisual content. These changes are at the core of their competitive advantage. But they throw into question the cultural legitimacy of content.

2. Rationale and Context

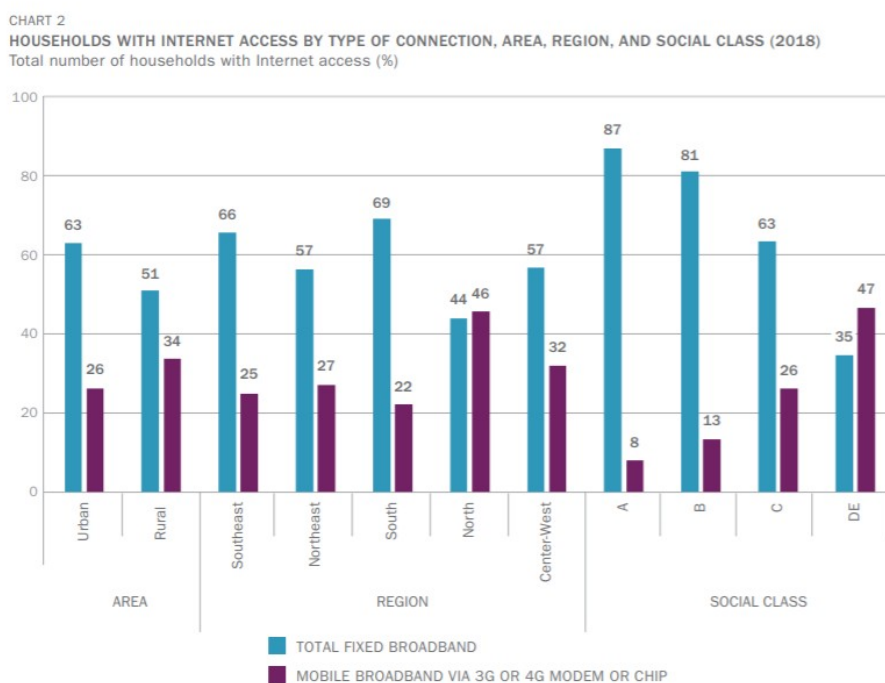
The term 'platform' usually describes a set of digital frameworks for social and marketplace interactions (Kenney & Zysman, 2016). The rise of new business models around digital platforms has created new challenges for sectoral regulation, as it has introduced new forms of actor interactions and is based on data-based value proposition. -

Brazilian audiovisual production¹ and consumption, especially independent production², has always depended on state investment or state-granted market incentives (see Policy Overview). Discussions around a regulatory framework for VoD platforms must therefore answer these questions:

1. Whether there are conditions for such a model still in place, and, if the model is still desirable in broader terms? And;
2. What aspects need to be adapted for its continued efficacy?

When content delivery takes place through the internet (OTT – Over-The-Top), issues related to low connectivity come up front. Diversity refers not only to the production and distribution of national and international independent content (an issue still at the heart of the problem), but also to those who have access to these services and what lack of diversity in terms of publics may mean in this new scenario.

Figure 1: Chart of households with internet access



Source: Cetic.br, 2018

¹ According to article 1º, V of the Provisional Measure no. 2228-1 (MP 2228-1/2001), a *national* Brazilian production needs to meet one of the following requirements: (i) be produced by a Brazilian production company, directed by a Brazilian or foreign resident living in Brazil for over three years and employ in its production at least 2 / 3 of Brazilian artists and technicians or residents for more than 5 years; (ii) be produced by a Brazilian production company registered at Ancine, in association with foreign companies with which Brazil has a cinematographic co-production agreement; (iii) be produced in co-production by a Brazilian production company registered at Ancine, in association with companies from other countries with which Brazil does not maintain a co-production agreement, guaranteed at least 40 percent of the content's patrimonial rights to the Brazilian production company and to employ in its production at least 2/3 of Brazilian artists and technicians or foreign residents living in Brazil for more than three years.

² According to article 1º, IV of the Provisional Measure no. 2228-1 (MP 2228-1/2001), an audiovisual content is independent if its production company, owner of the majority of the content's patrimonial rights, has no association or link, direct or indirect, with broadcasting companies nor mass electronic communication by subscription operators. Also, according to Ancine's Normative Instruction no. 104/2012, a Brazilian independent producer is the one that (i) is constituted under Brazilian laws; (ii) is located in the country; (iii) 70 percent (seventy percent) of its total and voting capital must be owned, directly or indirectly, by Brazilian nationals; (iv) the management of the company's activities and editorial responsibility over the contents produced must be exclusive to Brazilian nationals; (v) not be controlling, controlled or affiliated with programmers, packers, distributors or concessionaires of broadcasting service of sounds and images; (vi) is not bound to an instrument that directly or indirectly confers or aims to confer to minority shareholders, when they are programmers, packers, distributors or concessionaires of sound and image broadcasting services, commercial veto rights or any type of commercial interference on the contents produced; (vii) does not maintain an exclusive relationship that prevents it from producing or marketing to third parties the audiovisual content produced by it.

There have also been important changes in audiovisual audience consumption. The use of smart TVs has increased in recent years (7 percent of internet users in 2014, and 22 percent in 2017) (Cetic.br, 2017)³ Among cultural activities⁴ carried out on the internet in 2017, 71 percent of Brazilian internet users spent time watching videos, shows, movies or series and listening to music⁵ (Cetic.br, 2017). The way audiovisual content is accessed has also significantly changed. Streaming services presented a user growth (58 percent in 2014 and 71 percent in 2017), while downloading activities are decreasing (29 percent of internet users in 2014 and 23 percent in 2017) (Cetic.br, 2017). As to the geographical origin of the content, users who watched foreign series online (21 percent) outnumbered those who watched Brazilian series (13 percent), while Brazilian films (26 percent) outnumbered foreign films (24 percent) (Cetic.br, 2017).

Meanwhile, offline audiences for national audiovisual content seem to increase year after year, reaching the highest level of movie theaters' ticket sales since the 1990s⁶, and cable national content has even exceeded programmers' legally required minimum quotas⁷.

3. Methodology

As a business model premised upon bringing different groups together, platforms have existed for years. Malls link consumers and merchants. Newspapers connect subscribers and advertisers. The novelty of digital platforms is that information technology has profoundly reduced one's need to own physical infrastructure (Alstyne et al, 2016) and diversified assets to develop that sort of business.

Platforms are central to economic activity in the digital era. They replace and reconfigure markets, restructure economic transactions and data flows. Their value proposition is based on data (Srnicsek, 2017; Scholz, 2016; Alstyne et al, 2016). By bringing together producers' and consumers', user and interaction data, platforms optimize supply and demand in high-value exchanges/transactions. These interactions and information form their competitive advantage, facilitated by network effects, which leads towards a tendency to monopolize (Srnicsek, 2017), i.e. platforms' appetite for data and the idea that more users means more value leading to a winner-takes-all market.

In many cases, platforms are disrupting the current organization of economic activities by resetting entry barriers, changing the logic of value creation and value capture, playing regulatory arbitrage, repackaging work and repositioning power in the economic system (Kenney & Zysman, 2016). This has defied pre-existent legal arrangements, creating legal vacuum spaces in which these models currently operate⁸. This research draws from this framework to apprehend the impacts of digital platforms on the audiovisual market and map the efforts of regulating VoD in Brazil. The study addresses the following questions:

1. What shifts are VoD platforms producing in the Brazilian audiovisual scenario, specifically regarding diversity of content and access?

³ Cetic.br publishes yearly figures on internet access, infrastructure and usage since 2005; although a considerable part of the research repeats itself over the years, some modules are not applied every year. This is why some of the information on cultural activities refers to 2017, the last year for which detailed data on that was published.

⁴ The 2017 ICT Households - Survey on the Use of Information and Communication Technologies in Brazilian Households adopts the term "cultural activities" to analyze "online cultural consumption" habits (p. 255), answering questions such as types of videos watched online; frequency with which individuals listen to music or watch films or series on the internet; and origin of the music, films, or series watched online (p. 229). (Cetic.br, 2017)

⁵ In 2014, the rates were 58 percent regarding watching videos, and 57 percent regarding listening to music.

⁶ According to Brasil.gov.br, last accessed October 10, 2018. Jonas Antunes Couto, regulatory strategy director at the Brazilian -pay TV / Telecom Association - ABTA, informed us that, despite his requests to Ancine, there is no such data regarding -pay TV.

⁷ Also according to Telesintese.com.br, last accessed October 10, 2018.

⁸ In the United States, for example, Scholz (2016) acknowledges this scenario and points to a space for municipalization of regulation as the Federal government has chosen not to intervene (p. 07). Conflicts between Federal and municipal jurisdiction in Brazil will be discussed further.

2. Are the old problems of this sector being reproduced, enhanced or mitigated because of platforms, and what regulatory mechanisms should therefore be in place?
3. How are these issues being considered within regulatory discussions by the different players involved?

To answer these questions, we conducted five interviews with independent producers, directors, the executive director of Ancine at the time (2018) and a former executive secretary of the same agency, representatives of business associations in the domain and conducted observations in sectoral events in which platforms were being represented by lawyers. These interviews were analyzed alongside Ancine's official documents, media pieces about the issue and academic papers.

4. The rise of VoD in Brazil

The rise of VoD platforms in Brazil in the last few years has reconfigured the audiovisual market. Unofficial data accounts that the number of Netflix accounts would be about to surpass the number of all cable TV accounts in the country in the first semester of 2020.⁹

Research by Google (2018) pointed out that YouTube was the second biggest form of video consumption in Brazil - only behind TV Globo, the biggest Brazilian free-to-air television network. As part of that research, 3,000 people aged 14 to 55 years, from socio-economic classes A, B and C were consulted in the South, Southeast and Northeast of Brazil. 44 percent of those interviewed claimed to prefer to watch videos on YouTube, while only 22 percent chose Netflix - the third biggest form of video consumption in the country among all broadcast options.¹⁰

As Netflix expands its market base of subscribers¹¹ of VoD platforms (it has 18 percent of the paid OTT market in Brazil - Business Bureau, 2018), other streaming platforms are being created within Brazil. Most of them are owned by well-established television operators and programmers. According to a report from Business Bureau (2018), the service Globo Play, owned by the Globo Group, fares second in numbers of users, reaching only 4 percent of the total VoD market. Telecine Play, owned by the cable TV programmer Telecine, and Sky Online, by the cable operator Sky, each represent 3 percent of the market (Business Bureau, 2018). The remaining 72 percent of the market is shared by 74 smaller platforms¹². As the Netflix lead is being established, it has been stated that new (and smaller) platforms are being discouraged by the legal uncertainty of the regulatory scenario¹³.

Despite this reconfiguration, low connectivity seems to also hold back the market in general. In 2018, VoD platforms were only used by 8 percent of Brazilian households as the main form of audiovisual content consumption. In the US, that number rose to 13 percent, while in some of the biggest VoD markets, they

⁹Netflix does not officially reveal how many subscribers it has in Brazil, but according to unofficial accounts it would have around 15 million users in the beginning of 2020, whereas the number of cable TV accounts revolved around 17 million accounts. Uol, 2020. Available at <https://natelinha.uol.com.br/mercado/2020/01/29/netflix-cresce-beira-os-15-milhoes-de-assinantes-e-quase-igual-a-tv-paga-140051.php>.

¹⁰According to <https://www.thinkwithgoogle.com/intl/pt-br/tendencias-de-consumo/pesquisa-video-viewers-como-os-brasileiros-estao-consumindo-videos-em-2018/>, last accessed Oct 19, 2018.

¹¹ Ancine has classified VoD platforms into five categories according to their business models: **(i) free access or advertising VoD (AdVoD)**: the platform provides content for free as it is financed by advertising, such as YouTube; **(ii) subscription VoD (SVoD)**: users pay a fixed, usually monthly, amount to have access to the catalog, as it happens with Netflix; **(iii) rent or sale / transactional VoD (TVoD)**: users can access the catalog free of charge, but they must pay individually for each content consumed (video, series, music, etc.), like Google Play; **(iv) Catch up TV**: linear programming channels provide their content on a VoD platform for a time period, to add value to the service provided and retain the customer - it usually depends on the link with another service, like cable TV, as is the case for Telecine Play, owned by the cable TV programmer Telecine, and Globosat Play, from Globo; **(v) Hybrids**: combination of two models where providers can take advantage of their position in some segment of audiovisual content distribution, to offer content in another business model, like NET Now, from cable television operator NET.

¹²According to [Telesintese.com.br](https://telesintese.com.br), last accessed October 19, 2018.

¹³ According to [Telecomp.org.br/VoD](https://telecomp.org.br/VoD) last accessed April 9, 2018.

rose to 17 percent (Australia) and 16 percent (Mexico).¹⁴ The disruption of VoD, however, continues to play out in a big way.

4.1 One outstanding VoD platform: the technical workings of Netflix

In a monolithic architecture, a single-tiered software application in which different components combines into a single program power is a platform¹⁵ – an eventual change made in even one single and specific part of the structure can make the entire application go down. That is a risk for a service as big and complex as Netflix can ill afford to take. That is why, around 10 years ago, the company wrote the applications that run the service to fit into a “micro services” architecture, - which means that each application, or microservice’s code and resources are its very own¹⁶. Netflix estimates that it uses around 700 microservices to control each of the many parts that makes up its entire service. For instance, one microservice stores all the content users watch, another deducts the monthly fee from users’ credit cards, one provides users’ devices with the correct video files that it can play, one takes a look at users’ watching history and uses algorithms to guess a list of movies that they would like, and one will provide the names and images of these movies to be shown on a list on the main menu. This allows engineers to make changes to any part of the application rapidly, while ensuring that nothing else in the entire service breaks down.

The microservices architecture demands a massive network of computer servers, which Netflix once owned on their own, but, after considering how time consuming building computer systems that can support their software and keep fixing and modifying them to fit their needs would be, decided to move their data and content to the cloud-based infrastructure of Amazon Web Services (AWS) - that is, let Amazon deal with maintaining the hardware while Netflix engineers wrote hundreds of programs and deployed it on the servers¹⁷. It is on these AWS servers that Netflix stores the original digital copy of the shows or movies that make up their catalog. And as the platform works on different devices and each of them play a different format of video and sound files, another set of AWS servers take the original content file and convert it into hundreds of files, each meant to play the entire show or film on a particular type of device and a particular screen size or video quality¹⁸. This strategy, called redundancy, is designed with a duplicated component, so there could be a backup if the system fails.¹⁹

The complex Netflix ecosystem - software, content, and technology- becomes useless if the end user’s internet connection is too poor to handle the video quality. For platforms and sites in which millions of hours of video content are relayed across the internet between their servers and all the users, a much larger network of servers is needed to maintain performance. They address this by using a Content Delivery Network (CDN), which takes the original website and the media content it contains, and copies it across hundreds of servers spread all over the world. So when a user logs in, they will load a copy of it from the nearest CDN server, reducing the time taken between a request and a response. Netflix earlier used a variety of CDN networks, but a growing user base means they must deliver higher volume of content at more locations while lowering costs— and this led them to build their own CDN, called Open Connect, by installing their very own infrastructure around the world.²⁰

¹⁴ Ampere Analysis report. According to [Exame.abril.com.br](https://exame.abril.com.br), last accessed October 19, 2018.

¹⁵ According to [Computerworlduk.com](https://computerworlduk.com), last accessed April 15, 2019.

¹⁶ According to <https://medium.com/refraction-tech-everything/how-netflix-works-the-hugely-simplified-complex-stuff-that-happens-every-time-you-hit-play-3a40c9be254b> >, last accessed Nov. 04, 2018.

¹⁷ Netflix and Amazon are competitors, but their partnership turned out to be a beneficial situation for both companies. On the one hand, Netflix became AWS’s most advanced customer, pushing all of their capabilities to the maximum and constantly innovating upon how they can use the different servers AWS provided for various purposes. On the other hand, AWS improved their systems to allow Netflix to take massive loads on their servers, as well as make their use of different AWS products more flexible, and used the expertise gained to serve the needs of thousands of other customers.

¹⁸ According to [a post by Naren Gowda on Medium.com](https://medium.com/@naren.gowda/a-post-by-naren-gowda-on-medium-com), last accessed April 15, 2019.

¹⁹ See [Netfix Techblog on Medium.com](https://medium.com/@naren.gowda/netflix-techblog-on-medium-com), last accessed on April 10, 2019.

²⁰ According to [a post by Naren Gowda on Medium.com](https://medium.com/@naren.gowda/a-post-by-naren-gowda-on-medium-com), last accessed April 15, 2019.

The platform's decision to take its content to AWS servers also impacts operation costs and therefore market competition. As pointed out by Jonas Antunes Couto, regulatory strategy director at the Brazilian pay-TV / Telecom Association - ABTA, the infrastructure operational equation of a pay-TV service (whether is legal or tax obligations or the physical infrastructure itself) is more complex than a platform that uses the cloud and telcos' infrastructure for distribution²¹. "Netflix is able to invest billions on production precisely because it does not need to make certain infrastructure investments."²² Considering the expansion of cable television in Brazil through satellite (it reaches every single city in the country, he claims), he criticizes the strategy of allowing platforms to compete with traditional services to the detriment of wider social interests such as universalization of access to services²³.

As to security, two aspects of the platform's technical structure are worth mentioning. Netflix has always used Digital Rights Management (DRM) as an effort to stop people from copying its video streams - and keep peace with studios. DRM is software that authorizes the reproduction of copyrighted material, serving to preserve copyrighted materials from piracy and used on both physical DVDs and movies and TV series that are available to watch online - the player decodes the protection and starts the content reproduction. It gets legal backing from the Digital Millennium Copyright Act (DMCA), which makes it a felony for security pros to find and disclose vulnerabilities in DRM²⁴.

DRM use on streaming platforms was put to public debate on September 2017 when the Electronic Frontier Foundation (EFF) resigned from the World Wide Web Consortium (W3C) over the W3C's recommendations on protecting copyright in streaming video, making it possible for DRM to be managed by browsers.²⁵ The EFF and other organizations wanted browsers that adopt the standard to agree to protect security researchers and not pursue them under the DMCA, so if researchers broke DRM only to expose a security flaw, they would be protected. Nevertheless, W3C didn't make that part of the standard. According to Cory Doctorow, EFF's advisory committee, members of the consortium like Netflix weren't interested in discussing a compromise. "The irony here is that Netflix only exists because they did and continue to do something that outraged the entertainment industry," Doctorow explained²⁶.

The second aspect regarding the platform's security mechanisms to be mentioned is the adoption of the HTTPS - Hyper Text Transfer Protocol Secure. There are many state-of-the-art security mechanisms in place at Netflix, including Transport Level Security (TLS) encryption of customer information, search queries and other confidential data. The platform has begun to use HTTPS to encrypt the transport of the video content as well. According to the company, "this helps protect users privacy, ensuring that they are safe from eavesdropping by anyone who might want to record their viewing habits."²⁷ Social media and Netflix's competitors such as Amazon Prime Video and Hulu also use streaming with HTTPS connection. HTTPS is a protocol that adds a layer of security in connections between servers and users and makes it harder for hackers to steal users' data.

Interestingly, Netflix's caution with user data has been pointed as the main reason why the company has steered clear of news and avoided scandals. Compared with other platform companies, such as Facebook and Amazon, "its subscription-based business model means that the firm does not rely on selling users'

²¹ Jonas Antunes Couto, personal communication, August 30, 2018.

²² Personal communication, 2018.

²³ Personal communication, 2018.

²⁴ According to <<https://help.netflix.com/en/node/395>>, last accessed Nov. 15, 2018.

²⁵ According to eff.org, last accessed November 15, 2018.

²⁶ On its turn, in a statement Netflix wrote that "integration of DRM into web browsers delivers improved performance, battery life, reliability, security and privacy to users watching their favorite TV shows and movies on Netflix and other video services." According to Gizmodo, last accessed November 15, 2018.

²⁷ According to Netflix Techblog on medium.com, last accessed October 20, 2018. Netflix expects that by the end of 2016, most streams will be using TLS encryption., according to people.freebsd.org, last accessed October 20, 2018.

data or attention to outsiders. Instead, it offers customers a simple exchange: a monthly fee in return for television they want to watch.” Supposedly, according to *The Economist*, “that has protected the company from scandals over fake news, electoral manipulation and political tribalism.”²⁸ This does not mean that data is not important for Netflix’s business model - it has been used as an important asset especially for developing its recommendation algorithm, and therefore also to enhance and strengthen its own network effects.

Netflix’s techno structure seems to point to some explanations to the platform’s success and competitive advantage. And its intent to preserve such a structure seems to explain its institutional discourse while pursuing to influence OTT regulation around the world.

4.2 Towards Regulating VoD in Brazil: a short institutional history

Since 2012, when Ancine published a Normative Ruling (Instrução Normativa no. 105/2012) to impose a tax called Condecine²⁹ on the VoD market, the agency has been making efforts towards VoD regulation.

In 2015, the discussion was taken to the Superior Board of Cinema (Conselho Superior de Cinema - CSC) (Ormay, Schneider & Rodrigues, 2017). The CSC is an organ composed by members of the government, civil society and the audiovisual industry, and is responsible for defining audiovisual policies. Alongside with Ancine and the Audiovisual Department of the Ministry of Culture, it forms the creation and management structure for audiovisual policies. The decision to take the discussion to the CSC was based on Ancine’s limited normative power to establish a VoD regulation framework. According to Minister of Culture Sérgio Sá Leitão³⁰, such a change, “by creating a multistakeholder group, produced a ‘market think tank’ where all players are being represented, reflecting and creating policies together.” As to the role of the Ministry of Culture in the process, the Minister defended in a public statement one of “mediation and governance”, whereby asking the market to point out the regulation to be adopted by the State, consensus among the players various interests is prioritized³¹.

In December 2015³², the CSC released a document³³ stating its position on what the main issues to be addressed by a VoD³⁴ regulation should be. Six main topics were on their regulatory agenda:

- (i) taxation norms to ensure isonomy [equal treatment] and legal certainty among market agents;
- (ii) higher levels of competition on the offer side, and the presence of national content;

²⁸ According to [The Economist](#), last accessed October 10, 2018.

²⁹ The Contribution for the Development of the Brazilian Audiovisual Industry (Condecine) is a Contribution for Intervention in the Economic Domain (CIDE), used by the State as an instrument to regulate and intervene on an economy’s sector (in case of Condecine, the audiovisual market), correcting market distortions. We will come back to it further.

³⁰ Sérgio Sá Leitão was nominated by president Michel Temer in July, 2017. On November 2018, Brazil’s newly elected president Jair Bolsonaro announced he will extinguish the Ministry of Culture. Cultural, sports and social policies will be managed by the new Ministry of Citizenship. According to [folha.uol.com.br](#), last accessed December 10, 2018.

³¹ According to [teletime.com.br](#), last accessed Oct 20, 2018.

³² It was the CSC’s fourth meeting discussing VoD. The first meeting, in 08.06.2015, systematized the bases of the VoD regulation discussions, defining as its main axes content and taxation, on [Ancine](#). The second one, in 03.07.2015, established the defining characteristics of video [on demand services](#). At last, the third meeting, in 21.10.2015, started to indicate some caution regarding quotas for national content - we will come back to [this](#) further.

³³ The document was entitled “Challenges for regulating video on demand: consolidation of the Superior Board of Cinema’s vision on the construction of a regulatory framework for the video service under demand” (“Desafios para a regulamentação do vídeo sob demanda: consolidação da visão do Conselho Superior do Cinema sobre a construção de um marco regulatório do serviço de vídeo sob demanda”). According to Ancine-VoD, last accessed May 17, 2018. https://www.ancine.gov.br/sites/default/files/CSC%20-%20Consolida%C3%A7%C3%A3o%20Desafios%20VoD%2017%2012%2015_1.pdf, last accessed May 17, 2018.

³⁴ According to the CSC, the defining characteristics of video on demand services are: “ (a) an audiovisual content communication service; (b) organized in a catalog; (c) offered to the general public or to its subscribers; (d) in a non-linear manner; (e) by electronic communication networks, whether dedicated or not; (f) for commercial purposes, being remunerated directly by the user (by means of individual purchases or subscription) and / or by sale of advertising space; and (g) implies editorial responsibility of the provider, regarding the selection, organization and exhibition of the contents in the catalogs”.

- (iii) ensuring isonomy among market agents in case of extraterritoriality,³⁵
- (iv) reduction of information asymmetry, through obligations imposed upon market agents to release data and figures onto the authorities;
- (v) Brazilian and independent Brazilian content prominence, in three aspects:
 - a) minimum number of national titles in the catalogs,
 - b) investments in the production or licensing of national content
 - c) prominence or visual highlighting of Brazilian content in the interface with users.
- (vi) cross-subsidies, with emphasis on the Condecine, fundamental for the viability equation of the VoD enterprises.

In December 2016, President Michel Temer nominated Paula Pinha, Netflix's director of regulation and member of the Latin America VoD Association, as a counselor at the Board. It was the first time someone from the VoD market was nominated to this multistakeholder forum³⁶. Pinha cannot vote, but can take part in the discussions. The decision attests the importance of VoD market stakeholders in the audiovisual scene. For Netflix itself, it means both the ability to present their claims and reach negotiated solutions, and a symbolic gesture towards being open towards regulation and taxation³⁷.

It was about the same period that Ancine itself published a document with tentative regulation, open to public consultation³⁸. Ormay, Schneider and Rodrigues (2017) suggest that this initiative was an attempt by Ancine, to bring back and make public, the debate on VoD content and quotas, which had been left aside by the CSC. The document was based on four main pillars: (i) the quest for diversity in audiovisual content being offered; (ii) legal certainty; (iii) assuring isonomy among the economic agents of the audiovisual market and (iv) the development of the country's audiovisual economy.

One of the contributions formally received by Ancine was from Netflix itself; as a general note, arguing that "it is premature to indicate that this market currently has sufficient characteristics that meet the necessary requirements for state regulation", as "any type of state intervention needs to be preceded by a proper analysis of regulatory impact, which deepens the understanding of the market and identifies concrete elements that justify the regulation of a sector that still flourishes". In this sense, "a premature regulatory intervention in the sector may bring negative impacts to innovation, consumer choices, and competition."³⁹ This type of rationality seems to have guided the change in the VoD regulatory agenda, addressed further in this report.

In May 2017, Ancine published a report⁴⁰ containing recommendations based on the results of the public consultation. In the document, the agency recommended regulation through law, to be applied equally to all market actors and to foster content prominence through transversal content dissemination (that is, without having a unique and specific category for national content), with a taxation regime based on the companies' revenues. Ana Paula Bialer, partner at the law firm Bialer e Falsetti Associados, at a public event held in Getúlio Vargas Foundation about regulating the VoD sector, held that the document was superficial and unsatisfactory.⁴¹

³⁵ "Extraterritoriality" refers to the competence of a State to make, apply and enforce its laws beyond its territory. As the nature of OTT services transcends States physical borders, extraterritoriality is a key aspect on discussions regarding VoD regulations. See discussions ahead.

³⁶ According to teletime.com, last accessed Mar 5, 2018.

³⁷ Tácio Lacerda Gama, a law professor at Pontifícia Universidade Católica - PUC, claimed at a legal roundtable about VoD that Netflix's interest to participate on the negotiations involves also a moral argument, as "customers usually disregard companies that do not pay taxes." Lacerda Gama, Tácio. August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted at roundtable at Fundação Getúlio Vargas, São Paulo, SP. Available at <https://direitosp.fgv.br/evento/condecine-inovacoes-audiovisual>.

³⁸ The document was entitled "Regulatory news - Audiovisual Communication on Demand" ("Notícia Regulatória - Comunicação Audiovisual sob Demanda"). See Ancine.gov.br, last accessed Oct 10, 2018.

³⁹ According to Ancine.gov.br, last accessed May 17, 2018.

⁴⁰ According to Ancine.gov.brVoD last accessed May 17, 2018.

⁴¹ Ana Paula Bialer. August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted from FGLAW, São Paulo, SP.

In January 2018, Ancine's executive director was replaced by Christian de Castro Oliveira. The nomination happened after former executive director Manoel Rangel, who occupied the position from 2006 to 2017, left the agency and was substituted by Debora Ivanov as interim executive director. An effective Ivanov nomination was publicly supported by multiple players⁴², such as filmmakers, game developers and independent producers. Oliveira's nomination by President Temer was reportedly related to pacifying complaints about Ivanov's performance from within the agency, to Ivanov's connections with opposition parties, and to political tensions between Ancine under Ivanov's administration, and the Minister of Culture⁴³. One could say this political transition has been seen by stakeholders in the audiovisual market as a transition to a less interventionist Ancine. - Even before his nomination, Christian de Castro Oliveira has been advocating for a de-bureaucratization of the agency's proceedings as a way to keep up with the changes imposed on the market by new technologies as well as to bring private players closer to audiovisual policy discussions⁴⁴.

Meanwhile, discussions on CSC lead to a change in the VoD regulatory agenda. In September 2017, the Minister of Culture proposed, and the CSC voted in favor of withdrawing the issues of content and quotas to focus solely on taxation, namely the Condecine⁴⁵. The Board voted to separate the subjects in two phases of discussions. In the first phase, it would prioritize proposing regulation to Congress for the payment of Condecine by VoD services, including some mechanisms to foster local content as a way to solve the legal uncertainty regarding taxation that was being considered an impediment to the VoD market in Brazil. According to the Minister of Culture Sérgio Sá Leitão, "it is an entry barrier, there are several platforms that want to enter the Brazilian market, but do not because of the legal uncertainty."⁴⁶

The second phase would be the moment for discussing a broader regulatory framework, including content and quotas regulation. When interviewed in 2018, the then Ancine's executive director Christian de Castro Oliveira argued that quotas and content regulation should take place only after the Brazilian VoD market establishes itself, since the experience of creating quotas for pay-TV in Brazil "came just after the market reached a certain degree of maturity. It was then much easier to look and see what the imbalances and distortions were. In this sense, it is wiser to do so in a second moment, if needed."⁴⁷ Ancine has positioned itself more as providing technical assistance for multi stakeholder negotiations than as a stakeholder having its own voice. Former Executive Secretary Mauricio Hirata relates the change to a general new direction of government, less left-leaning and interventionist⁴⁸.

In June 2018, the CSC approved a hybrid Condecine regime. According to the proposal, VoD companies will be able to choose a Condecine collection regime based either on the number of titles on their Brazilian catalog, or on the number of users' subscriptions, and exemptions will apply for companies opting for a simplified taxation system called Simples, which requires that several conditions are met. Also, the contribution will not apply to additional services provided by pay-TV operators, such as making the content of the channels available to their subscribers in the form of VoD, or on a 'TV Everywhere' service (making paid channel transmissions available to other devices such as smartphones), since these companies already collect tributes over pay-TV services⁴⁹. In addition, discounts will be awarded based on the amount of Brazilian productions the platforms make available: the more national titles in the catalog, the lower the

⁴² According to meioemensagem.com.br, last accessed September 17, 2018.

⁴³ According to cultura.estadeo.com.br, last accessed September 24, 2018.

⁴⁴ According to teletime.com.br, last accessed April 10, 2019.

⁴⁵ According to folha.uol.com.br, last accessed September 24, 2018.

⁴⁶ According to teletime.com, last accessed Sept 20, 2018.

⁴⁷ Christian de Castro, personal communication, 2018.

⁴⁸ Mauricio Hirata, personal communication, 2018.

⁴⁹ In the music business, this secondary use is called "simulcasting" and it has been quite a discussion over whether new payments related to public performance apply.

amount of contribution owed by VoD companies. That is, incentives for incorporating Brazilian content are created by means of Condecine discounts.⁵⁰

As the proposal was about to be voted and become the official position of the CSC before the Congress, in August 2018 16 entities from national and independent audiovisual production sector released a manifesto in which, they made public their view that the CSC should be including the issues of quotas and other mechanisms to foster local content on VoD platforms, and requested that the deliberation be postponed⁵¹. For Ancine's Executive Director, the initiative was premature, as it criticized matters that were still in discussion on the CSC at the time.⁵²

In the end, the hybrid Condecine regime proposal was put to vote on the meeting, but according to Ancine's executive director, an impasse was reached due to a conflict that was foreign to the demands stated in the manifesto: vertical media ownership concentration prohibitions, following disputes around the approval of the Time Warner - AT&T merger by the Brazilian antitrust authority.⁵³ After all, as taxation regimes, media ownership concentration also has significant impact on actors' competition within the market as well as on content production and distribution.

In October 2017, Brazil's antitrust authority, the Administrative Council for Economic Defense - Cade, approved a merger of Time-Warner and AT&T. Time-Warner licenses several TV channels in Brazil, while AT&T owns Sky, which is the second-largest subscription television service in Brazil. Cade approved the deal as long as the companies' operations in Brazil remained separate and agreed not to share sensitive information. The merged company must also disclose the terms of all content licensing and TV programming deals to Cade, which will assess if they undermine competition in the market. According to Cade's councilor in charge of the case, Gilvandro Araújo, "the agreement forces the companies to observe objective non-discrimination standards that are more comprehensive than the usual legal demands."

Cade's decision seems to have focused only on antitrust law and favored principles of non-interference in regulation, disregarding the Conditioned Access Law prohibitions on vertical media ownership concentration. The Conditioned Access Law prohibits broadcasters, programmers and producers from holding more than 50 percent of the capital in companies that distribute content (telecommunication companies), and that on the other hand these telecommunication companies own more than 30 percent in producers, programmers and broadcasters.⁵⁴ This separation prevents, for example, a company that operates in both fields from favoring its affiliates, therefore hindering the entrance of new (and usually smaller) competitors into the market. In an interview, Regulatory Strategy Director of ABTA (Brazilian Association of pay-TV), claimed that one of the current conflicts amongst industries' competing interests is that VoD models would be counting precisely on this concentration of distribution and programming/content production, to reduce costs within the supply chain.⁵⁵ Telcos argue that the Conditioned Access Law prohibitions on vertical media ownership concentration are outdated and result in unfair market competition between them and VoD platforms.⁵⁶

As a VoD platform, over the last years Netflix has been defending a legal framework that ensures infrastructure and "minimum standards necessary for the good performance of services without interfering

⁵⁰ As of the publishing of this report, the CSC has not yet defined the criteria for applying these discounts. According to [Ancine](#), last accessed September 17, 2018.

⁵¹ They also had the expectation that discussions would follow completion of analyses the Ancine and their own representative associations were performing. According to <https://www1.folha.uol.com.br/colunas/monicabergamo/2018/08/cineastas-e-produtores-criticam-processo-de-regulacao-do-video-sob-demanda.shtml>, last accessed Sept. 24, 2018.

⁵² Christian de Oliveira Castro, personal communication, September 14, 2018.

⁵³ According to <http://fortune.com/2017/10/18/att-time-warner-merger-brazil/>, last accessed on Sept. 10, 2018.

⁵⁴ See articles 5 and 6 of Law n. 12.485/11, "Lei do SEAC".

⁵⁵ Jonas Antunes Couto, personal communication, August 30, 2018.

⁵⁶ Also according to observacom.org last accessed October 10, 2018.

in the way business models are structured and offered to the consumer” and that VoD business models are distinctly different, especially because they do not control the internet infrastructure - “it will be the consumers themselves who will choose the providers that provide better quality services.”⁵⁷

4.3 Revenue sharing and cross-funding within the sector: the “Condecine” tax

In 2001, the Federal Government Provisional Measure no. 2.228-1 (MP 2228-1/2001) created the Contribution for the Development of the Brazilian Audiovisual Industry (Condecine).⁵⁸ The Condecine is a type of tax (Contribution for Intervention in the Economic Domain (CIDE)), meant to be an instrument for improvement in the very economic sector for which such tax applies, which is considered prioritarian.⁵⁹ Despite its use as an economic planning mechanism, a CIDE is legally a tax.⁶⁰ As a CIDE to fund the audiovisual sector, Condecine is generally applied at a rate of 1 percent over the payment, credit, employment, remittance or delivery of funds to producers, distributors or intermediaries overseas in connection to the exploitation of foreign audiovisual works or its acquisition or import at a fixed price. Since the enactment of the Conditioned Access Law (“Lei do SEAC” - Law no. 12.485/2011), Condecine is also collected over pay-TV services. The whole idea behind the Condecine is to collect revenues from the audiovisual sector as a way to fund the Brazilian audiovisual industry, especially independent players.

Three types of Condecine are currently in place. The first one, Condecine Transaction (Condecine Remessa) is collected over revenues paid to producers, distributors and intermediaries abroad, derived from profits from cinematographic and video-phonograph works, or by their acquisition or importation. Pay-TV programmers are exempted if they invest 3 percent of such transactions in the production of Brazilian independent content. For example, NET, a Brazilian pay-TV provider, pays HBO for the right to certain content. Instead of retaining 11 percent of this transaction, NET can deposit 3 percent of the amount into an account whose resources will be used to produce national independent content.

The second one, Condecine Title (Condecine Título) is collected over the commercial exploitation of audiovisual content in each of the five different sectors of the market: theatres, home video, pay-TV, Free-to-Air TV and “other markets” (as we will see further, the unclear meaning of this term was later used by Ancine to impose Condecine payments on the VoD market). The amount to be collected varies according to the sector and the type of content (advertising or not, duration and format - in case of multiples episodes). Condecine Title must be collected every 12 months in case of advertising content, or every five years for non-advertising content. Operationally, Ancine issues a certificate authorizing exploitation of particular content upon receiving information concerning the commercial rights and the Condecine collection.

⁵⁷ In 15.01.2018, as a contribution to the public consultation on the revision of the telecommunications model promoted by the Ministry of Communications, Netflix sent a document in which it basically rebuts telcos’ arguments that some OTT services should be under the same regulation as telecommunication companies because they offer the same services. The platform argued that adopting a legal framework to eliminate supposed regulatory asymmetries does not take into consideration “fundamental differences” in the business models. One of the differences cited is the fact that over-the-top have no control over the infrastructure, allowing the user to switch providers anytime. According to teletime.com.br, last accessed September 24, 2018.

⁵⁸ Through the Provisional Measure no. 2.228-1, later approved by Congress.

⁵⁹ There are authors arguing that Condecine violates the Brazilian Federal Constitution of 1988 for, mainly, two reasons: (i) the creation of Condecine formally violates the Federal Constitution, because its economic planning feature does not configure a situation of “relevance and urgency” required to enact Provisional Measures (article 62 of the Federal Constitution) and tax regulation requires complementary laws; (ii) as Condecine is supposed to stimulate the national audiovisual market, imposing it to other groups (such as foreign distributors) violates the referibilidade, a constitutional principle determining the necessary link between the group of taxpayers and the purpose of taxation. Tácio Lacerda Gama endorses this movement adding that Condecine is not a contribution because its requirement to pay a certain amount to authorize distribution in a given market constitutes a mere fee, collected under the exercise of a fiscalization. Other authors defend the constitutionality of Condecine arguing that: (i) the requirement of complementary laws refers only to general tax rules; (ii) it is a contribution destined to the funding of an intervention activity of incentive to a determined economic sector (cinematographic and videophonographic industry), which will benefit from the state intervention.

⁶⁰ To Tácio Lacerda, however, starting at the Fernando Henrique Cardoso administration, the revenue model of the Brazilian state was fundamentally changed, with the establishment of such contributions as a preferential instrument of collection over other types of taxes. According to the law professor, it was a strategy to increase the country’s Gross Domestic Product (GDP) without having to increase income taxes.

At last, Condecine Teles is collected from telecommunication companies providing services through channels that, effectively or potentially, distribute audiovisual content. This type of Condecine was the last one to be established and has been responsible for the largest part of the resources collected as Condecine (about 90 percent) and of the Audiovisual Sectoral Fund (about 80 percent⁶¹); it has however been highly criticized for its supposed lack of “referrability”, a constitutional principle determining the necessary link between the group of taxpayers and the purpose of taxation.- According to Lisa Shayo, a lawyer at the law firm Pinheiro Neto Advogados, collecting Condecine Teles from companies “that may only potentially distribute audiovisual content already goes against referrability”.⁶² Telecommunication companies sued in 2015, saying also that benefits from the Condecine collection would not come to their sector, but were ultimately lost.⁶³ Five entities representing the Brazilian audiovisual production sector had published a manifesto stating that the suspension of Condecine payment could lead companies that work in the audiovisual sector to bankruptcy, which speaks for the relevance of the amounts collected.⁶⁴

The Condecine is one of the main incomes directed to the Audiovisual Sectoral Fund (Fundo Setorial do Audiovisual – FSA).⁶⁵ Created in 2006,⁶⁶ the FSA is a fund dedicated to the development of the entire chain of audiovisual production in Brazil, with mechanisms dedicated to cooperation between different economic agents, the infrastructure of services and theaters, research and innovation, growing the national market share and developing new means of diffusion of Brazilian audiovisual production.⁶⁷ The annual investment plan and priority areas are defined by a Managing Committee, as well as the norms and criteria for project proposals.⁶⁸ The economic importance of such funding mechanisms is not to be taken for granted. According to Ancine’s executive director Christian de Castro Oliveira, since the fund’s implementation in 2008, FSA’s investments reached R\$ 3.421 billion - 13,195 projects were registered, 2,343 contracts were signed and 2,489 proposals were selected-, creating about 1.7 million jobs within the market.⁶⁹

Up to the completion of this report, no consensus has been reached on if and how the VoD market should be contributing to the system. In 2012, Ancine published a norm to impose Condecine payments on the VoD market⁷⁰ based on the interpretation that it was allowed to do so because the Condecine law establishes collecting from “other markets”.⁷¹ According to this new regulation, up to BRL 3,000 could be charged for each foreign video available in the catalog of streaming services in Brazil, based on the video's length. For

⁶¹ Daniela Lara, August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted from FGV LAW, São Paulo, SP.

⁶² Lisa Shayo, August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted from FGV LAW, São Paulo, SP.

⁶³ Tribunal de Justiça do Distrito Federal e Territórios. Mandado de Segurança Coletivo no.1000562-50.2016.4.01.3400, decided in March 1st 2016 in favor of telcos, suspending the collection of Condecine. However, 6 days later the Brazilian Supreme Court overruled the decision, accepting Ancine’s argument that the suspension would jeopardize 74 percent of the Audiovisual Sector Fund that year and, therefore, the promotion of the audiovisual sector. As to the referrability, the Court reaffirmed its jurisprudential understanding that the CIDE can be created by ordinary law and does not require direct link between the taxpayer and the application of the resources collected. It also acknowledged that the Conditioned Access Law (Law no. 12.485/2011) allowed the implementation of the common practice of large telecommunication companies to offer “combo” packages, which include -pay TV services (which would be directly connected to Condecine’s purposes). (Supremo Tribunal Federal. Suspensão de Segurança no. 5116, Rel. Ricardo Lewandowski, March 07, 2016. According to < <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=311715> >, last accessed Sept 17, 2018).

⁶⁴ According to < <http://www.telesintese.com.br/entidades-audiovisual-criticam-ataque-das-teles-ao-condecine/> >, last accessed Oct. 10, 2018.

⁶⁵ Along with the Telecommunications Inspection Fund (Fistel). Created in 1966, the Fistel is a Brazilian tax for telecommunication providers designed to provide resources for the government to better supervise the offering of these services. The tax is applied to companies that operate various types of telecommunications, ranging from broadband providers to radio and television broadcasters.

⁶⁶ The FSA was created by Law no. 11.437/2006 and regulated by Decree no. 6.299/2007.

⁶⁷ According to bndes.gov.in.br, last accessed September 5, 2018.

⁶⁸ The members of the committee are nominated by the Ministry of Culture, consisting of two representatives of the Ministry, one representative of the Presidency of the Republic, one from the Ministry of Education, one from Ancine, one from accredited financial agents and three from the audiovisual sector, chosen based on a list submitted by the Superior Council of Cinema.

⁶⁹ According to cultura.gov.br, last accessed December 19, 2018.

⁷⁰ Normative Ruling (Instrução Normativa) n. 105/2012.

⁷¹ According to article 21, §2º of Ancine’s norm, the term “other markets” comprehends (i) VoD, (ii) audiovisual content to be exhibited on public transportation and (iii) audiovisual content on restrict exhibition. The regulation is applicable to multiple segments in the video streaming market, which includes on-demand video platforms that work similarly to OTT services.

national videos, a discount of 80 percent would apply as an incentive for inclusion of national content in VoD catalogs.

The measure was highly criticized in light of the normative power of Ancine to interpret the law in such a controversial theme, and, although still in force, there has been very limited action to enforce it (Cunto, Worcman e Figueiredo, 2017) especially due to the resistance. Ancine itself later acknowledged that “the regulation of VoD depends on the creation of a law” and that “the legislative branch, and not Ancine, is responsible for conducting this market’s regulation process” (Ancine, 2017). After all, over the years and the shifts in the direction of Ancine, its strategy and approach towards VoD has changed considerably.

The enormous impact the Condecine has on the FSA and on the Brazilian audiovisual market as a whole, as well as how it touches upon the interest of important Brazilian market players such as telcos, seems to explain the centrality of the matter within Ancine’s VoD regulation discussions as well as the lack of consensus regarding the regime and form of calculation of this tax for such services. In the 2015 document, systematizing the main issues to be addressed by VoD regulation, CSC stated that the current Condecine would not be the best tax treatment for the service:

“such treatment tends to be a significant barrier for small providers and to restrict the quantity and diversity of titles in the catalogs. The challenge (...) is to build a new tax model that allows the sustainability of VoD in its various formats, without neglecting the collection of Condecine, whose values play a fundamental role in the financing of the audiovisual sector”⁷²

As the argument goes, fixed prices for titles would be a bigger burden for smaller platforms, and they could also mean an economic disincentive for building larger catalogs, especially those of less popular items. It has also been stated that the bureaucracy involving certificate issuing by Ancine would not be adequate to the dynamics of the online services, whose catalogs change constantly - and currently without any authorization.⁷³ Such claims mobilize interesting visions of efficiency vs. inefficiency, modernity vs. anachronism, digital vs. analog which, while may contain truth, convey sentiments which support one argument or the other. One example of a situation in which such images are imperfect refer to data and transparency.-As we dwell on below, the system of data sharing between traditional windows and the Ancine operates quite efficiently according to many of the market actors we spoke to and detailed data is being currently released online by the agency.⁷⁴

Condecine is however not the only taxation dispute surrounding VoD. There has been an important conflict on whether such platforms should be taxed as goods or as services, and such a dispute takes on federalist contours. That is because taxation on goods (ICMS) is collected by states, whereas taxation on services (ISS) is collected by municipalities. In January 2017, President Temer enacted a law obliging VoD companies to pay service taxes to the cities where their service is provided.⁷⁵

The debate around VoD (and other over-the-top internet applications) taxation has an important impact on revenue sharing – such as Brazilian cities and states finances and shares between different countries in cases of extraterritoriality⁷⁶ – as well as on audiovisual market competition. Jonas Antunes Couto, regulatory

⁷² See note 18.

⁷³ Ana Paula Bialer. August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted from FGLAW, São Paulo, SP.

⁷⁴ See <<https://oca.ancine.gov.br/>>.

⁷⁵ Complementary Law no. 157/2016 (Lei Complementar LC 157/2016). This new law has been highly criticized for those who believe that streaming is not a type of service as it only gives access to a certain content. Others criticize the collection of ICMS, by the states, over VoD as it does not comprehend the category of “telecommunication service” as -pay TV and other forms of audiovisual distribution do.

⁷⁶In 2013, Apple was notified by the Brazilian Ministry of Justice for using the dollar as the currency for transactions on iTunes since it is illegal to charge in dollars for products sold within Brazilian territory. According to tax lawyers, Apple received a 34 percent tax rebate from the Brazilian government's - the company was paying only the Tax on Operations of Credit, Exchange and Insurance (Imposto sobre Operações Financeiras - IOF) collected over credit card payments in dollar, which is borne by consumers. Apple argued they adopted the dollar as currency because iTunes transactions are made from the company’s headquarters, located in the US. On December 2017 Apple announced iTunes would adopt the Brazilian

strategy director at the Brazilian pay-TV/Telecom Association- ABTA, points out that the different legal and tax obligations imposed upon pay-TV overtax their services and, as platforms are under more lax regulation and fewer taxes (goods are taxed by 15 percent, which is the case of pay-TV, while services only by 2 percent), this places a “competitive pressure” on the former.⁷⁷ Couto defends new rules to acknowledge this new OTT platforms phenomenon, considering business models differences while guaranteeing fair competition.⁷⁸

However, discussions also seem to reveal a lack of consensus on the nature of OTT services and on the operating dynamics of its market. Ana Paula Bialer, partner at the law firm Bialer e Falsetti Associados, even questions the existence of market distortions to be corrected: “does it make sense to discuss the CIDE, a government instrument to correct distortions in economic sectors regarding streaming?”⁷⁹

4.4 “Extraterritoriality” and audiovisual without borders

According to Christian de Castro, Ancine’s Executive Director, when the CSC decided that they would focus discussions on the Condecine, they did so based on the idea that VoD discussions were complex and they would not be able to reach agreement on different controversial issues at once.⁸⁰ That meant that other concerns that were previously in the Ancine’s regulatory agenda were pushed to the backburner, to be discussed later,- and were therefore taken out of the agenda. One of them was the issue of “extraterritoriality”.

Extraterritoriality refers especially to the challenge of enforcing the law and applying sanctions to companies who provide services from abroad,⁸¹ and determining whether a certain service is in fact providing a service in Brazil. In the case of pay-TV channels, the Conditioned Access Law defined its enforcement scope to channels, which have introduced modifications to adapt to the Brazilian public, including subtitles, dubbing to Portuguese or advertising directed to the Brazilian public (Article 19). Maurício Hirata, former Ancine Executive Secretary, mentioned discussions at the agency about Apple’s iTunes, which for a long time sold their services in dollars and only through international credit cards. The company argued that because their services were not being sold directly in Brazil, obligations such as the Condecine did not apply. According to Hirata, YouTube’s advertising is sold and organized from abroad, which has been raising similar questions. In his opinion, it would be important that the CSC took on discussions about developing criteria such as those developed for pay-TV.⁸²

5. Netflix’s algorithm, user data and catalogs: a case for national content quotas?

Netflix is a video streaming on-demand company that operates on a subscription-based model. Its platform structure serves as the intermediary between entertainment content producers and consumers. It has also moved to begin funding productions throughout the world through Netflix Originals. The production and programming of content is made with the help of individual consumers’ usage data, as well as by monitoring the most downloaded shows on pirate sites and through legal arrangements between the

currency, the real, starting 2018. According to link.estadao.com.br, folha.uol.com.br, and folha.uol.com.br/tec, last accessed October 20, 2018. A similar situation happened in the UK, according to [The Guardian](http://TheGuardian), last accessed October 20, 2018.

⁷⁷ Jonas Antunes Couto, personal communication, August 30, 2018. A similar debate is taking place in the US. Pressure is being made on the Federal Communications Commission - FCC for a decision on whether or not OTT services will be under cable television rules, which are usually more restrict. According to < <https://www.lightreading.com/video/ott/verizon-to-fcc-dont-treat-ott-like-cable/d/d-id/734366> >, last accessed on Oct. 30, 2018.

⁷⁸ Personal communication, 2018.

⁷⁹ Ana Paula Bialer. August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted from FGLAW, São Paulo, SP.

⁸⁰ Personal communication, 2018.

⁸¹ For examples of extra-territorial effects of laws in a digital context, see Internet [Society’s report](http://Society's report).

⁸² Maurício Hirata, personal communication, 2018.

platform and movie studios.⁸³ The platform also mines consumer data to determine which content viewers pay to see and relies heavily on this information to determine the total cost of each licensing agreement.⁸⁴ On the one hand, it guarantees users satisfaction and convenience; on the other hand, it informs the selection and production of content as well as licensing agreements.

More than 80 percent of the content people watch on Netflix is discovered through the platform's recommendation system. According to Todd Yellin, Netflix's Vice President of Product, the platform uses machine learning and algorithms to analyze what content people watch, what they watch subsequently, what they watched prior, what they watched a year ago, what they've watched recently and what time of day.⁸⁵ This information is then combined with more data gathered from dozens of in-house and freelance staff who watch every minute or every show and tag it.

In a country like Brazil where the audiovisual market's development has been fostered by public investments, and media ownership concentration is a historic regulatory concern, Netflix's recommendation system seems to pose a "chicken and egg" situation. In June 2018, we conducted research using a bot to identify the number of Brazilian titles on Netflix's Brazilian catalog.⁸⁶ The bot found only 115 options for national content on the Brazilian catalog (3865 titles altogether), that is, three percent.⁸⁷ This poses the question: do people not watch national content because there are not many options available or are there limited options because people do not watch national content?

National and independent audiovisual content incentives in Brazil trace back to the 1930s. In the film industry, the Decree no. 21.240/1932 fixed a minimum of Brazilian films that should be created and be in monthly programming for popular education (called "screen quota" or "cota de tela"). With Decree no. 1.949/1939, the government established the mandatory exhibition of one feature-length Brazilian feature film a year in cinemas, a quota that was expanded to three feature films a year in 1945. In 1952, a new policy change demanded featuring one national film for every eight foreign film programs, that is, "if a movie theater had a weekly program, six of its films should be national" (SIMIES, 2009).⁸⁸ In 1959, the criterion became a fixed number of days of national content exhibition per year - a criterion that remained the same,⁸⁹ with number of days varying over the years. Currently, the "screen quota" has legal provision in article 55 of Provisional Measure No. 2.228-1 (MP 2.228-1/2001), which aims to ensure market reservation for national content against the massive presence of foreign products in theaters,- the criterion is a fixed number of days of exhibition determined each year.⁹⁰

⁸³ According to compos.org.br, last accessed March 9, 2018.

⁸⁴ Netflix spent USD \$100 million to secure first rights to 'House of Cards' without seeing a single scene or ordering a pilot. According to the company's database, the numbers on how many people were watching Kevin Spacey and David Fincher movies and how many viewers watch political thrillers indicated that getting exclusive access to the show *made sense* <<https://www.wired.com/2012/11/netflix-data-gamble/>>.

⁸⁵ According to Wired, last accessed March 12, 2018.

⁸⁶ Due to licensing contracts which have territorial limitations, Netflix's catalogs differ by country.

⁸⁷ Netflix does not offer a public list of titles or of categories. To reach this result, we used an aggregator of Netflix's categories and used JSONs offered by Netflix itself to count the number of Brazilian titles in categories including "Brazilian" in the name. After eliminating duplicated results, we tested the list with as many films we could find on the platform as possible. It must be said that the Netflix catalog changes constantly and the results would change over time, but not as significantly to alter the point we make here.

⁸⁸ "It is interesting to note that there were no substantial differences in terms of the number of days of compulsory exhibition of national films between 1950 and 1963. Only the criterion changed: the 1950' obligation to exhibit six films per year, which was translated into 42 days, in 1951 becomes stipulated by proportionality, but also corresponded to at least 42 days of exhibition. Finally, in 1959 the criterion, still in place today, was the one of a fixed number of days of exhibition per year, which, until 1963, was 42 days" (SIMIES, 2009, p.142).

⁸⁹ In November 29 2018 the Technical Chamber of the Exhibition Rooms Market, a group created in December 2017 to monitor and analyze the behavior of the exhibition market, as well as to discuss the evolution of the Brazilian cinema, approved a new criterion for "screen quotas". In a meeting chaired by Ancine's executive director, it was established to consider the single exhibition session and not all the sessions of a room per day, as it happens today. To Christian de Castro Oliveira, "this more accurate criterion only became possible thanks to the System of Tickets Control (Sistema de Controle de Bilheteria - SCB), implemented in 2017. Through this System, the exhibitor sends to Ancine the complete data of programming and box office of its cinemas daily. The digitalization of the Brazilian exhibition park, which is now completed, also allows a new business model in the market, making the distribution of audiovisual content more flexible". Its implementation depends on presidential approval. According to Ancine, last accessed November 29, 2018.

As to the pay-TV market, quotas have only been adopted more recently. The Conditioned Access Law from 2011 establishes mechanisms for directing resources for the independent and regional production and imposes quotas of national and independent content in channels and channel packages that will be commercialized to subscribers. It reserves three hours and 30 minutes a week, in prime time, for Brazilian content in all channels of qualified space – those that present in its prime time more than 50 percent of audiovisual content of fiction, documentary, animation, reality shows, video musical and variety programs carried out outside an auditorium, half of which should be produced by independent producers. It also imposes an obligation on providers to include Brazilian channels of qualified space in their channel packages. At least one-third of the channels of qualified space must be Brazilian, up to the limit of 12 channels. And one-third of these national channels cannot have links with distributors and packers as they should be programmed by independent Brazilian programmers.⁹¹ It is also expected that at least two of these channels display 12 hours of independent Brazilian programming, one of which cannot be linked to television channels. As the enactment of the Conditioned Access Law (“Lei do SEAC” - Law no. 12.485/2011) established a Condecine collection over pay-TV services, the FSA’s calls for proposals, and therefore its funds, are used to accomplish these quotas.⁹²

All these regulatory mechanisms that foster national content, however, are not enforceable in the VoD market, and their adequateness to these new platforms has been divisive. On pay-TV, the measure for quotas has been number of hours; but what would the measure for VoD catalogs be? One argument raised in the regulatory debate has been establishing a minimal percentage of titles would be an incentive for services to have a smaller overall catalog. Therefore, a solution would have to be carefully crafted, thinking of general availability of titles, and different quotas for different sizes and types of catalogs. Marcelo Bechara, regulation director at the Globo Group, argued that before regulating the new service, it is important to try to reduce the rules on the audiovisual sector and cable TV. “What should be discussed is not to regulate the service, but to deregulate another. Why not discuss a Conditioned Access Law deregulation?”⁹³

One other possibility under discussion is making changes to the recommendation systems of platforms, to create what has been called a specific “prominence” of national content, or change the recommendation algorithm on the user interface (Ancine, 2017). Some players argue that such an imposition would imply intellectual property violation as it would demand changes to the platform’s algorithm (and the business model as a whole).⁹⁴ The first argument seems unconvincing, because it has become quite common worldwide that legislation and court decisions determine features and workings of certain applications – a classic example was the court settlement between Napster and Metallica in 2001, in which Napster agreed to block music being shared from any artists who wished so.⁹⁵ However, such interventions can be very troublesome if they are unilateral and inconsiderate of private stakeholders’ stance on technical workings of their business model or directly interfere with their business proposition, running the risk of being ineffective, impossible or presenting collateral effects. Other stakeholders see such interventions as having the potential of leading to “censorship”, as they would intervene in user’s choice of content.⁹⁶ Arguing that

⁹⁰ In a 2014 action at the Brazilian Supreme Court, the Union of Cinematographic Exhibitors of the State of Rio Grande do Sul argued that, in the light of the principle of isonomy, there is no similar determination such as the “screen quota” with regard to other companies in the cultural sector, such as bookstores, radio and television stations. The Union defends there is a violation of the constitutional principle of free initiative and State interference in the economic activity of film companies, as well as disproportionality in the measures adopted in relation to the programming and the receipts collected. A final decision has not been reached yet. According to stf.jus.br, last accessed October 15, 2018.

⁹¹ According to article 2º of the Conditioned Access Law, a Brazilian independent programmer is the one (i) that is not controlling, controlled or affiliated to a packer or distributor and (ii) do not maintain an exclusive link that prevents it from commercializing, to any packer, the rights of exhibition or placement associated with its programming channels.

⁹² Ancine has established a complex funding system and one of the possibilities, through a program called PRODAV, is that independent studios are funded in projects which are selected by programmers themselves, and the productions are tied to them by contract. See regulation of PRODAV in fsa.ancine.gov.br last accessed 21 December 2018.

⁹³ According to telesintese.com.br last accessed April 10, 2019.

⁹⁴ Ana Paula Bialer, August 24, 2018. *Condecine and audiovisual innovations*. Lecture conducted from FGV LAW, São Paulo, SP.

⁹⁵ See *Metallica, et al. v. Napster, Inc.*

⁹⁶ Jonas Antunes Couto, personal communication, August 30, 2018.

such content offers would be “forced” without previous indication of user preferences, market actors around the VoD system have been claiming these mechanisms wish to solve a problem that is typical of linear media, and may not even exist on VoD business models, in which users anyway choose what to watch.

Even if indeed linear media and interactive media are essentially different and require different frameworks for diagnoses and intervention, the widespread belief that VoD platforms’ algorithms dissolve diversity concerns as they have the role of linking the user to their most secret preferences sounds at the very least naive and does not stand epistemologically. Algorithms organize information through selection and imposing hierarchies of content, but that they are free from subjectivity, error or attempted influence is a “carefully crafted fiction” (Gillespie, 2014, pp. 177-179).⁹⁷ In the case of VoD and especially Netflix, which is also an owner of content, several factors can come into play: Netflix, having moved from being a mere intermediary to also funding production and owning content, could favor its own content over others, favor content due to contractual arrangements with other content owners, simply make mistakes in its predictions of user taste, or be influenced disproportionately by particular types of people who make their early viewership, but do not necessarily represent other and newer users. This is not to say that platforms’ algorithms should be under strict regulation, but to complexify discussions around cultural diversity and tie it to longstanding discussions around policies concerning the formation of preferences.⁹⁸

In that respect, one other issue is that users’ preferences are formed and influenced by other factors than the content they previously consumed. As pointed by Carol Alckmin, an independent producer at O2 Filmes (a large but still independent producer in Brazil), “there has been a demand for national content, as legal incentives have provided us with more possibilities of local content to watch”⁹⁹. She believes, for example, Brazilian audiences tend to prefer “watching Murilo Benício [a Brazilian actor] than a Van Damme role, as they can relate more to the first than the latter.” - But they could not know that before they were shown Murilo Benício’s performance.¹⁰⁰ Alckmin’s argument is supported by recent academic scholarship, which notes that “a plurality of regionally based media capitals of entertainment finance, production, distribution, and marketing exist, customizing TV shows and films for ‘culturally proximate’ audiences” (Mirrlees, 2013, p. 47).¹⁰¹

The current recommendation system, therefore, could limit users’ experiences by not introducing new and diversified content to user’s repertoire – - content those users may not even acknowledge, considering their past experiences. Around the same subject, there have been claims on the importance of serendipity, that is, how essential it is that people be exposed to content by chance, and how algorithms can rule that out – - but corporations should become committed to such discussions (Sunstein, 2017).¹⁰²

⁹⁷“The criteria public information algorithms take into account are myriad; each is fitted with a threshold for what will push something up in the results, position one result above another, and so on. So evaluations performed by algorithms always depend on inscribed assumptions about what matters, and how what matters can be identified (...). More than mere tools, algorithms are also stabilizers of trust, practical and symbolic assurances that their evaluations are fair and accurate, and free from subjectivity, error, or attempted influence. But, though algorithms may appear to be automatic and untarnished by the interventions of their providers, this is a carefully crafted fiction.” (GILLESPIE, 2014, pp. 177-179). Also, there are implications when we use algorithms to select what is most relevant from a corpus of data, therefore letting them produce and certify knowledge. In doing so, they impact users political choices as well as cultural lives, making this supposing objective information serve in the construction of users opinions. The Twitter suppressing of the #OccupyWallStreet hashtag in the early days of that societal movement is used by the author as an example of the power that algorithms have to determine what is not only worthy of the public’s attention, while also reflects the will of some (GILLESPIE, 2012). About neutrality of algorithms, see also O’NEIL, Cathy (2016).

⁹⁸This discussion may gain new contours with article 20 of the Brazilian General Data Protection Law (Law 13.709/2018) which ensures a right to information and explanation about the use of data. The new law establishes the right to explanation in the case of automated decisions that may have an impact on the users’ lives. The explanation should include not only information about the personal data that served as a substrate for the algorithm, but also about the logic behind such decisions. The law will come to force in August 2020. See MONTEIRO, Renato Leite. [Existe um direito à explicação na Lei Geral de Proteção de Dados do Brasil?](#) Instituto Igarapé. Artigo Estratégico 39. 2018.

⁹⁹Carol Alckmin, personal communication, August 24, 2018.

¹⁰⁰Personal communication, 2018.

¹⁰¹For more on this matter see TUNSTALL, Jeremy. *The Media Were American: U.S. Mass Media in Decline*. New York, NY: Oxford University Press, 2008.

At last, regarding diversity, the notion that interactive media does not present challenges to diversity finds its counterpart in public policy analysts who see it as highly improbable that market forces will themselves produce diversity in content. “The Conditioned Access Law mechanisms basically created an independent audiovisual market in Brazil; unless VoD is really extremely disruptive, the tendency is that public policy measures for diversity are needed, because this is a market that tends towards concentration”, argued Mauricio Hirata.¹⁰³ He also mentions that the delay in solving regulatory aspects has been a consequence of no public funds being directed to productions that have VoD as their first window, a mechanism that could also foster Brazilian and independent content on these platforms.¹⁰⁴

5.1 VoD, Netflix and changes in the audiovisual industry -- a connected scenario

In an interview for this project, Paula Sacchetta, a documentary director working for the independent studio Mira Filmes, who has directed a few documentaries of substantive media impact, mentioned what she sees as a contradiction in the current market scenario. Most mechanisms for public funding of national films are still directed towards traditional windows – in one occasion, for example, she received funds to produce a documentary film tied to a pay-TV channel, and she had to agree to not make her movie available online for a number of years after release. At the same time, she mentions, directing and producing for Netflix is currently seen as a source of commercial prestige, the economic conditions are favorable, and the possibility of reaching a global audience is a major pro,¹⁰⁵ vehiculating in movie theatres and participating at festivals is however still a source of cultural distinction. Carol Alckmin, executive producer at O2 Filmes, mentions that production times have shrunk considerably with the VoD market which in her opinion is detrimental to creativity. At the same time, both the quota and funding mechanisms brought by the Conditioned Access Law and the fact that the VoD market has created new opportunities have heated up the audiovisual market, positively, impacting the careers of professionals, who would before take years to reach positions which are much more democratized today. According to Alckmin, the increasing demand for content has accelerated professionalization within the market.

On a global scale, a similar debate made headlines in April 2018, when Netflix decided to exit France’s Cannes Film Festival, over the festival leadership’s decision to ban films from competing unless they secure

¹⁰²Recent discussions regarding commercial performance and audiovisual production are of notice here. On July 2018 Ancine changed the previously predominant model of selection of projects for the production of feature films, animation and documentary to receive resources from the FSA. The agency established a score system of selection, based on a list, released in August 2018, that scored producers, directors and distributors from zero to ten. The scores were based mainly on the commercial performance and the quantity of works produced. To Marcelo Ikeda, professor at Universidade Federal do Ceará - UFC, “the supposed innovation of this announcement is that [Ancine] does not analyze the merits of the projects. They do not read the scripts, nor really analyze the merit and the artistic content of the works that will be contemplated with the resources of FSA”. The score system already existed but they were only complementary mechanisms, but after Ancine’s announcement, about 1/5 of the country’s annual audiovisual budget will be distributed through this system. Besides the economic concentration, the new system may favor regional concentration as it does not fulfill the Conditioned Access Law’s demands for 30 percent of the FSA’s resources to go to projects in the North, Northeast and Midwest of the country. Ancine’s score system plays the role of an algorithm, when it specifies criteria for funding projects. According to [Nexojournal](#), last accessed on August 28, 2018.

¹⁰³Personal communication, 2018.

¹⁰⁴There has been a few Netflix originals Brazilian productions over the years — 3% (produced by a Brazilian independent producer, Boutique Filmes), *The Mechanism* (produced by Zazen Productions) and *Coisa Mais Linda* (produced by the Brazilian independent producer Prodigio Filmes).

¹⁰⁵“We still believe in ‘protecting’ movies, but this commercial logic to cinema does not seem to work anymore. Going to the movies is getting more and more expensive, so, as a distribution option, movie theaters reach fewer people (...) We used to make films to exhibit them on movie theaters. Today, we make films so they get to people. And I know I get to reach more people if my film is on Netflix’s catalog”. Paula Sacchetta, personal communication, August 22, 2018. On the other hand, Carol Alckmin, an independent producer at [O2 Filmes](#), points out that platforms are precipitating and cutting shorter the time available for the creative process: “Now, what I feel about these SVoD platforms is that the processes are much faster. If you close a deal now, with some platform, you’ll probably already have a very specific date [to deliver the production]. So you’re going to have to scale that time between development, shooting and post production (...) And as a person who studied audiovisual, film and radio and TV with passion, it’s a bit frustrating to me because we want to make the content with the greatest care possible, we want to really reflect on those characters, understand if that curve is plausible or not, and creating content is a very organic and dynamic thing, it’s an ecosystem that you’re adjusting to. If we were to think of a con to this model of SVoD is that there is an acceleration of the creative process that is often enriched with time, it is purified over time”. Carol Alckmin, personal communication, August 24, 2018.

a local theatrical release.¹⁰⁶ Carol Alckmin presented an interesting perspective on this conflict, mentioning that perhaps Netflix is seen as having less cultural legitimacy because of making decisions based on algorithms rather than on “human inspiration”. Several of our conversations with people from the audiovisual market present this sort of concern for a loss of human centered creation, timings, and cross-market collaboration in a world dominated by algorithms.

Netflix, however, insists that creative decisions remain in the hands of the creators. In 2013, Joris Evers, the company’s former director of global corporate communications (from 2011 to 2014), stated that the platform “doesn’t get super-involved on the creative side.” Instead it hires “the right people” and gives them “the freedom and budget to do good work”.¹⁰⁷ Some authors even suggest that the use of big data is, in fact, “fostering a new golden age of creativity” since a subscription-based business model and content abundance (as opposed to broadcast television’s scheduling slots) could mean more freedom to create edgy or controversial content and taking chances on niche content because, “if viewers don’t like a particular show, they can watch something else on the same platform”.¹⁰⁸

Lastly, besides more immediate shifts in the audiovisual market, certain market actors in Brazil have been expressing the concern that the very idea of national content is impacted by the economic organization of these new markets. As film director Paula Sacchetta and executive producer Carol Alckmin explain, what has been called “Brazilian content” on international VoD platforms is content produced by Brazilian studios, but not necessarily owned by Brazilian players themselves in terms of intellectual property. Netflix Originals, for example, is content funded by Netflix and by force of contracts alone, whose copyright solely belongs to Netflix,¹⁰⁹ and that is the case for most such companies and international programmers. According to Brazilian law, though, Brazilian content is that which is controlled by Brazilian economic agents.¹¹⁰

5.2 Data, transparency and public policy

These discussions regarding audiovisual policies and VoD business models seem to indicate the importance of data and transparency while designing policy regulations. Netflix’s recommendation system criteria as well as other information regarding the company’s revenues and infrastructure remain classified, making it difficult to get at a precise assessment of the platform’s impact on the Brazilian audiovisual market. According to Mauricio Hirata, new tech companies are establishing a tendency of not sharing data, as opposed to the previous market standard of releasing detailed data to Ancine which helped develop policies and regulate the sector.¹¹¹ Traditionally across nations, movie theatres have delivered very detailed

¹⁰⁶ According to [The Verge](#), last accessed on August 20, 2018.

¹⁰⁷ According to [The New York Times](#), last accessed April 20, 2019.

¹⁰⁸ According to [HBR](#), last accessed April 29, 2019.

¹⁰⁹ “With most Netflix originals, we own all the rights to the title and can stream it anywhere in the world. Originals we can stream anywhere include Narcos, BoJack Horseman, Master of None, Beasts of No Nation, and more. Some Netflix originals are not available in all regions, for the following reasons:

- When some Netflix originals were created, Netflix was only available in a small number of countries, so we did not secure the licensing rights for all global regions.
- Despite a TV show or movie being a Netflix original, other companies may have the rights to stream it in a particular region due to content deals made before Netflix was available in that region.
- Depending on the region, Netflix may not be able to obtain the licensing rights for an original series for many years. Some Netflix originals that we do not yet have global licensing for include Orange is the New Black, Arrested Development, and Lilyhammer.” According to < <https://help.netflix.com/en/node/4976> > , last accessed Dec 22, 2018.

¹¹⁰ MP 2228: “Art. 1. V - Brazilian cinematographic work or Brazilian video phonographic work: one that meets one of the following requirements: a) is produced by a Brazilian production company, (...), is directed by a Brazilian or foreign director resident in the country for over 3 (three) years, and employs in its production at least 2 / 3 (two thirds) of Brazilian artists and technicians or residents of over 5 (five) years; b) is performed by a Brazilian production company registered at ANCINE, in association with companies from other countries with which Brazil has a cinematographic co-production agreement and in agreement with them. c) is performed under co-production by a Brazilian production company registered at ANCINE, in association with companies from other countries with which Brazil does not maintain a co-production agreement, with ownership of at least 40 percent of the patrimonial rights of the work to the Brazilian production company and to employ in its production at least 2/3 (two thirds) of Brazilian artists and technicians or residents in Brazil for more than three (3) years”.

¹¹¹ Mauricio Hirata, personal communication, August 23 2018.

information on box office collections worldwide, on a daily level, due to the need for building trust in a very tense sector. Pay-TV and domestic video have provided detailed data in Brazil, as compelled by law. The resistance of VoD in delivering data is, according to him, is even leading to a tendency of traditional sectors releasing less data due to renewed concerns around losing competitive edge. Regarding VoD platforms in Brazil, Hirata claimed that “Ancine never got hold of data on volume or sorts of content from primary VoD sources - data has always been obtained secondarily”.

According to actors in the film market who preferred not to be identified, even film producers complain of not having access to sufficient data on their films on Netflix, especially if compared to box office data, which, due to long-time regulations, provide very specific data both to market players and to Ancine.¹¹² Alckmin however claimed that the fact that platforms know much more precise information about user taste (for instance, that 70 percent of the audience of a certain series abandoned watching it at the twelfth minute of the third episode) has been driving them to request content to producers to attend specific audiences and tastes, and in some cases collaboration in reaching those results works well. Jonathan Friedland, Netflix’s former chief communications officer (from 2012 to 2018), justified it by saying “because we have a direct relationship with consumers, we know what people like to watch and that helps us understand how big the interest is going to be for a given show. It gave us some confidence that we could find an audience for a show like ‘House of Cards.’”¹¹³ The company’s use of data science has been a point of pride as the platform sees itself as an agent of “transformation of an entire industry”, even publicly explaining how it uses data to make decisions throughout contents’ studio production’s stages.¹¹⁴

One important issue regarding transparency and data is that all the other aspects of regulation and public policy development, including taxation, require strict oversight and information for evidence-based policies, which is impossible without data.

6. Concluding Policy Recommendations

- Brazil’s infrastructure problems and unequal connectivity across the country and through socio-economic classes hamper the universalization of VoD services. Considering the new trends of media consumption, this scenario excludes certain groups from accessing these services, posing threats to a democratic access to culture, as established by the Brazilian Constitution.
- Considering how much the quality of internet connection impacts its viewers experiences, Netflix’s efforts to influence internet regulation in Brazil are understandable. In 2015, as a contribution to the public consultation regarding the regulatory decree of the Marco Civil da Internet (Brazilian’s Civil Framework, a law establishing rights and duties on users and corporations online)¹¹⁵ organized by the Ministry of Justice, Netflix argued that the internet is a value-added service and as a result, the National Telecommunications Agency (Anatel) should be in charge of overseeing and enforcing net neutrality rules (InternetLab, 2015) - a suggestion which was later accepted. On that occasion, Netflix also¹¹⁶ defended free access to networks service providers and opposed an eventual CDNs regulation¹¹⁷ - making the company’s concern to avoid any charges for the services it uses to deliver

¹¹²According to the agency’s [Normative Instruction no. 123 / 2015](#), exhibitors must send to Ancine (i) the identification of the exhibitors, movie theaters, content exhibited and its distributors and service providers of remote ticket sales; (ii) information regarding the exhibition sessions such as date, technology, seats available, subtitling and accessibility; (iii) data on tickets sales, revenues per session and forms of payment, broken down by the type of seat and ticket.

¹¹³According to [The New York Times](#), last accessed April 20, 2019.

¹¹⁴See [Netflix Techblog](#) on medium.com, last accessed April 29, 2019.

¹¹⁵Law no. 12.965/14.

¹¹⁶According to < <http://www.telesintese.com.br/netflix-consulta/> >, last accessed on Sept. 24, 2018.

¹¹⁷Netflix bear the costs of its CDN solution, the Open Connect. By opposing to regulation, the company seeks to avoid charges over the services it uses to deliver its content to the end user. “Allowing the possibility of such charges creates a perverse incentive for ISP’s to leave these access points jammed (..) in an attempt to extract payments from online content providers to pay for a route of traffic outside the jam generated”, argued in the statement. According to < <http://www.telesintese.com.br/netflix-consulta/> >, last accessed on Sept. 24, 2018.

its content to end users very clear. Lastly, the platform stood against zero rating practices "since it presents consumers with only a slice of the internet".¹¹⁸

- In Brazil, historic state efforts to foster local and independent content have been effective. Now, they need to address new features posed by technology and VoD new business models. The broader reach these services have could make a case for policies fostering local, independent and more democratic material. Noting this for instance, in October 2018, the European Parliament approved new rules for audiovisual media, including 30 percent of European content on the video-on-demand platforms' catalogs in order "to support the cultural diversity of the European audiovisual sector".¹¹⁹
- By reaching more people and having no limits on catalogs, VoD platforms could channel content that otherwise would have not been released. In 2017, Netflix released the movie 'Loev', a queer Indian drama. Shot secretly in a country where, at the time, homosexuality was illegal, and considered "not Indian enough" for the festival circuit, the movie presented aspects of the Indian culture that went beyond the stereotype perpetrated on the festival circuit.¹²⁰ Moreover, VoD services can be a platform for a local-to-global flow of independent and local content — '3%', 'The Mechanism' and 'Coisa Mais Linda' are a case in point.
- The inclusion potential of content production and dissemination does not seem to be put in place voluntarily by the market. There should be discussions on quotas or other incentive models that take particularities of VoD into consideration. Tax exemptions for national independent titles could be an option. The government should also think of producing other databases such as national content databases (currently inexistent), favoring licensing opportunities.
- As long as their particularities are considered, national public funding models must include VoD platforms both as taxpayers and as recipients of content, ensuring that policies that were formulated for diversity and for strengthening the national market apply (ownership, for instance) to them. Also, such funding should allow for the development of alternative platforms, such as platforms for content that do not return high commercial gains but are nevertheless culturally important. There should also be further discussions around revenue flows, since former rules around ownership due to public funding are not enforceable in such models.
- Ensuring isonomy among players entails more transparency - ultimately concerning the algorithm - for accountability, proper sanctions and law enforcement - clearly establishing institutions' legal powers and extra-territorial application of the regulations. In February 2019, the European Parliament, the Council of the European Union and the European Commission reached a political deal on the first -ever rules aimed at creating a fair, transparent and predictable business environment for businesses and traders when using online platforms.¹²¹ The deal intends to ban certain unfair practices, assure more transparency in online platforms and establish new avenues for dispute resolution. This demand seems to relate with former Ancine's Executive Secretary Mauricio Hirata's observation regarding the lack of transparency and information about digital platforms' practices.

¹¹⁸Netflix however is part of zero rating contracts with internet service providers in Australia and celebrated interconnection agreements with local access providers in US. Also according to telesintese.com.br, last accessed on Sept. 24, 2018.

¹¹⁹The new regulations still need to be approved by the Council of EU ministers. According to a European Parliament [report](#), last accessed April 10, 2019.

¹²⁰According to [Vice](#), last accessed on April 28, 2019.

¹²¹According to europa.eu, last accessed April 10, 2019.

- It is important that VoD platforms are required to provide the same level of transparency as the other players of the market, regarding prices, catalogs, usage, etc. A model has to be thought of, thinking of all the information that other stakeholders in the market must have to be able to operate and innovate, so that competition is ensured. In other markets, it has become clear how data concentration has been detrimental to competition and has fostered extreme concentration, ensured by network effects.¹²² It is therefore a top priority to study a detailed model of transparency and data sharing requirements that will be important not only to the market directly, but also to allow research and analysis (such as this) to inform policy..
- The current political scenario in Brazil and discussions about criminalizing societal actors' activities are limiting possibilities. Organizing further has been going on (screenwriters collective societies for instance) and it should be ensured that such associations also have a political voice and find their way to communicate clearly in the media, to reach public opinion as well.

¹²²On this regard, there's a suggestion of a "progressive data-sharing mandate", according to which a company that has passed a certain level of market share has to share some data, chosen at random, with other firms in its industry that ask for it. See [Technology Review](#), last accessed April 29, 2019.

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Appendix

List of interviewees

1. Carol Alckmin, executive producer, O2 Filmes (independent studio, but one of the largest in the world).¹²³ Date: August 24, 2018. Length: 36 min.
2. Christian de Castro Oliveira, Ancine's executive director. Date: September 14, 2018. Length: 57 min.
3. Jonas Antunes Couto, regulatory strategy director, Brazilian pay-TV / Telecom Association - ABTA. Date: August 30, 2018. Length: 54 min.
4. Mauricio Hirata, former Executive Secretary, Registry Superintendent and Advisor to the Collegiate Board of Directors at Ancine. Date: August 23, 2018. Length: 82 min.
5. Paula Sacchetta, Film director, Mira Filmes (independent studio). Date: August 22, 2018. Length: 59 min.

¹²³According to CENA – Jornal Gazeta Mercantil. 18 de maio de 2007. Available at [Cenacine](#).

Annex

AWS- Amazon Web Services

FSA- Audiovisual Sectoral Fund (Fundo Setorial do Audiovisual)

CDN- Content Delivery Network

CIDE- Contribution for Intervention in the Economic Domain (Contribuição para Intervenção no Domínio Econômico)

Condecine- Contribution for the Development of the Brazilian Audiovisual Industry (A Contribuição para o Desenvolvimento da Indústria Cinematográfica Nacional)

DMCA- Digital Millennium Copyright Act

DRM- Digital Rights Management

GDP- Gross Domestic Product

HTTPS- Hyper Text Transfer Protocol Secure HTTPS

Ancine- National Film Agency (Agência Nacional do Cinema)

Anatel- National Telecommunications Agency

OTT- Over-the-top

CSC- Superior Board of Cinema (Conselho Superior de Cinema)

ISS- Tax on Services (Imposto sobre Serviços)

ICMS- Tax on the Circulation of Goods and Transportation and Communication Services (Imposto sobre Circulação de Mercadorias e Serviços)

TLS- Transport Level Security

VoD- Video on Demand

