

## HONORABLE JUDGE OF THE 5<sup>TH</sup> BUSINESS COURT OF THE RIO DE JANEIRO STATE COURT

*“Yes. It is correct to state that the **Defendant uses the invention claimed by the PI 0506163-6 patent when encoding video files according to the specifications of the HEVC standard with the deblocking filter of said standard enabled**, which it did on the occasions demonstrated by the practical tests presented by DivX on pages 89/125, 2008/2026 and 4578/4610.”*

(Expert report - Answer to Plaintiff DivX's question 153 - p. 7405)

### Dockets # 0214224-53.2020.8.19.0001

**DIVX, LLC** (hereinafter “DivX” or Plaintiff), already qualified in the dockets of the patent infringement lawsuit aforementioned, filed against **NETFLIX ENTRETENIMENTO BRASIL LTDA.** (“Netflix” or Defendant), respectfully submits, through its lawyers, in view of the conclusion of the expert report<sup>1</sup> confirming that Netflix **(i) infringes the PI 0506163-6 patent**, and, therefore, that **(ii)** it has been **disobeying the decisions issued by this Court for months now**. DivX request this Court, in accordance to articles 139, IV<sup>2</sup>, 297<sup>3</sup> and 298<sup>4</sup> of the Brazilian Code of Civil Procedure (CPC), to **ratify the expert report**, closing the discovery phase, as well as, in compliance with the decision rendered in interlocutory appeal # 0060197-47.2022.8.19.0000, to **determine measures to ensure compliance with the preliminary injunction<sup>5</sup>** which, as proven in the expert report, has never been obeyed.

### 1. ENDING THE EXPERT EXAMINATION AND CONSEQUENT CLOSURE OF THE DISCOVERY PHASE

1. On September 11, 2023, the expert presented clarifications in relation to the divergent opinion of the Defendant's technical assistants, as determined by article 477, paragraph 2, II, of the Brazilian Code of Civil Procedure, which constitutes the last stage of the adversarial process between the parties and the court's expert. As can be seen from the expert's statement, the precise expert report was fully ratified by the expert despite of the Defendant's delaying and unjustified discontent, confirming that Netflix continues to infringe the Plaintiff's patent: **“In view of what is set out in this final statement, this Expert Team ENTIRELY RATIFIES the conclusion presented in the EXPERT REPORT.”**<sup>6</sup>

<sup>1</sup> Expert report on pages 7241/7410 and clarifications from the expert on pages 8953/8969.

<sup>2</sup> Art. 139, IV, of the CPC: The judge shall conduct the proceedings in accordance with the provisions of this Code, having a duty to: [...] IV - determine all the necessary inductive, coercive, injunctive or subrogation remedies to assure the performance of the court order, including claims whose subject matter is a cash benefit.

<sup>3</sup> Art. 297 of the CPC: A judge may order the measures deemed necessary in order to enforce a provisional remedy.

<sup>4</sup> Art. 298 of the CPC: In the decision that grants, denies, amends or revokes the provisional remedy, the judge shall clearly and precisely state the reasons for his or her judgment.

<sup>5</sup> Art. 300 of the CPC: Interlocutory relief shall be granted when there are elements that prove the probability of the alleged claim (the “smoke of good law” or *fumus boni iuris*) and the risk of loss or injury to the useful outcome of the lawsuit (*periculum in mora*).

Art. 311, I and II of the CPC: Relief based on prima facie evidence is to be granted regardless of the production of evidence of risk of loss or injury to the useful outcome of the lawsuit, when: I - there is an abuse of the right of defence or the party demonstrates clear intentions of delaying the proceedings; II - the allegation can only be proven by means of documental evidence and when there is a rule based on the trial of multiple claims on the same point of law or a “súmula”, a binding statement.

<sup>6</sup> Fl. 8968.

2. Furthermore, the expert rebutted one by one all the points of disagreement presented by the Defendant's technical assistants, reaffirming and deepening what had already been the subject of the expert report, in particular demonstrating that **(i)** there is no limitation on the application of the PI 0506163-6 method to specific deblocking strategies<sup>7</sup>, **(ii)** it is not necessary for the standard to be fully encompassed in the patent, which would even be impossible<sup>8</sup>, **(iii)** the patent is not limited to the teachings of MPEG-4<sup>9</sup>, **(iv)** the patent covers regions of discontinuous area<sup>10</sup>, **(v)** the expression "determined pixels" is equivalent, in the context of the patent, to "predetermined levels"<sup>11</sup>, and **(vi)** the "all elements rule" has been used to conclude that the patent is infringed literally<sup>12</sup>.

3. Considering that there is no other evidence to be produced in this case<sup>13</sup>, as well as the fact that the Defendant's opportunity to submit clarification questions<sup>14</sup> has expired, it is clear that the **discovery phase is over**,<sup>15</sup> since the expert report on pages 7241/7410, supplemented by the expert's final statement provided on pages 8953/8969, meets all the legal requirements, leaving no room for doubt as to its conclusions, and should therefore be ratified by this Court.

4. Furthermore, it is necessary to determine the appropriate measures to enforce Netflix's compliance with the preliminary injunction, as shown below.

---

<sup>7</sup> "Notwithstanding the above, no indication was found in the patent letter that the technology was limited to post-processing. This shows that the important thing is the comparison between the patent and the standard, i.e. if the technology was incompatible, this would have been confirmed during this comparison." (Fl. 8955).

<sup>8</sup> "As stated in the expert report (pages 7266 and 7300 - fragments below), the H.265/HEVC standard has a very complex and sophisticated method for defining the boundaries to be filtered. It would be impossible for a patent to encompass this distribution and identification method and, at the same time, the technology claimed by patent PI 0506163-6. The title would certainly suffer from a lack of unity of invention." (Fl. 8957).

<sup>9</sup> "As I explained in item 1.1 of this letter of clarification, as well as in the expert report (pages 7249 and 7251), there is no point in limiting the technology claimed by patent PI 0506163-6 to the MPEG-4 Part 2 standard, since this patent covers technology that seeks to overcome this technical standard." (Fl. 8959).

<sup>10</sup> "Thus, according to what is described in the patent, a region can indeed be made up of a discontinuous area, since what is required is that there be multiple rows and multiple columns in this region." (Fl. 8961).

<sup>11</sup> "The expert report (page 7294) already explains that the patent considers 'predetermined levels' as 'predetermined pixels', given that the wording of the dependent claims, which, as seen, have rules, and must be linked (dependent) to the independent claim, shows that the patent addresses the same matter, sometimes as 'predetermined level', sometimes as 'predetermined pixel'." (Fl. 8962).

<sup>12</sup> "The possibility of infringement by equivalence was mentioned only for the sake of completeness and concern for technique. The expert report concluded literal/direct infringement of these claims, in view of the implementation of all their elements by the defendant." (Fl. 8964).

<sup>13</sup> In the decision of pages 5052/5053, it was stated that the disputed points would be (and have been) settled by expert evidence, with no need for oral evidence, judicial inspection or documentary evidence (except for documentary evidence on supervening facts), which demonstrates that the instructional phase has been overcome.

<sup>14</sup> According to the decision on pages 8789/8790, Netflix chose to submit supplementary questions after the deadline, rendering the possibility of submitting questions of clarification (art. 233 of the CPC) preclusive, as recommended in the precedent mentioned below: "ACTION FOR INSTRUMENT. INDEMNIFICATION. DECISION REJECTING THE FORMULATION OF SUPPLEMENTARY QUESTIONS AFTER THE PRESENTATION OF THE EXPERT REPORT. **INADMISSIBLE FORMULATION OF NON-EXPLANATORY QUESTIONS AFTER THE EXPERT REPORT HAS BEEN PRESENTED.** INTELLIGENCE OF ARTICLE 425 OF THE CPC. The court decision is correct when it analyzes the nature and content of the supplementary questions and rejects their submission, as well as the carrying out of a new expert opinion, as they are unimportant to the outcome of the case. Appeals heard and dismissed." (AI 0015956-95.2016.8.19.0000, 12th CC, Rel. Cherubin Schwartz, j. 21/06/2016).

<sup>15</sup> Although Netflix's conduct so far leads me to believe that *jus sperniandi* is inevitable.

## 2. A BRIEF OVERVIEW OF THE PRELIMINARY INJUNCTIONS ISSUED IN THE LAWSUIT, ALL OF WHICH WERE IGNORED BY THE DEFENDANT

---

5. This lawsuit was filed almost three years ago, on **October 21, 2020**. It is the longest running patent infringement lawsuit in the field of information technology in Brazil. This delay can only be attributed to the Defendant's purposeful delaying behavior, which with each new decision files successive appeals with a request for suspensive effect, as has already been seen on several occasions<sup>16</sup>.

6. Precisely in order to mitigate the deleterious effects of time for the holder of the infringed patent, a provisional injunction was granted on **November 4, 2020**, ordering the Defendant to refrain from providing content in HEVC format under penalty of a daily fine of BRL 50,000.00 (fifty thousand reais)<sup>17</sup>.

7. After overcoming the various setbacks caused by the Defendant's delaying behavior, the preliminary injunction was confirmed by the 5<sup>th</sup> Chamber of Private Law on **05/27/2022**<sup>18</sup>. The Court partially modified the preliminary injunction's judicial command to determine "*that Netflix refrain from using, within 30 (thirty) days from this date, the deblocking filter protected by the PI 0506163-6 patent, until the judgment of the merits of the action in the first instance, ensuring the continued enjoyment of the HEVC standard*"<sup>19</sup>.

8. Although the judgment has not been stayed, nor has its provisions been revoked by the Higher Courts<sup>20</sup>, DivX proved that Netflix was disobeying the preliminary injunction<sup>21</sup>, trusting that the absence of the Defendant's assets in Brazil would guarantee it impunity. On this basis, this Hon. Judge, on **29/07/2022**, ordered Netflix to deposit the accumulated amount of the daily fine for non-compliance with the preliminary injunction into a judicial account on a monthly basis for as long as it did not prove that it had ceased to make use of the patent-in-suit<sup>22</sup>. The measure was aimed at making the preliminary injunction effective and, at the same time, safeguarding the useful outcome of the process, since Netflix does not keep any relevant assets in the national territory, sending all its profits abroad.<sup>23</sup>

---

<sup>16</sup> By way of example, we cite excerpts from decisions in which this Court recognized Netflix's intent to delay. Judgment recognized Netflix's intent to procrastinate: "*the motions for clarification have a **merely procrastinatory nature**, since there is no defect, omission or obscurity in the decision under appeal*" (fl. 6843); "*the supplementary questions are untimely since they were submitted after the expert report was completed, and are not clarifications, but mere dissatisfaction with the result of the expert report. Therefore, the time for submitting the questions has expired, and **the defendant's petition will only have the effect of procrastinating the proceedings***" (fl. 8789).

<sup>17</sup> Pages 1416/1421.

<sup>18</sup> Interlocutory appeal # 0081946-91.2020.8.19.0000 - judgment at pp. 4439/4447.

<sup>19</sup> Fl. 4446.

<sup>20</sup> Special Appeal # 2074392/RJ filed by Netflix against this ruling is pending judgment. Bearing in mind that the 5<sup>th</sup> Chamber of Private Law did not violate any provision of federal law and that it is not permissible to review the fulfillment of the requirements for the granting of provisional relief, due to the application of Precedents 7/STJ and 735/STF, DivX trusts that the appeal filed by the Defendant will not prevail, since it is not even cognizable.

<sup>21</sup> DivX submitted to this Court Judgment, in the petition on pages 4572/4575, **(i)** tests conducted in the laboratories of the COPPETEC Foundation of UFRJ (pages 4578/4610), as well as **(ii)** tests carried out on the Defendant's *streams*, the content of which was endorsed by notarial minutes (pages 4611/4636), demonstrating the continued use of the deblocking filter by Netflix during the transmission of video files in HEVC format.

<sup>22</sup> Pages 4886/4888.

<sup>23</sup> As evidenced by the documents attached on pages 4637/4639 and 4640/4860.

9. Netflix appealed<sup>24</sup> against this decision, and the 5<sup>th</sup> Chamber of Private Law decided to “**stay the enforceability of the advance deposit of the fine, until the actual non-compliance with the judicial decision that set them is demonstrated**”, considering that “[t]he enforceability is still uncertain and can **be assessed with evidentiary instruction**” (Doc. 2).

10. It should be noted that the Rio de Janeiro Appellate Court itself stated that, “[i]f it is proven that the defendant/Netflix uses the patent PI0506163-6, and that it is held by the plaintiff/aggravated party, **it will undeniably have to answer for the alteration of the truth of the facts, in addition to the retroactivity of the fine from the time of the non-execution of the judicial decision**” (Doc. 2).

11. And the expert report<sup>25</sup> confirmed both that Netflix **(i)** altered the truth of the facts, and **(ii)** failed to comply with the court decision. This means that Netflix has been disobeying the order to refrain from using the patent-in-suit, which remains in full force and effect, despite there being no reason to justify its non-compliance. The Defendant's negligent behavior means that the fine set is retroactive and that measures must be adopted to change the truth of the facts, as determined by the above-mentioned final and unappealable judgment.

### 3. GROUNDS FOR THE ENFORCEMENT MEASURES REQUESTED BY THE PLAINTIFF

---

12. The expert's conclusion corroborated what the Plaintiff has always said: the Defendant is infringing her patent: “*That said, it is clear that the Defendant NETFLIX has infringed the the PI 0506163-6 patent held by the Plaintiff DIVX*”<sup>26</sup> .

13. More specifically, the expert opinion proved that the Defendant's statement to the effect that it “*does NOT use the DivX Patent for streaming high-resolution videos to its customers, but only implements the technology determined by the HEVC standard*”<sup>27</sup> is not true, since the deblocking filtering method of PI 0506163-6 is the same method recommended in HEVC: “*Yes. It is correct to state that **claim 1 of the PI 0506163-6 patent claims technology for selecting the deblocking method which is that prescribed in the HEVC standard.***”<sup>28</sup> .

14. Therefore, when the Court ordered “*that Netflix refrain from using, within 30 (thirty) days from this date, the **deblocking filter protected by the PI 0506163-6 patent, until the judgment of the merits of the action in the first instance***”<sup>29</sup> , the Defendant was prohibited from using the HEVC deblocking method, because it is the same thing.

---

<sup>24</sup> Interlocutory appeal No. 0060197-47.2022.8.19.0000 (Doc. 2 - full text of the judgment).

<sup>25</sup> See the expert's conclusion: “*The matters described in claims 1, 17, 18, 19, 24, 25, 30 and 31 of PI 0506163-6 are present in H.265/HEVC, i.e., the deblocking filter specified in said standard is selected according to the methods claimed through the aforementioned patent. That said, it is clear that Defendant NETFLIX has infringed patent PI 0506163-6 held by Plaintiff DIVX, characterized by the presence of the elements of the patent in the standard used by Defendant H.265/HEVC.*” (fl. 7406).

<sup>26</sup> Fl. 7406.

<sup>27</sup> Fl. 4871.

<sup>28</sup> Fl. 7404 - response of the expert report to Plaintiff's question 151. In the same vein, the report concludes: “*the deblocking filter specified in the aforementioned standard is selected in accordance with the methods claimed in the aforementioned patent.*” (fl. 7406).

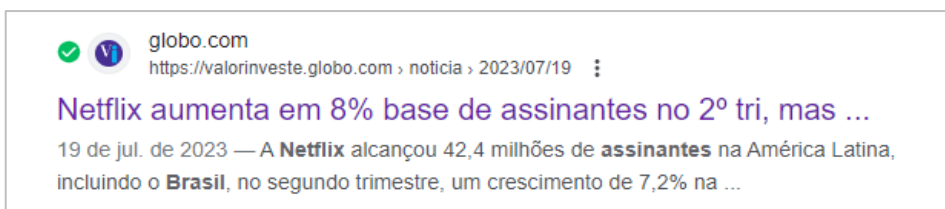
<sup>29</sup> Fl. 4446.

15. The Defendant obviously knew that it had to stop using this method in order to comply with the court order. After all, we can't believe that Netflix, with all its technicians, engineers and specialists, wouldn't know that both methods are the same. But it decided to follow the path of impunity, down the road of judicial disobedience, delaying the process as long as possible while, in the meantime, profiting - and a lot - from the use of someone else's invention.

16. The damage to the Plaintiff, which was already serious at the time this lawsuit was filed, has only increased. After all, the patent-in-suit is valid until **13/11/2028** and, since this lawsuit was filed, 3 (three) years have already passed without the Plaintiff being able to avail itself of the rights arising from said title.

17. The harmful effects of Netflix's parasitic conduct had already been anticipated by the 5<sup>th</sup> Chamber of Private Law in the judgment that partially confirmed the preliminary injunction granted by this Court. On that occasion, it was considered that *“the continuity of any violation of intellectual property has economic repercussions of great proportion, because it negatively affects the licenses already granted to third parties who, in good faith, pay for the use of the invention. In this context, there is a market imbalance”*<sup>30</sup>.

18. And the market imbalance caused by Netflix's parasitic competition is clear. **Even with a court decision ordering the cessation of the illegal activity, the market is forced to compete with a company that offers cutting-edge video quality without paying anything for it**, in clear unfair competition, since it lowers its costs and allows it to offer better prices and conditions, which may even cause a reaction that impacts current and future licenses with DivX. Based on piracy and unauthorized use of third-party technology, the Defendant has been increasing the number of subscribers to its streaming service quarter by quarter. In this regard, headlines fill the Internet search pages:



19. Looking at the case file, it is not difficult to see that **Netflix is trying to suffocate DivX and drown the Judiciary, opposing unjustified resistance to the regular progress of the case in order to gain time - precisely because it has always known that it was infringing the patent - while the right on which the lawsuit is based continues to perish.**

<sup>30</sup> Fl. 4445.

20. Throughout the course of this lawsuit, Netflix has filed 24 petitions<sup>31</sup>, 10 motions for clarification<sup>32</sup>, 6 interlocutory appeals<sup>33</sup>, 5 internal appeals<sup>34</sup>, 3 special appeals<sup>35</sup>, 2 appeals within special appeals<sup>36</sup> and filed 2 writs of mandamus<sup>37</sup>, **all of which in some way involve an abusive defense - either because of its impertinence, or because it deals with a precluded matter, or even because it has an obvious delaying purpose.**

21. The Defendant also raised, from its first manifestation in the case file, four different and impertinent preliminaries which, despite having been rejected by the E. TJRJ and the E. Superior Court of Justice, **ended up leading to the stay of the present lawsuit for almost a year**<sup>38</sup>.

22. It is not unknown that the broad defense, a corollary of the adversarial process, is an absolutely dear principle in the Brazilian legal system. However, as the illustrious Professor and Judge Barbosa Moreira teaches, *“the right to defend oneself cannot be equated with the right to act lightly and maliciously, resisting the plaintiff's claim in a way that merely disrupts and procrastinates the progress of the lawsuit”*<sup>39</sup>.

23. It is always necessary to be aware of what the Superior Court of Justice has already stated in the sense that *“the ruse is often camouflaged and obscure, so as to confuse the eyes of those who need to find it. The deceiver never presents himself as such, but, on the contrary, acts allegedly under the cloak of the most cherished principles, such as access to justice, due process of law and ample defense, in order to commit and conceal his misdeeds.”*<sup>40</sup>.

24. Moreover, from the outset of the lawsuit, it had already become clear that the preliminary injunction does not affect the operation of Netflix's video streaming services and ensures the enjoyment of the HEVC standard (as expressly pointed out by the Court), **which can very well be used without its deblocking method activated.**

25. As for the lack of irreparable harm to the Defendant, it should be remembered that, even if the use of the “entire” HEVC were prohibited, Netflix could still provide its users with 4K (Ultra HD)

---

<sup>31</sup> pages 1.423/1.449, 1.703/1.711, 1.806/1.809, 2.055/2.059, 2.126, 2.134/2.135, 2.282/2.375, 3.748, 3.750/3.791, 3.826/3.831, 4.212, 4.190/4.193, 4.306/4.313, 4.499/4.506, 4.869/4.874, 4.890/4.891, 4.983/4.989, 5.135/5.183, 6.608/6.662, 6.710/6.718 e 6.784/6.787.

<sup>32</sup> Motion for clarification filed before this Court and in the interlocutory appeals Nos. Judgment and in interlocutory appeals Nos. 0081946-91.2020.8.19.0000, 0053867-68.2021.8.19.0000, 0055632-40.2022.8.19.0000, 0003018-24.2023.8.19.0000, 0034597-87.2023.8.19.0000 and 0034623-85.2023.8.19.0000.

<sup>33</sup> Interlocutory appeals Nos. 0081946-91.2020.8.19.0000, 0053867-68.2021.8.19.0000, 0055632-40.2022.8.19.0000, 0003018-24.2023.8.19.0000, 0034597-87.2023.8.19.0000 and 0034623-85.2023.8.19.0000.

<sup>34</sup> Interlocutory appeals filed in interlocutory appeals Nos. 0081946-91.2020.8.19.0000 and 0003018-24.2023.8.19.0000, 0034597-87.2023.8.19.0000 and 0034623-85.2023.8.19.0000.

<sup>35</sup> Special Appeals Nos. 0081946-91.2020.8.19.0000, 0053867-68.2021.8.19.0000 and 0055632-40.2022.8.19.0000.

<sup>36</sup> Special appeals No. 0081946-91.2020.8.19.0000 and 0053867-68.2021.8.19.0000.

<sup>37</sup> Writs of mandamus no. 0809217-26.2023.8.19.0001 and 0052277-85.2023.8.19.0000.

<sup>38</sup> On this point, DivX recalls that, on **01/07/2021**, this MM. Judgment, certainly misled by the Defendant, issued a decision on pages 4296/4298 accepting the preliminary lack of jurisdiction raised by Netflix and determining that the case be referred to one of the São Paulo Business Courts. DivX was then compelled to file an interlocutory appeal (No. 0053867-68.2021.8.19.0000) with a request for suspensive effect, which was granted on **August 2, 2021**. The interlocutory appeal was unanimously granted by the 5th Chamber of Private Law (then the 24th Civil Chamber) on **May 25, 2022, the date** on which the suspension of the proceedings ceased.

<sup>39</sup> BARBORA MOREIRA, José Carlos. *Abuse of Procedural Rights*. Rio de Janeiro: Editora Forense, 2000. p. 113.

<sup>40</sup> REsp n.º 1817845/MS. Rel. Min. Nancy Andrighi, Terceira Turma, j. 17/10/2019 - [Entire content](#).

video content in formats other than HEVC, for example VP9 and AV1, both of which are free to use, without any damage to the continuity of its activities or to its subscribers.

26. Indeed, the Defendant's also stated that it "*mainly uses three varieties of encoded video formats: H.264/AVC, H.265/HEVC, and VP9*" and "*also uses in a reduced form an old encoding format called H.263*", as well as "*testing a new encoding format called AV1*"<sup>41</sup>. In other words, if the Defendant provides its videos in **five different formats**, it certainly **wouldn't do any harm to stop providing them specifically in the HEVC format**.

27. As can be seen, the elements highlighted here show that the requirements for preliminary injunction based on urgency (art. 300 of the Brazilian Code of Civil Procedure) and on evidence (311, I and II, of the Brazilian Code of Civil Procedure) have been met<sup>42</sup>. Everything indicates that it is **imperative that, at the very least, energetic measures be taken by this Hon. Court to make the preliminary injunction in force effective - which, as proven by the expert opinion, is not being respected**.

28. What is clear is that Netflix simply decided to continue violating DivX's rights and ignored court rulings solely because it was the most profitable way to do it. It seems to be "worth it" for Netflix to disregard the preliminary injunction, even after the copyright has been confirmed by an expert. We need to put an end to the situation and force the defendant to respect the rights of others and, above all, court orders.

29. Bearing in mind that **(i)** the preliminary injunction prevents Netflix from using the method claimed in PI 0506163-6 and **(ii)** the expert opinion proved that this technology is "*the one prescribed in the HEVC standard*"<sup>43</sup>, as well as that **(iii)** the order for Netflix to deposit the accumulated amount of fine in a judicial account on a monthly basis had only been deferred<sup>44</sup> until after the expert opinion elucidated the occurrence of non-compliance with the said preliminary injunction, DivX respectfully requests that Your Excellency **order Netflix to deposit in a judicial account, on a monthly basis, the accumulated amount of the fine since the preliminary injunction was granted, in no more than 15 working days**, and, thereafter, to make the deposit on a monthly basis until the infringement ceases.

30. This measure is necessary because it is the only way for Netflix to immediately feel the effects of its disobedience to what was ordered by the E. TJRJ, and it is therefore up to the Defendant to bear the fine for non-compliance with the preliminary injunction or bring to the record suitable proof that it is finally complying with the preliminary injunction in force (which it will certainly not do).

---

<sup>41</sup> Fl. 1984.

<sup>42</sup> Although art. 311 of the CPC does not include the likelihood of the author's right as a legal requirement, DivX is *not* unaware of the understanding of the Superior Court of Justice to the effect that the granting of such relief "*requires not only an abuse of the right of defense or a manifest purpose of delay on the part of the opposing party, but also the cumulative existence of the likelihood of the right alleged*." (Interim relief in AREsp n.º 2.034.826/MT. Rel. Min. Maria Isabel Gallotti, Fourth Panel, j. 17/10/2022 - [Entire content](#)). It should be noted, on this point, that **the probability of the plaintiff's right has already been recognized in two levels of jurisdiction**, when the emergency injunction in force was granted and confirmed, in **addition to having been evidenced by the conclusions reached in the expert report of pages 7241/7410**.

<sup>43</sup> Fl. 7404.

<sup>44</sup> It should be recalled: "***THEREFORE, I vote to acknowledge and grant the appeal to suspend the enforceability of the advance deposit of the fine, until the actual non-compliance with the court decision that set them is demonstrated.***" (Doc. 2).

31. And this measure is expressly provided for in the judgment handed down by the Appellate Court in this case, which has already become unappealable, according to which after *“it has been proven that the defendant/Netflix uses the patent PI0506163-6, and that it is held by the plaintiff/aggravated party, it will undeniably have to respond by [...] retroactivity of the fine from the time of the non-execution of the judicial decision.”* (Doc. 2).

32. It is worth remembering that this measure is necessary because all of the large profits that Netflix earns from its activities in Brazil are promptly used to buy foreign currency to send abroad. This fact has already been duly recognized by this Justice. Court: *“although it is recognized that Netflix is a global giant in the streaming sector, its share capital in Brazil is derisory and all the profit earned here is converted into foreign currency and remitted abroad, an assertion that has not been disproved by the Defendant”*<sup>45</sup>.

33. This is not an execution of fine, since there will be no withdrawal of this amount, but, in fact, an appropriate measure for the effectiveness of the preliminary injunction, under the terms of the provisions of article 297 of the Brazilian Code of Civil Procedure. So much so that, in the decision that first ordered the measure (temporarily stayed until the end of the examination), this Court expressly pointed out that *“the amount of the deposits will remain at the disposal of this business court and will not be withdrawn until the final judgment of the case”*<sup>46</sup>.

34. Furthermore, it is necessary to give effect to the Appellate Court's determination (already stabilized by the absence of an appeal against it, it should be noted) to the effect that, once the infringement has been proven in an expert opinion, the Defendant *“will have to answer for altering the truth of the facts”*. Since it has been proven that Netflix has not been truthful since its first statement in these proceedings - stating that it does not use the technology protected by DivX's patent - as well as that it insists on not complying with the preliminary injunction granted, even using numerous unfounded incidents and appeals for this purpose, behavior contrary to good faith has been established, in the form of art. 80, items II and VI, of the Brazilian Code of Civil Procedure, and Netflix should be punished in the form of art. 81 of the same legal diploma.

35. But that's not all: if Netflix continues to insist on disobeying the preliminary injunction, the hypotheses typified in art. 77, IV and VI, of the Brazilian Code of Civil Procedure will be configured, which constitute an **act against the dignity of justice** (art. 77, §2, of the Brazilian Code of Civil Procedure), and Netflix must be **warned** that if it continues to fail to comply with the preliminary injunction, it will be punished under the terms of §2 of the same provision.

36. In the same vein, since Netflix is an internet application provider, in the form of art. 5, VII, of Law # 12.965/2014<sup>47</sup> (“Marco Civil Law of the Internet in Brazil”), it must comply with Brazilian law - including, of course, compliance with court decisions (art. 77, IV, of the Brazilian Code of Civil Procedure) -, as provided for in art. 11 of that law<sup>48</sup>.

---

<sup>45</sup> Fl. 4887.

<sup>46</sup> Fl. 4887.

<sup>47</sup> Art. 5 of the Marco Civil da Internet: For the purposes of this Law, the following are considered: [...] VII - Internet applications: the set of functionalities that can be accessed through a terminal connected to the Internet.

<sup>48</sup> Art. 11 of the Brazilian Civil Rights Framework for the Internet: **In any operation involving the collection, storage, safekeeping and processing of records, personal data or communications by internet connection and application providers in which at least one of these acts takes place in national territory, Brazilian legislation and the rights to privacy, protection of personal data and the secrecy of private communications and records must be respected.**



37. As such, the Plaintiff requests that the Defendant also be **warned** under the terms of article 12, I, of that Law<sup>49</sup>, that its reluctance to comply with the preliminary injunction, in addition to constituting an act contrary to good faith and an affront to the dignity of justice, also constitutes an illicit act punishable (cumulatively) by the other sanctions provided for in items II to IV of the same article 12<sup>50</sup>, which range, in addition to the warning requested herein, from the imposition of a fine on turnover, to the prohibition of the exercise of activities.

38. It is therefore necessary to **personally summon and warn the defendant to comply with the above order, under penalty of the sanctions provided for in the aforementioned legal provisions.**

#### 4. CONCLUSION AND REQUESTS

---

39. In light of the above, DivX respectfully requests that the **expert report be ratified**, closing the discovery phase, especially in view of the exhaustiveness of the clarifications provided by the court's expert, trusting that the unreasonable objections formulated by the defendant will be rejected.

40. Furthermore, and in view of the fact that **(a)** Netflix is prevented from using "*the deblocking filter protected by the PI 0506163-6 patent*"<sup>51</sup>, **(b)** the expert opinion proved that the deblocking method protected by this patent is precisely the deblocking method used by HEVC<sup>52</sup> and **(c)** Netflix assumes to use the HEVC deblocking method and, *ipso facto*, DivX's technology, even during the term of the preliminary injunction, **(d)** having also been proven that the Defendant continues to use the technology owned by the Plaintiff, it is requested, based on articles 139, IV, 297, 298, 300 and 311, I and II, all of the Brazilian Code of Civil Procedure, Hon. Judge, cumulatively, the following measures:

- i) That the order issued by this Court on page 4887 be re-established, as already determined the Appellate Court's decision that has already become unappealable<sup>53</sup>, so that the Defendant may be personally summoned to **deposit, within 15 working days, in a judicial account linked to this Court, the accumulated amount of the fine for non-compliance with the preliminary injunction in force**, corresponding to BRL 50,000.00 (fifty thousand reais) per day of non-compliance, which to date amounts to **BRL 16,550,000.00 (sixteen**

---

<sup>49</sup> Art. 12 of the Marco Civil da Internet: **Without prejudice to other civil, criminal or administrative sanctions**, violations of the rules set out in arts. 10 and 11 **are subject, as the case may be, to the following sanctions**, applied **individually or cumulatively**: I - warning, with a deadline for the adoption of corrective measures [...].

<sup>50</sup> Art. 12 of the Marco Civil da Internet: **Without prejudice to other civil, criminal or administrative sanctions**, violations of the rules set out in arts. 10 and 11 **are subject, as the case may be, to the following sanctions**, applied **individually or cumulatively**: [...II - a fine of up to 10% (ten percent) of the turnover of the economic group in Brazil in its last financial year, excluding taxes, taking into account the economic condition of the offender and the principle of proportionality between the seriousness of the fault and the intensity of the sanction; III - temporary suspension of activities involving the acts provided for in art. 11; or IV - prohibition of the exercise of activities involving the acts provided for in art. 11.

<sup>51</sup> Fl. 4446.

<sup>52</sup> "Thus, it is concluded that all the matters described in claims 1, 17, 18, 19, 24, 25, 30 and 31 of PI 0506163-6 are present in H.265/HEVC and that, therefore, **the deblocking filter specified in this standard is selected according to the methods claimed by said claims.**" (fl. 7268).

<sup>53</sup> "THEREFORE, I vote to acknowledge and grant the appeal in order to **suspend the enforceability of the advance deposit of the astreintes, until it is demonstrated that there has been an effective breach of the court decision that set them.**" (Doc. 2).

million, five hundred and fifty thousand reais)<sup>54</sup>, as well as to **deposit monthly, in a judicial account linked to this Court, the accumulated amount of the daily fine indicated above**, as long as it does not prove unequivocally in these proceedings that it has effectively stopped using DivX's method;

- ii) That the Defendant be **warned**, under the terms of art. 12, I, of the Marco Civil Law of the Internet in Brazil, that continued disobedience to what has been determined in this process will give rise to the application of punishment for **(a) an act against the dignity of justice** (art. 77, IV, §§ 1 and 2, of the CPC), as well as **(b) the other sanctions provided for in art. 12 of the Marco Civil Law of the Internet in Brazil – notwithstanding the possibility of the adoption of other inductive, coercive, mandamus or subrogation measures** (art. 139, IV, of the Brazilian Code of Civil Procedure) if the above sanctions do not prove sufficient for the Defendant to comply with the preliminary injunction; and
- iii) Finally, the Defendant should be **condemned for bad faith litigation**, in view of its delaying conduct and alteration of the truth of the facts (arts. 80, II and VI, and 81, both of the Brazilian Code of Civil Procedure).

For these reasons,  
grant is requested.

Rio de Janeiro, September 18<sup>th</sup>, 2023.

**Carlos Aboim**  
**OAB/RJ 110.246**

**Gabriel Mathias**  
**OAB/RJ 148.390**

**Rodolfo Barreto**  
**OAB/RJ 196.288**

**Bruno Falque**  
**OAB/RJ 234.282**

**Amanda Terra**  
**OAB/RJ 244.856**

**Luis Felipe Salomão Filho**  
**OAB/RJ 234.563**

**Paulo Cesar Salomão Filho**  
**OAB/RJ 129.234**

**Alice Moreira Studart da Fonseca**  
**OAB/RJ 164.462**

**Marcelo Fontes**  
**OAB/RJ 63.975**

**Ricardo Loretti**  
**OAB/RJ 130.613**

**Adilson Vieira Macabu Filho**  
**OAB/RJ 135.678**

---

<sup>54</sup> Doc. 1.