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Law and Technology Research Institute of Recife **(IP.rec)**

Contribution to the Federal Communications Commission's Public Consultation:

Preventing Digital Discrimination

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Sumary

Our work and context

The **Law and Technology Research Institute of Recife - IP.rec**[1] is an independent Brazilian research and advocacy think tank which focuses on the analysis of policies and technological developments that affect the human rights ecosystem on the Internet.

Universal Internet access is the centerpoint for the **IP.rec** research agenda. The institute has a wide ranging portfolio of works on the theme since its foundation, partaking in initiatives such as the Brazilian Internet Forum- FIB and in discussions at national and international level, such as the World Summit on the Information Society, in 2017. IP.rec is involved with connectivity and access matters through its membership in the Coalizão Direitos na Rede, building campaigns, contributing to public policies and developing advocacy in partnership with the public and private sectors.

IP.rec lauds the Federal Communications Commission's initiative to receive public contributions on fighting digital discrimination in broadband access. The considerations of the Brazilian Institute are presented here to the Commission in view of the public nature of the proposed debate and the potential benefits of approaching it from a multistakeholder and international perspective.

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Meaningful access to a free, neutral and open Internet, and the elimination of digital

Ip.rec considers that an active and focused approach on digital discrimination is a fundamental step towards incorporating a meaningful and contemporary concept of internet access.

Decades after the creation of the commercial Internet, we have witnessed steadfast growth in the number of connected individuals and a significant reduction in the digital divide, both in Brazil and also in the United States. However, the limitations of this expansion and the characteristics of current access capabilities have proven to be decisive in a context in which public services and general social activities were exclusively held in the digital environment. In Brazil, the current Covid-19 pandemic meant that school activities had to take place mostly through digital platforms during 2020 and 2021. In addition, at the start of the pandemic, the Internet was the only mechanism that enabled citizens to transfer and use the financial assistance provided by the government as a result of the pandemic. In this critical context, disparities with regard to the availability and quality of Internet access based on race, class and geographic location prevented rights such as the right to education and to adequate food, from being fully guaranteed. In 2020, IP.rec's

third institutional note on Covid-19 addressed the themes of “infrastructure, broadband and inclusion” from the perspective of digital inequality and the need for real and effective universal digital connectivity.

Section 60506 of the Infrastructure Investment and Jobs Act addresses equal access to broadband services offered by Internet Service Providers (ISPs) and is the subject of this **Notice of Inquiry**, in a demonstration of the global nature of the situation described. The section is in a chapter about long-term measures for the expansion of broadband and assigns the Federal Communications Commission to the role of ensuring that these broadband services are offered without technical and economic differentiation by ISPs. Beyond measures directed at ISPs, FCC's call for input highlights the prospect of initiating the process “of establishing a shared understanding of the harms experienced by historically excluded and marginalized communities, with the intent of making meaningful policy reforms and systems improvements”.

In the Infrastructure Investment and Jobs Act, “equal access” was defined as “the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions”, definition linked to the objective of eliminating inequality of access “based on income level, race, ethnicity, color, religion, or national origin”. Furthermore, the law also provides a broad concept of digital inclusion and digital equity, a result of the incorporation

of the “Digital Equity Act of 2021” (TITLE II, seções 60301 a 60307). Therefore, the legislation intends to promote digital inclusion through fixed and mobile broadband, electronic devices and skills required to guarantee that everybody can make use of “affordable information and communication technologies” (Title III, 11). Digital equity was defined as the “condition in which individuals and communities have the information technology capacity that is needed for **full participation** in the society and economy of the United States” (Title III, 10).

Through this combination of guidelines and context, it could be said that the legislation assesses, systematically , the profound impacts of digital divide during Covid-19 and the digital discrimination still found in United States. The proposal can be an important benchmark to establish policy measures which translates an up to date and pressing debate on digital inclusion. This is because the diagnosis shows that any percentage of exclusion can cause immeasurable damage to human rights and that connectivity gaps are based on the social characteristics listed in Section 60506, that is, “income level, race, ethnicity, color, religion, or national origin”. This recognition is reinforced when analyzing the populational groups included in the scope of the Digital Equity Act (TITLE II, sections 60301 to 60307), which adds the incarcerated population, people with disabilities, residents of rural areas, veterans and people with low levels of schooling.

We highlight:

1. Currently, fighting digital discrimination means facing the absence or insufficiency of connectivity and, consequently, of human rights. IP.rec considers that the FCC should intentionally focus on the mentioned groups to estabish measures to avoid digital discrimination.

As demonstrated by surveys in Brazil[2], the exclusion of these groups often does not mean complete and absolute lack of connectivity, but a "second-class connectivity". This may happen through low or unstable speeds, limited data or insufficient devices. Recent data from the US scenarios[3] show that the "smartphone-only" Internet users are mostly black, Hispanic, low-schooling, low-income and residents of rural areas. Geographically, lower rates of economic development in southern states are accompanied by slower and less widespread connections, a regional disparity that is not strange to the Brazilian case[4]. Other data from Pew Research Center show significant inequality in the ownership of devices between people without disabilities and people with disabilities[5].

These factors reinforce the importance of a qualified notion of connectivity.

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[2] Cetic.br (2021, October).

[3] Retrieved from https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/

[4] Arretche (2019).).

[5] Retrieved from https://www.pewresearch.org/fact-tank/2021/09/10/americans-with-disabilities-less-likely-than-those-without-to-own-some-digital-devices/

Therefore, it is important to prioritize the expansion of fixed and reliable broadband in households. In that sense, the concept of “meaningful connectivity” can be highlighted as a way to go beyond the currently used definition of Internet connection, on which an Internet user can be someone who had any kind of access to the Internet in the last three months. According to the Alliance for Affordable Internet, “We have meaningful connectivity when we can use the internet every day using an appropriate device with enough data and a fast connection”. The emphasis on regularity, speed and availability seeks to reflect the distinction between a restricted use and an active use.

2. IP.rec considers that discrimination in Internet access should be fought with actions based on a qualified and updated concept such as “meaningful connectivity”. This orientation was partially included by the definition adopted in the Invest Act. IP.rec assesses that FCC can operationalize it in actions adopted towards ISPs and in the general premise of eliminating digital discrimination at the connectivity level.

Based on the previous considerations, it is to be understood that there are substantial differences and specific challenges in the pressing efforts to

guarantee equal access to broadband for citizens of different “income level, race, ethnicity, color, religion, or national origin”. Often combined, these social traits are associated with lower levels of quality of life, purchasing power and, above all, ensured access to human rights. It is not by chance that the groups in relation to which it is necessary to avoid discrimination of access by the ISPs operation are also the groups that tend to have lower levels of direct access in general, or that are limited to a lower quality access - even when a good part of of the physical first level digital[6] has already been noticeably reduced. The fact that these individuals have not been totally reached and that the conditions of the services received by them are still unequal demonstrate “the harms experienced by historically excluded and marginalized communities”: this challenge requires a holistic and intensive approach at the public policy level.

This initiative must enfold the need to overcome any lack of knowledge at the diagnostic level so that it is possible to develop up to date and complete diagnoses, define strategies, allocate resources and intervene in loco to work directly with ISPs and communities. The groups listed by Section 60506 and included in the Affordable Connectivity Program (AFC) are the most unknown populations in demographic terms and are usually more prone to being outside of the sphere of direct reach of the State, therefore subject to statistical and applicational gaps. Questioning the usual ways of measuring connectivity, Bronzino et al. (2021)[7] highlight that vulnerable populations are also the ones that

[6] Van Deursen, A. J., & Van Dijk, J. A. (2019)

[7] Bronzino, F., Feamster, N., Liu, S., Saxon, J., & Schmitt, P. (2021).

vulnerable populations are also the ones that least engaged in speed tests or diagnostic surveys.

When assessing that there is an invisibility chain from the level of diagnosis to the level of public action, it can be urged that the specificities of the groups must be directly incorporated by FCC's policy making activity. The 2021 National League of Cities report, "State of the Digital Divide in the Hispanic Community", highlights how a significant part of the Latinx population tends to refuse participation in government programs due to the distrustful relationship with US authorities, for reasons that range from the fear of deportation policies to the generalized preference for keeping their personal information private. Language and economic barriers are also listed in the document.

3. IP.rec considers that the FCC's work to operationalize the fight against digital discrimination can benefit from the continuous improvement and detailing of diagnostics and connectivity mappings. The invisibility cycle can only be solved if the socio-historical particularities of the populations highlighted by the legislation and by the FCC are incorporated throughout the Commission's full policy cycle.

In order to expand the technical and institutional infrastructure for offering and improving broadband service, a more distributed market of ISPs can favor the necessary reach, achieving disconnected or poorly connected groups. The Agency's economic and regulatory action may encourage providers to settle in economically less privileged areas. In addition, intentionally considering the social, geographic, political and economic conditions of the target groups can lead to strategic contact with local ISPs, some of which might have sprung from the communities themselves. The FCC can play an important role by working in order to facilitate dialogue and enabling operation of diverse profiles of ISPs, working along with local actors. Building an agenda **with** civil society also has the potential to incorporate fundamental good practices in the sense of implementing multistakeholder approaches in the creation and execution of Internet policies.

4. In the fight against digital discrimination in Internet access, the expansion of coverage and the improvement of connectivity quality can benefit from reduced levels of market concentration, equal conditions for competition and incentives for small and local providers.

Furthermore, the enterprise may require the evaluation of different connectivity approaches. One of the possibilities to be studied involves the

expansion of public networks. According to data from the company Broadband Now, in 2021, 18 American states “explicitly prevent or make it unreasonably difficult to establish” municipal networks, highlighting that states that allow these networks have more accessible plans. On the other hand, the community networks model is especially suited to the targeted action. Encouraging and facilitating the creation of these local and communal initiatives can guarantee the elimination of discrimination at the provided service level and directly confront the challenges posed by the remaining gaps. The Tribal Virtual Network, the community ISP Acorn Wireless, and the case of Waimanalo - Hawaii are internationally known as successful experiences, part of them with the Internet Society support, a non-profit entity that accumulates expertise and reference materials regarding the community network model.

5. Creative approaches can compose FCC’s toolkit, such as the implementation of municipal and community networks

In direct reference to the possibility of discrimination on the part of ISPs, we highlight the importance of the principle of net neutrality, as well as the importance of preventing the discriminatory performance of critical services offered by these providers. Brazil has extensive experience in the debate about net neutrality and the study, research, and legal implementation of the principle is one of the bastions of Brazilian Civil Rights Framework for the Internet, with

wide international recognition. Even if 5G connections are based on network slicing in order to reach the promised speed levels, it is up to the FCC to prevent this practice from justifying the indiscriminate differentiation of Internet services. We consider that this issue should be evaluated as sensitive by the FCC and we invite the Commision to act based on an international level of reference about the relationship between government bodies and ISPs. In 2021, IP.rec published a "Conceptual sampling report (global north-south) relating to the civil liability of internet intermediaries", also addressing the case of the United States.

In Brazil, under the terms of the Brazilian Civil Rights Framework for the Internet, the connection provider cannot offer a cheaper plan that restricts users' access to certain sites: he can only differentiate the service in terms of price and browsing speed. Even so, one of the characteristics of digital inequality in the country is the limitation of connection through reduced mobile data browser. Through zero rating, ISPs discriminate access by offering unlimited bandwidth for specific applications, a practice that restricts user navigation, makes informational autonomy unfeasible and restricts rights. **IP.rec stands for a free, neutral and open Internet.**

Finally, we emphasize that the expansion of the Internet connection must occur with the preservation of opt-out options, i.e., without asserting exclusive digital options for fundamental rights. Thus, even citizens who choose not to be connected cannot fail to have access to public policies and their fundamental rights. The autonomy that safeguards the possibility of disconnection by opt-out

should neither justify digital exclusion due to inertia, nor external and displaced imposition. Therefore, we highlight how strategies based on local providers and community networks can promote meaningful digital inclusion and prevent digital discrimination. Knowing and including groups that still suffer from the different layers of digital inequality is an essential task for the multistakeholder and global promotion of human rights.

6.Preserving net neutrality is a barrier against digital discrimination. Universal and meaningful access must take into account the informational autonomy of individuals and groups.

Final considerations

IP.rec acknowledges, once again, FCC's call for inputs and reinforces the need for debates and consultative processes of a multistakeholder nature. It also understands that the topic is of public interest and transcends national borders.

A global and multistakeholder consultation provides the Commission with information, data, and experiences, supporting actions with a corresponding and enriched approach. In turn, it is worth emphasizing the role of significant and universal connectivity for the individual and collective rights of all Internet users. Being the connection network global, it is urgent that all countries face the issue of digital divide and digital discrimination together.

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