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The Law, State and Telecommunications Review

Aims and Scope

The Law, State and Telecommunications Review publishes two annual issues released on May and October since 2018 and one annual issue released on May uninterruptedly since May 2009. The journal mission is to publish legal and interdisciplinary analyses on telecommunications and communications focused on policy and regulation of communications services, telecommunications services, Internet-based services and rights, such as the right to communicate, to publish, to private exchange, to design communication platforms, and other related topics, such as privacy, intellectual property, universal access, convergence, satellite and spectrum regulation, telecommunication licensing and regulatory design, independent agencies, deregulation, e-commerce, big data, net neutrality, and so forth, with emphasis on national and foreign experiences through the lenses of legal and regulatory theories. It accepts submissions in English, Spanish, and Portuguese. It does not charge for processing, submission, or publishing the articles. Authors are allowed to hold the copyright of their paper without restrictions. We welcome paper submissions all year round. They will undergo rigorous peer review process by anonymous refereeing of independent expert referees. The Law, State and Telecommunications Review is a journal maintained by the University of Brasilia and edited by the Telecommunications Law Research Group of the School of Law Center on Law and Regulation. The journal adopts structured abstracts with clear indication of purpose, methodology/approach/design, findings, practical implications, and originality/value of the papers. Keywords should depict the actual content of the article and be limited to five, according to the ABNT NBR 6028 standard. The journal adopts the ABNT NBR (Brazilian Association of Technical Standards) citation

The main goal of the University of Brasilia Law, State, and Telecommunications Review is to put together high quality legal analyzes and interdisciplinary research on telecommunications focused on regulation, technology, policy and legal framework. We invite authors to submit papers on any relevant topic related to telecommunications policy and regulation, such as but not limited to infrastructure, broadband, broadcast, telecommunication services, universalization, interconnection, consumer rights, privacy, right to communicate, and Internet. We also accept papers focused on telecommunications regulatory approach from the viewpoint of environmental law, antitrust law, labor law, tax law, consumer protection and urban law.

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Contents

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The Self-Regulating Jury in the Field of Interactive Advertising

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ABSTRACT

[Purpose] Electronic advertising and commercial communications may sometimes violate existing regulations, resulting in unlawful advertising. To address this issue, Spain created an Advertising Jury to resolve disputes in this area.

[Methodology/Approach/Design] The Spanish and European regulations will be analyzed in terms of regulation and self-regulation mechanisms. Self-regulation instruments are a suitable complement to current legal regulations.

[Findings] Self-regulation mechanisms can be triggered by Autocontrol's Advertising Jury when an instance of advertising has violated one or more rules of the relevant code of ethics. This organisation is a recognised moral authority in the field and an extrajudicial mechanism for settling disputes concerning interactive advertising. Although it normally adjudicates cases in which the parties have already voluntarily committed to complying with its decisions, it also adjudicates cases involving third parties or non-member companies.

[Practical Implications] Self-regulatory initiatives in the field of interactive advertising exist at both the European Union (EU) and national levels. One such initiative implemented at a national level stands out as a positive example for others: Spain's Autocontrol.

[Originality/Value] The purpose of self-regulation is to try and bridge the gap between the law's minimum requirements and the maximum level of ethical behaviour for online advertising. This should not be achieved through coercion but through the free and voluntary dedication of those involved.

Keywords: Self-Regulation. Unlawful. Internet. Freedom of Expression. Advertising.

INTRODUCTION

Advertising is a feature of modern society that has increased in social and economic importance (CARO ALMELA, 2007) and will presumably continue to do so in the future. It is an activity that plays a very important role. Advertising is disseminated through various communication channels, but one stands out from the rest – the Internet.

While it would be desirable, and appropriate, to have strict control over all online advertising, this is not currently feasible. In any case, the Internet should self-regulate in order to raise the overall level of accountability of the industry as a whole and to better protect consumers and/or users. The purpose of selfregulation is to try and bridge the gap between the law's minimum requirements and the maximum level of ethical behaviour for online advertising. This should not be achieved through coercion, of course, but through the free and voluntary dedication of those involved (PRESAS MATA, 2018). Ethics is an essential requirement for honest (GÓMEZ NIETO, 2016) online advertising (PRESTON, 2010) that respects (FERNÁNDEZ SOUTO & VALDERRAMA SANTOMÉ, 2000) human dignity.

Self-regulatory initiatives in the field of interactive advertising exist at both the European Union (EU) and national levels. One such initiative implemented at a national level stands out as a positive example for others. We are referring to Spain's Association for the Self-Regulation of Commercial Communication (Autocontrol), which has instituted several codes of conduct. There are two mechanisms for verifying compliance with these codes of conduct (FERNÁNDEZ CARBALLO-CALERO, 2015). One is an ex-ante control mechanism managed by Autocontrol's Technical Office, known as copy advice. This mechanism helps Internet advertising campaigns avoid violating legal and ethical rules (VILAJOANA-ALEJANDRE & ROM-RODRÍGUEZ, 2017). The other is an ex-post control mechanism that is applied once it has been determined that the advertising likely violates one or more rules of the applicable code of ethics. This mechanism is managed by Autocontrol's Advertising Jury (AUTOCONTROL, 2021b) and ensues after Autocontrol first attempts to mediate the matter. This prestigious oversight board is a recognised moral authority in the field and settles out-of-court disputes concerning interactive advertising (AUTOCONTROL, 2021a). Although it normally adjudicates cases in which the parties have already voluntarily committed to complying with its decisions, it also adjudicates cases involving third parties or non-member companies. This may lead to questions about whether such decisions are an expression of the constitutional right to freedom of speech, or whether they represent a clear act of unfair competition.

GENERAL CONSIDERATIONS REGARDING THE CURRENT RELEVANCE OF THE VIRTUAL PROMOTION OF GOODS AND/OR SERVICES

Information is not the only element in advertising, nor is it the most important element even today. Persuasion is the most important element (WRIGHT, 1980). The element of persuasion imbues advertising with connotations of aggressiveness, given that most business competition today takes the form of advertising (SPANG, 2005). The persuasive purpose of advertising that typically assumes the formal modality of advertising messages undermines the objectivity that is characteristic of information (RAMOS FERNÁNDEZ, 2003), although the predominance of one or the other dimension depends on the specific advertising expression.

One of the most significant business manifestations of information and communication technologies is virtual advertising. To make virtual advertising more effective and efficient, new techniques have been implemented to capture the viewers' full attention (PUENTE DOMÍNGUEZ, 2019) and are characterised by their low cost, speed, and ability to reach a large number of users (ORE & SPOSATO, 2021).

Any company striving to survive in competitive global markets must adopt and use new technologies to permanently adapt to sales trends and have capabilities for designing electronic marketing strategies. The need for businesses to retain customers and strengthen customer relationships means that they are

always looking for ways to directly reach individual consumers and personalise their product offerings. This constitutes a new type of sales in which businesses establish continuous and direct customer relationships, wherever these customers may be.

One of the most interesting aspects of consumer contracts is the precontract period, i.e., all those activities between the parties that occur before there is mutual consent to finalise the contract. During this pre-contract period, consumers and/or users usually become aware of the basic characteristics of the good and/or service of interest by virtue of advertising received through both traditional and virtual channels.

EXTRAJUDICIAL SETTLEMENT OF ONLINE ADVERTISING DISPUTES BETWEEN SERVICE PROVIDERS AND CONSUMERS/USERS

Advertising disseminated on the Internet at times leads to certain conflicts between information service providers and the potential recipients of this advertising. These conflicts are settled in courts of law or through extrajudicial settlement mechanisms established for this purpose.

Relevance of the Instrument in Question as a Potential Regulatory Body

Since the dawn of humanity, conflicts1 between humans have always existed. Laws serve to settle these disputes and provide an appropriate resolution mechanism for the parties involved. In this sense, the science of law is the science of resolving disputes. These disputes are pathological legal phenomena, and law is the science or art of curing them.

Recently, the resolution of intersubjective conflicts seems to be primarily reserved for government judicial entities. However, governments are increasingly recognising alternative channels to the courts (BÖRZEL & RISSE, 2010), which should be viewed as mechanisms for resolving disputes pertaining to individual freedoms. Therefore, individuals have various options for addressing their own interests and needs. In any case, we must stress the peaceful and nonconfrontational coexistence of both instruments. Channels such as alternative dispute resolution (ADR) or online dispute resolution (ODR) should not be viewed as formulas for opposing or contravening courts of law. The collaboration of the courts is essential for achieving the intended protection.

The Spanish legal system today, by virtue of the Spanish Constitution (SC), guarantees the freedom of its citizens (SC Article 1.1) and the effective protection of their rights. SC Article 117.3 imbues the government with the authority exercised by its courts and tribunals. This gives the government a monopoly over judging and executing judicial decisions, although nothing prevents individuals from resolving their own disputes or entrusting their resolution to a third party.

Numerous disputes between consumers or users and businesses can and frequently do arise as a result of interactive advertising, just as they do with product and service promotion in the physical world. These

disputes can be resolved through various means, the most important of which are judicial and extrajudicial mechanisms, including the procedure established by the Advertising Jury (KATSH & RIFKIN, 2001; KAUFMANN-KOHLER & SCHULTZ, 2004; ESTRELA & CORREIA LOUREIRO, 2013).

The best way to avoid conflict is through prevention. To this end, we believe that it is certainly useful for information service providers to abide by legal requirements and other complementary quality criteria in their Internetbased promotional activities. Such quality criteria should be enforceable by the accompanying contract, where appropriate, and should enhance the relevant legal regulations.

In short, although all information service providers operating on the Internet are obliged to comply with the law, not all do so. Thus, it is relatively common for disputes to arise between consumers/users and businesses. To avoid such situations that obviously undermine the rights of the weaker contracting party, the European Community (LEMA DEVESA, 2018)2 and national3 legislators encourage businesses to adhere to self-regulation mechanisms in the field of advertising. In addition to enabling full compliance with prevailing legislation, these mechanisms allow businesses to provide additional benefits (BODDEWYN, 1985; RAMOS FERNÁNDEZ, 2001) to consumers and/or users that go beyond minimum legal requirements, which instils a greater sense of confidence.

Of great benefit to the consumer is that verification of compliance with legal and contractual rules is carried out by an impartial third party. For the entities that manage self-regulation systems in the field of advertising, this is the extrajudicial mechanism established in the code of conduct (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021b). Both elements represent the constituent assumptions of any self-regulation system.

Interactive advertising codes of conduct contain a set of good professional practices with requirements that exceed the legal regulations in force4 and have been approved specifically for the advertising industry to protect consumer/user rights and interests. To this end, these codes of conduct refer to general advertising principles; the need for advertising and advertiser identification; the obligation to comply with regulations in many areas; information on various issues pertaining to access to certain services, and the contracting of the goods and/or services being promoted; full protection of the privacy of the potential recipient; special provisions regarding advertising disseminated in certain media (such as forums, news channels, and chats) to avoid surreptitious advertising that violates the principles of authenticity and advertising sponsorship (FERNÁNDEZCAMACHO, 2020) and measures to protect minors (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021a). One of the rightful areas of focus of these codes of conduct is educating (DE LERMA GALÁN, 2018) and consumers/users5 in the matters they regulate6. For example, users are often unaware of the potential problems associated with the use of their personal data and of the available tools to remedy these problems. As rightly established

in codes of conduct, it is appropriate to launch information campaigns7 regarding consumer rights in advertising, especially the use of personal data, whether provided voluntarily or collected automatically. There is a clear lack of information (GÓMEZ CASTALLO, 2001) for consumers in the field of interactive advertising, an issue that should be addressed by requiring service providers to improve the transparency of certain practices.

The following advantages of adhering to a good practices document in the virtual advertising field, usually, a code of conduct, include incentives for the development of standards that ensure high levels of rectitude in advertising; speed, compared to the process for complying with legislated rules; specificity regarding a specific media and cultural environment, which is particularly relevant on the Internet; flexibility for accommodating changes in public opinion and advertising technology and methodology (MARSDEN, 2008; AGUILAR RUIZ, 2011); adaptable procedures developed by advertising experts; prevention of violations, especially if mechanisms exist for assessing advertising before it is disseminated (usually called copy advice) (MUELA-MOLINA & PERELLÓ OLIVER, 2014); shorter timeframes and lower costs for developing extrajudicial procedures to address advertising violations; and opportune sanctions through the timely publication of resolutions and withdrawal of advertising. Benefits for consumers include advertising self-discipline mechanisms that facilitate access to certain dispute resolution bodies through a simple and free complaint system, which enables disciplining of advertisers that violate consumer rights (REICH, 1992)8. Furthermore, the important educational and informative value of selfregulation should not be overlooked (GÓMEZ SEGADE, 1980; DE MIGUEL ASENSIO, 2005; PERELLÓ OLIVER, MUELA MOLINA & HORMIGOS RUIZ, 2016).

Regarding adherence to a particular system of advertising self-regulation, the supervisory body represents a competitive advantage for certain enterprises in that it leads to greater consumer/user confidence (PONTE, 2002; EDELSTEIN, 2003). Indeed, consumers and/or users must know that in the event of a dispute, they can turn to an independent and impartial extrajudicial mechanism to which the company has voluntarily adhered. To ensure that codes of conduct do not sit on shelves collecting dust, an oversight body must be empowered to verify compliance and, if necessary, impose appropriate sanctions for code violations (BERLEUR, 2002). Otherwise, these codes of conduct are reduced to mere declarations of intent or ineffective propaganda tools (VARGAS PORTILLO, 2020).

The terms “self-regulation” and “sanction” might seem difficult to reconcile, as the former is largely associated with voluntary activity and private autonomy, and the latter is usually associated with the public domain due to its markedly coercive nature. However, this is not the case, as the disciplinary sanctions are private in origin and traditionally articulated as a natural complement to the capacity for normative self-regulation that every organisation possesses (LÓPEZ JIMÉNEZ, VARGAS PORTILLO & DITTMAR, 2020).

In other words, businesses need to be able to provide consumers and/or users with tools to avoid or

resolve disputes that may arise in digital advertising, especially if they are cross-border initiatives (SEWART & MATTHEWS, 2002; WAHAB, 2004). For this reason, consumer tools for registering complaints, many of which are implemented through codes of conduct, should be encouraged. Simple, quick, and inexpensive tools are the only ways of compelling consumers to bear the risk of non-compliance or deficient compliance by a business.

Without detracting from the competitive advantage enjoyed by businesses that choose to adhere to a code of conduct, adherence to the good practices presented in these documents means that a business is obligated to accept the favourable or unfavourable decisions of an extrajudicial dispute resolution body. In fact, if a business refuses to comply with such a decision, it could be expelled from the self-regulation system and suffer the corresponding consequences of negative publicity and loss of credibility.

Composition

There is debate regarding the entities that should make up the supervisory body, as its impartiality may be questioned depending on its composition.

Certain supervisory bodies only incorporate entities actively involved in the field of advertising. Self-regulation in this field is a self-determining system

for the advertising industry10. Three industry actors must agree on the minimum standards of conduct: advertisers that pay the advertising costs, agencies that produce the advertising content, and the channels or media that disseminate the advertising content.

Thus, the members of these bodies, especially in the area of virtual promotion, are very diverse businesses with consumer representation that, although limited, should be viewed positively. In other cases, the supervisory body will be made up of business, consumer, and government representatives. Although Internet advertising is subject to its own legal regulations, the existing regimes seem insufficient and inadequate. In fact, although heteroregulation should establish a minimum level of regulation, it is not as effective as it should be (LLAGUNO & HERNÁNDEZ RUIZ, 2009). Indeed, because of external control, there is now a certain hyper-regulation of commercial communication due to the plurality of legislators, approaches11, interests12 , and controls13.

Structure

The functions of the control body vary according to its particular structure. The aim is to incorporate the advantages inherent to judicial systems and avoid their disadvantages. For the purposes of this study, the main objective of the control bodies is agility and speed in the extrajudicial resolution of online disputes. In any case, their decisions must be reasoned and based on the approved reference documents that have been accepted by the service providers participating in the advertising self-discipline system.

Supervisory bodies can adopt different structures, but three main types can be identified:

(1) Single supervisory body – It has full decision-making capacity, and any disputes it considers are resolved in a single phase. The most significant advantage of this structure is its inherent speed, and its most visible disadvantage is no higher-level entity is available to review decisions rendered.

(2) Dual supervisory body – This body is not as speedy as the single supervisory body because it consists of two phases. The first phase involves a dispute investigation and then the rendering of a decision on adjudicated cases. The second phase involves reviewing the decisions rendered in the first phase. An example of a dual body is the Advertising Jury, which resolves disputes in the field of interactive advertising.

(3) Tripartite supervisory body. In addition to the two phases of dual supervisory bodies, there is a third phase that exists outside the selfregulation system itself and involves acting on cases of non-compliance by the sanctioned party with the decision rendered (MARSDEN, 2011). This structure could be considered a co-regulatory system (ROTFELD, 1992; PATIÑO, 2007; PROSSER, 2008; FEENSTRA, 2019). Any type of activity by public entities to compel compliance with sanctions imposed by a self-regulation system supposes very close collaboration between private and public entities (SENDEN, 2005; HYMAN, 2009; GINOSAR, 2014).

The Need to Observe Certain General Principles: Council Resolution of 25 May 2000

Recourse to extrajudicial dispute resolution processes can in no case result in the erosion of consumer rights. As the European Commission stated in Recommendation 98/257/EC of 30 March 1998, the objective of an extrajudicial process cannot be to replace the judicial system14; therefore, an extrajudicial process can only deprive consumers of their right to access the judicial system if these consumers explicitly accept this, in full knowledge of the facts and after the dispute has begun.

A review of the various European initiatives reveals that two main ADR types have been legislated in the EC. One type, regulated by Recommendation 98/257/EC, seeks to resolve conflicts through the active intervention of a person who proposes or imposes a solution. The other type, regulated by Recommendation 2001/310/EC of 4 April 2001, seeks to resolve conflicts by bringing the parties together to arrive at a mutually agreed solution.

Disputes arising from the commercial practices of businesses adhering to codes of conduct also fall within the scope of Law 7/2017 of 2 November. Although Directive 2013/11/EU of the European Union Parliament and Council of 21 May 2013 makes no reference to extrajudicial dispute resolution systems for advertising-related complaints, they are included in the scope of Article 37.4 of Spain's Unfair Competition Law 3/1991 of 10 January 1991 and subject to the same EC regulations. If these extrajudicial resolution systems were not included, they would remain unregulated and there would be no mechanism for notifying the EC of advertising-related complaints. Thus, extrajudicial dispute resolution systems, whether related to sales and service contractual obligations or noncompliance with

codes of conduct on unfair competition and alternative advertising, are subject to the same legal regime, without any distinction.

There are two aspects of Article 37.4 of Spain's Unfair Competition Law (Ley de Competencia Desleal – LCD) that are very relevant to this study. First, a control body must be established (BODDEWYN, 1989) in the system for it to be truly self-regulating. Second, the control body must be independent (FERNANDO MAGARZO, 2008).

In the law, independence is a prerequisite for the self-regulation system to function in an extrajudicial dispute resolution capacity. It should be independent of the body's members and of the body itself. A list of the criteria for abstention and recusal should be established to ensure independence and should adhere to the requirements in EC Recommendations 98/257/EC of 30 March 1998 and 2001/310/EC of 4 April 2001. These EC Recommendations establish the principles applicable to extrajudicial bodies for the consensual resolution of consumer disputes when a code of conduct governing the business-consumer relationship exists.

The legislation demands that self-regulation systems must meet the requirements of EC law, and as such, the EC must be notified of these systems in accordance with the EU's Council Resolution of 25 May 2000 pertaining to the EC network of national bodies for extrajudicial settlement of consumer disputes or any equivalent function (known as the EEJ-Net). This Resolution seems to require that enforcement bodies must be integrated into the EEJ-Net. Integration implies full compliance with the principles established in EC Recommendation 98/257/EC (FERNÁNDEZ CARBALLO-CALERO, 2015) of 30 March 1998 on the principles applicable to extrajudicial consumer dispute resolution bodies concerning independence, transparency, adversarial procedures, effectiveness, legality, freedom of choice and the right of representation, as supplemented by EC Recommendation 2001/310/EC of 4 April 2001. The scope of this Recommendation includes the principles of impartiality, transparency, effectiveness, and fairness.

The independence of the decision-making body shall be established in a way that guarantees its impartiality. When individuals are making dispute resolution decisions, independence shall be guaranteed by implementing the following measures: the designated individual shall have the ability, experience, and competence, particularly in legal matters, required for the function; the duration of the designated individual's term in office must be long enough to guarantee independence of action, and this individual may not be dismissed without just cause; and where the designated individual is appointed or remunerated by a professional association or business, that individual cannot have worked for that association or any of its members, or for the business concerned, for three years prior to assuming the role. Where a group of individuals is making dispute resolution decisions, the independence of this group may be guaranteed by equal representation of consumers and professionals or by complying with the criteria presented above15.

Regarding the principle of transparency, necessary measures must be taken (HARKER, 2003) to ensure that transparency is built into the process (HARKER & HARKER, 2002)16. There are two main types of transparency measures. First is the free and timely release of information regarding the dispute resolution process to anyone who requests it. Second is the publication of an annual report by the appropriate body about decisions rendered in order to facilitate evaluations of the results obtained and determine the types of disputes that have arisen.

The adversarial process (audi alteram partem from the Latin "listen to the other side") means that the dispute resolution process should allow any interested party to present its perspective to the appropriate institution and to be fully informed of the other party's positions and facts, as well as, where appropriate, of any expert statements.

The effectiveness of the dispute resolution process shall be ensured by implementing certain guarantees. First, the consumer should have direct access to the process without needing a legal representative. Second, the process should be free of charge or have only moderate costs. Third, relatively short deadlines should be established between the submission of the complaint and the rendering of a decision. Fourth, the decision-making body must be given an active role, enabling it to consider all the elements useful for the settlement of the dispute.

The principle of legality means that any decision rendered by the decision making body cannot have the effect of depriving the consumer of protections guaranteed by the mandatory provisions of the laws of the country in which the body is established. Furthermore, in cases of cross-border disputes, the decision may not deprive the consumer of protections guaranteed by the mandatory provisions of the laws of the Member State in which the consumer habitually resides, as provided for in Article 5 of the Rome Convention of 19 June 1980 on laws applicable to contractual obligations. Any decision shall be justified and communicated in writing or another appropriate form to the interested parties as soon as possible.

The principle of freedom means that the decision is binding for the parties only if they have been informed in advance and have explicitly accepted this commitment. A consumer's adherence to an extrajudicial process may not be the result of a commitment made before the dispute arose, where such a commitment has the effect of depriving the consumer of the right to have recourse to a court of law with jurisdiction over such disputes.

Last, the principle of representation means that the process may not deprive the parties of the right to be represented or supported by a third party at all stages of the proceedings.

A high level of consumer protection can be achieved through the principles established in the abovementioned EC Recommendations and as presented in Article 169 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 153 TEC).

In Spain, these principles and provisions are fulfilled by Autocontrol's Advertising Jury (MEDINA & AN, 2012).

Finally, it should be noted that extrajudicial entities can make fair decisions based on legal provisions as well as on codes of conduct. The resolutions made by the self-regulatory systems do not imply a lower level of protection than those that could be issued by the courts of justice. It should be noted that legitimate codes of conduct will include not only the legal regulations themselves but also additional elements that extend the minimum rights conferred by law on the weaker contracting party.

RELEVANT INTERNATIONAL INITIATIVES

The international non-governmental organisations that have developed self-regulating mechanisms in the field of advertising are very diverse17.

The International Chamber of Commerce (ICC) is the primary example of an organisation that has developed self-regulating mechanisms and is the most influential private organisation that has developed standards of behaviour in advertising and marketing that are widely accepted by the international business community. These standards for self-regulation consist of codes of conduct and guidelines. Although the ICC has not established an international system of selfregulation, it has developed a catalogue of good practices that have significantly influenced the development of various national codes of conduct for advertising self-regulation.

The following are the most noteworthy documents produced by the ICC: the 1937 Code of Ethics in Advertising (AZNAR GÓMEZ, 2000)18; the 1955 Code of Legal Practices in Advertising19; the 1997 ICC International Code of Advertising Practice, applicable to advertising for the promotion of any form of goods and/or services and by any means; the 1991 ICC International Code of Environmental Advertising; the 1998 ICC Guidelines on Advertising and Marketing on the Internet; the ICC International Code of Direct Marketing20; and the 1992 International Code on Sponsorship, last updated in 2003.

Another international association that promotes advertising self-regulation is the International Advertising Association (IAA). It acts as an information exchange mechanism for best practices in advertising and assists its national chapters in developing self-regulation systems. There are other international associations that, while promoting self-regulation, have had only limited success in standardising national self-regulation systems; an example is the World Federation of Advertisers.

Regarding activity specific to the field of electronic advertising, the work of the Global Business Dialogue on Electronic Commerce (GBDE) is noteworthy. This is an international initiative that brings together the main businesses operating in this sector and aims to develop recommendations to influence national legislation and business standards. Of interest to this study are the GBDE's 1999 recommendations on commercial communications.

THE ADVERTISING JURY

In addition to the ex-ante review function, certain self-regulation systems provide an ex-post review of disputes about potential code of conduct violations (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021c). The latter review is conducted by the supervisory body after the advertising campaign in question has been broadcasted and will determine if it violated one or more ethics rules in the applicable code of conduct. If a violation is identified, the supervisory body recommends that the advertiser withdraw or modify the advertising. There is usually no objection to a supervisory body's decision when it rules against a member institution, but the same cannot be said when it rules against non-member third parties. One of the most exemplary extrajudicial systems listed by the European Commission for alternative consumer dispute resolution mechanisms is Autocontrol's Advertising Jury.

Concept and Inherent Characteristics

The model in Europe for extrajudicial dispute resolution bodies in the field of interactive advertising is Autocontrol's Advertising Jury, the first private entity to be accredited by the Spanish government as an ADR body.

The Advertising Jury belongs to an association called Autocontrol but is fully independent. Autocontrol was constituted in 1995 (MEDINA & AN, 2012) and is the successor organisation of Autocontrol de la Publicidad S.A., which was created in 1977. Among advertisers, agencies, and media organisations, Autocontrol's membership includes more than 70% of Spain's advertising industry.

Autocontrol was the first Spanish private entity to be incorporated into the European Commission's European Extrajudicial Network (EEJ-Net), due to the Advertising Jury's function as an extrajudicial dispute resolution body that fulfills all of the requirements and principles of independence, transparency, efficiency, legality, adversarial procedures, freedom of choice and the right to consumer representation established in EC Recommendation 98/257/EC of 30 March, on the principles applicable to bodies responsible for the extrajudicial settlement of consumer disputes.

Article 47 of the Autocontrol statutes and Article 3 of the Advertising Jury's regulations establish the following organisational structure for the Jury: one president, between three and six vice presidents, and between nine and 20 members of indisputable impartiality. Note that the use of the word "indisputable" is intentional as great emphasis is placed on impartiality; none of the Jury members can have any relationship whatsoever with the member companies.

The Jury only intervenes when a dispute has arisen and acts in with a regulated procedure based on the principles of equality of the parties, the right to file claims, and the right to defend (FEENSTRA & GONZÁLEZ ESTEBAN, 2019). Although the Jury is indeed administratively dependent on Autocontrol, it is not an arm of that organisation. The Jury is made up of experts 21 in different fields such as law, economics, advertising, communication, and sociology that is of increasing relevance. Despite its recent creation, the advertising self-regulation system created by Autocontrol has become the

preferred mechanism for resolving disputes in Spain, even more so than the courts of law.

We can confidently state that the Advertising Jury is the main actor in Spain's new system for advertising self-regulation. The Jury is defined in Article 22 of Autocontrol's statutes as a specialised body focused on deontological ethics in advertising, endowed with absolute functional autonomy and independence, and composed of independent individuals.

It only deals with commercial advertising, thereby excluding political, institutional, and religious advertising. Furthermore, according to Article 13.2 of the Jury's regulations, it addresses advertising disseminated in Spain in the last 12 months as well as cross-border advertising (Article 12.3 of the Jury's regulations) that has been disseminated abroad and censured by a national selfregulation body that is part of the European Advertising Standards Alliance (EASA), if there are indications that the advertising in question will be disseminated in Spain (Article 12.4 of the Jury's regulations). Furthermore, accordance with Article 13.4 of the Jury's regulations, resolved complaints regarding commercial communication or complaints that are being addressed through another legal or administrative process will not be accepted by the Jury 22.

The norms applied by the Advertising Jury are not legal norms. If they were, the Jury could be seen as encroaching on a judicial function that corresponds exclusively to judges and courts of law, in accordance with EC Article 117.

Dispute resolution in the field of interactive advertising shall be based on the 1996 (general) code of conduct in advertising as last amended in June 2019 as well as on the sectorial code in question. The rules contained in the sectorial code are to be regarded as deontological or ethical, without prejudice to the fact that they sometimes contain, in addition to the applicable regulations, enhanced rights for potential consumers and/or users. Self-regulatory instruments establish the observance of legal rules as a minimum standard of ethical behavior (BODDEWYN, 1992), allowing the Jury to sanction non-compliance with the law23 as behaviour that violates advertising ethics.

The pleadings of the disputing parties and the decisions of the Advertising Jury may refer to previous Jury decisions to support their respective cases or reasoning. Except when justified, the Jury does not usually deviate from earlier decisions. This is similar in cases adjudicated by a court of law, especially the Supreme Court. This practice also conforms to the requirements of legal certitude, the principle of equality, and the prohibition of arbitrariness.

The Advertising Jury's technical authority and the impartiality it has demonstrated in decisions made by jurists of recognised prestige and experts with proven reputations in the sector have generated a high degree of credibility and trust since its inception throughout the advertising industry, government, and society in general. When cases adjudicated by the Advertising Jury have been subsequently litigated in the Spanish courts, the resulting legal judgements have substantially aligned with the Jury's previous decisions. This clearly demonstrates how the Jury has established a solid canon that transcends the

domain of selfregulation and influences the Spanish judicial system.

Ex-Ante Review for Members and Third Parties

There are two mechanisms for verifying compliance with good practice documents, typically codes of conduct. These are the voluntary ex-ante review, which is an advisory service (often called copy advice) conducted before the event, and the mandatory ex-post review conducted by a control body such as the Advertising Jury.

Copy advice is a voluntary, confidential (unless contraindicated), and normally non-binding advisory service on the legal and ethical correctness of an advertising campaign or project before it is publicly disseminated. It can be requested by the advertiser, the advertising agency, or the broadcasting medium.

These advisory services are usually provided by technical offices that are independent of the juries that resolve disputes. The only entity in Spain that provides such a service is Autocontrol's Technical Office. This office is staffed by jurists and advertising professionals who assess whether a specific advertisement complies with the code of conduct's regulatory and ethical standards. If found to be non-compliant, the issue must be resolved by means of a negative copy. This review is not another dispute resolution mechanism but provides a useful tool for preventing disputes from happening. In other words, it has a preventive function. In light of the very practical utility of this type of review, LCD Article 37.4 states that codes of conduct "may include, inter alia, individual or collective measures of ex-ante self-regulation of advertising content."

There is also a transnational copy advice system. EASA, an organisation that comprises all of Europe's (and some from other regions) self-regulation systems24, has set up an online system for resolving cross-border copy advice. This transnational system allows members of a country's advertising selfregulation system (such as Spain's Autocontrol) to request copy advice when planning an advertising campaign in another member country to ensure that it complies with the legislation and advertising codes of conduct of that country.

Cross-Border Claims Handling Mechanisms

When a complaint about interactive advertising does not fall within the territorial scope of a national self-regulation system, it is transferred through Autocontrol's Confianza Online tool to EASA, which then processes the complaint through its cross-border complaint system (SHUIBHNE, 2006; HORVATH, VILLAFRANCO & CALKINS, 2009; SEMOVA, 2016)25. The main objective of this mechanism is to facilitate the transfer of cross-border advertising complaints to the self-regulation body of the country in which the media outlet is established, which will then adjudicate the case. The EASA mechanism is more than a simple cross-border complaint-handling system; it is a framework for cooperation between national self-regulation systems (EASA, 2010). This cooperation is enabled by a

commitment by the leaders of these self regulation systems to refer complaints submitted in their territory to the appropriate body for adjudication.

Participation in a coordination mechanism such as EASA does not necessarily mean that one national self-regulation body has to accept the assessments and decisions made by another national self-regulation body. However, given that EASA supports the EC criterion of mutual recognition (PERELLÓ OLIVER & MUELA MOLINA, 2017), it likely favours the idea that national self-regulation bodies should accept the assessments and decisions made by other national bodies, even if their codes of conduct are not identical.

The Main Procedure of a National Self-Regulation System

In this section, we will examine procedures used by Autocontrol's Advertising Jury, with a focus on two specific aspects - active and passive legitimation. Regarding the latter, we will analyse judgements against third parties outside the system and the problems that this raises.

Active Legitimation

According to Article. 12.2 of the Jury's regulations, "[the] procedure shall be initiated by request or complaint from any person having a legitimate interest in a particular commercial communication. It may also be initiated ex officio26, when the circumstances so require, by the governing bodies of the Association." Therefore, a complaint may be lodged by any interested party, be it a public entity or a private one such as an individual consumer, a company, a business association, or a consumer association. It can be inferred that membership in or compliance with Autocontrol is not a prerequisite for filing a complaint27. The procedure is free of charge for consumers, consumer associations, government bodies, and Autocontrol members. However, it is not free for entities that are not members of Autocontrol.

The rule cited above implies that a claimant must have a "legitimate interest" in the advertising in question. In other words, there must be some connection with the advertising so that any decision on the matter has some effect on the claimant.

Passive Legitimation

Although Article 16 of the Jury's regulations refers to "party or parties complained against," complaints addressed by the Jury are normally directed at a single advertiser. Advertising agencies and media owners who have broadcast the advertisement would not be considered parties to the complaint.

From this, we can conclude that the Jury's decisions can be addressed to both member companies and non-member third parties28. Although the latter could be somewhat paradoxical, because these third parties never consented to observe the ethical rules included in the code of conduct, a third party may

decide to voluntarily accept the Jury's jurisdiction. As we shall see further on, even if there is explicit opposition by a third party, this does not prevent the Jury from issuing a non-binding opinion on the deontological correctness of the advertising campaign submitted for its assessment. The Jury's decisions are binding on affected parties, both members and non-member third parties, that have explicitly or voluntarily accepted the authority of the Advertising Jury.

Decisions pertaining to Member Companies

It is normal practice for the self-regulation system to issue rulings on the endeavours of companies that have voluntarily and explicitly expressed their desire to participate in the system as members. In fact, the number of rulings concerning third parties is significantly lower than those concerning member companies. However, some instances of rulings in the field of interactive advertising against non-member entities do exist. These decisions are always based on the codes of conduct established by the self-regulation system for interactive advertising.

The Advertising Jury will intervene when mediation by Autocontrol between member companies has been unsuccessful. The mediation process is an optional conflict resolution mechanism that precedes Jury intervention, in which the Jury secretary acts as an independent third-party mediator that tries to bring the disputing parties together by negotiating mutually acceptable positions. Most of the differences between parties in the field of interactive advertising are usually resolved by mediation, with a relatively smaller percentage of cases requiring the intervention of the Advertising Jury.

Decisions pertaining to Non-Member Companies or Third Parties

As discussed above, participation in self-regulation systems must always be voluntary for information service providers, and it is never acceptable for the self-regulating entity to unilaterally demand compliance with the code of conduct from a non-member business. In other words, when a business has not agreed to adhere to a self-regulation system and its corresponding code of ethics, the selfregulating entity cannot demand compliance because there is no basis for doing so. Codes of conduct must be regarded as lacking an essential element inherent to legal regulations, which is universal applicability. However, the Advertising Jury may find itself ruling on disputes involving companies that are not members of the self-regulation system. Despite the voluntary nature of the system, which can only be statutorily binding on member organisations, its moral strength for members and non-members of the Advertising Jury's decisions is undeniable.

If a non-member third party refuses to submit to the Jury's authority, the Jury will not render a decision29. However, the plaintiff can still ask the Jury for a non-binding opinion on the non-member third party's advertising. This assessment is issued as a written opinion that articulates its deontological point of view and that is in no way binding for non-member companies.

Considering that the code of conduct on which the Jury bases its opinion incorporates existing legal regulations and numerous ethical considerations, this opinion would not be inconsistent with the norms applied by the judicial system when adjudicating controversial cases of interactive advertising. In any case, it is worth repeating that the opinion is not binding, and the affected service provider is always free to accept its recommendations or not.

Additionally, the Jury or governing bodies of the Association may decide to forward this non-binding opinion to the authorities, as provided for in Article 30 of the Jury's regulations.

Balancing Freedom of Speech and Unfair Competition

Publication of a ruling by an online advertising self-regulation system against a third party not associated with the system could be considered an act that constitutes unfair competition, specifically, defamation (LARA GONZÁLEZ, 2007). LCD Article 2 limits its scope of application to competitive marketplace activity. Before examining whether or not the publication of such a ruling constitutes defamation, we must first analyse the LCD's scope of application.

Rulings against non-member service providers cannot be considered acts of unfair competition if the self-regulation body was not pursuing a competitive purpose by publishing the ruling. The LCD would not apply in this case because the conditions of Article 2 have not been met. Therefore, to establish whether the publication of such a ruling is unlawful, Article 1902 of the Spanish Civil Code should be applied to determine if any harm caused can be claimed under that article.

As we will see further on, if the self-regulation body has a competitive purpose, then the publication of such a ruling may be considered an act of unfair competition. However, if the self-regulation body has no competitive purpose but the publication of its ruling has harmed the name or reputation of the non-member service provider, then damages may be claimed under Article 1902 of the Spanish Civil Code.

If the ruling publication contains accurate, true, and relevant statements, then the outcomes of applying either the LCD or Civil Code will likely not be very different or considered unlawful. However, if the ruling publication contains personal insinuations, both the LCD and the Civil Code could consider this unlawful.

The key to determining whether we are dealing with an act of unfair competition under LCD Article 2 depends on whether or not the ruling publication had a competitive purpose in the marketplace. According to LCD Article 2.2, competitive purpose is presumed when the context of an action demonstrates that it objectively promotes or publicises the perpetrator's services or those of a third party in the marketplace.

Thus, an action that extends beyond the purely private domain of the perpetrator, the effectiveness of which is not limited to the internal domain of the perpetrator's organisation or that is not intended to enable other externally significant conduct, such as preparatory activity, should be considered to have

been carried out in the marketplace. External significance must be understood as the impact of the activity on the marketplace. In principle, it is irrelevant whether the activity has a commercial purpose or not because the key issue is the potential attack on the competition. The LCD's concept of a marketplace seems to be more economic than legal, as it states "marketplace activity should be understood as any activity that actually or potentially affects economic relationships and decision-making by economic agents."

A competitive purpose is any activity that in itself, or in the context of the case, is aimed at influencing the market structure or competitive positions of the marketplace operators, whether their own or that of a third party. This concept includes all marketplace operators, such as natural or legal persons, a group of economic operators, and an entire sector or segment of the economy, whether on the supply or demand side and/or their activity to influence the formation and development of economic relationships in the marketplace. This element is closely related to the one above because the marketplace activity must have the capacity to influence the relationships and structure of the marketplace by transcending the private domain of the perpetrator. Competitive purpose implies the actual execution of the activity in the marketplace exchange of goods and services (SPOSATO, 2021). There is no requirement for the competitive purpose to be exclusive.

The presence of competitive purpose in an activity/conduct depends on the consequences that it produces or may produce in the marketplace. In other words, it depends on the effects it has or may develop on the operators' positions and the formation and development of economic relationships in the marketplace to which those operators are a party as participants in the marketplace. Competitive purpose must be assumed in any activity aimed at changing those positions or influencing the formation or development of those relationships. Thus, the assessment of the competitive purpose of an activity must begin with the identification of the relevant market, a task that is also needed to gain a proper understanding of the pertinent facts. Therefore, a reasonable and basic forecast must be made of the likely evolution of the relevant market and the market's existing relationships. Although the LCD presents it as an autonomous element, competitive purpose is closely linked to external transcendence, as competitive purpose derived from marketplace activity, a fact that further delineates the objective element of the competitive activity.

The existence of a competitive purpose is the legal presumption that the marketplace activity objectively promotes or publicises one's own services or those of a third party. Competitive purpose exists if the activity is objectively able to influence the marketplace structure and processes, either now or in the future. Likewise, the activities of preparing or disseminating advertising or publicity also have a competitive purpose.

The first group of behaviours mentioned above is considered to be unfair practices, as they meet the criteria established in LCD Article 2. Article 3 of the LCD sanctions certain acts of unfair competition,

such as the defamation of competitors that, by significantly distorting free competition, affects the public interest. This type of activity could occur in the self-regulation of online advertising. For example, the dispute resolution body could issue a ruling that a non-member service provider violated the code of conduct and then publicise that ruling by making statements motivated by competitive purposes. We have already stated that this practice is unlawful, but two other points must be discussed; first, whether the ruling announcement is accompanied by other opinion statements regarding the strictly private domain of the non-member company; and second, whether the purpose of making these statements of opinion is to defame the competitor.

Regarding the unfair competition practices that harm competing businesses, these defamatory activities fall under LCD Article 9. The self regulation system is the offending party that defames a competitor that is not a member of the self-regulation system.

Acts of defamation under LCD Article 9 consist of the dissemination of statements likely to undermine the goodwill and reputation of a third party (information service provider) in the marketplace. However, it should be noted that making statements that, although pejorative, are accurate, true, and relevant (exceptio veritatis) does not constitute defamation. This aligns with LCD's social model in that the competitor's individual interest in avoiding defamation is outweighed by the public's need to be informed.

However, LCD Article 9 clarifies that, even if a statement is true, when it refers to a competitor's private, internal affairs and not its commercial activity, it is considered to be unfair when it is defamatory and insulting. Strictly personal statements about an economic operator's private, internal affairs do not influence the business or professional activity of that operator. As their name indicates, statements of a strictly personal nature are considered to belong to the personal, private domain of the third party concerned.

Defamatory statements are considered to be unfair competition when statements about the persons, products, or services of a competitor are intended to harm its reputation in the eyes of consumers. This distinguishes commercial defamation from the offences of libel or slander.

It is unacceptable for a self-regulation system that is supposed to defend the sector in which it operates to undertake any activity that undermines the reputation of a competitor for competitive purposes. Moreover, such behaviour may cause all self-regulation systems to deservedly lose credibility.

The Advertising Jury's intervention is enabled by the right to freedom of speech as recognised in EC Article 20, which protects ideological freedom that encompasses the expression and broadcasting of beliefs and value judgements. In certain cases, some might consider these expressions to be defamatory to the name or reputation of a non-member company. If a court of law determines that defamation has occurred, then damages may be claimed by the injured party under Article 1902 of the Civil Code, which imposes the obligation to compensate any person who, by commission or omission, causes harm to

another person through fault or negligence.

Just as any natural or legal person has the right to freely express opinions on matters of public interest, even if the opinion is a reproach or criticism of a third party, that right extends to business associations that represent an industry sector, such as the online advertising industry. Those associations have the right to express opinions on the ethical and deontological correctness of a matter of public interest, such as an online issue affecting consumers and/or users, even that opinion involves an ethical or deontological reprimand of someone's conduct.

The right to freedom of speech protects the free expression of thoughts, ideas, and opinions, a broad concept that should include beliefs and value judgements. In other words, freedom of speech is the right through which ideological freedom is positively projected - free expression of thoughts and ideas (PEREZ ROYO, 2018). The right to freedom of speech includes criticism of the conduct of others, even when it is unkind and may annoy, disturb or displease the person to whom it is addressed, as this is required by the pluralism, tolerance, and spirit of openness without which there is no democratic society. Such rulings will not be binding on companies that have not committed to abiding by the code of ethics but are allowable by virtue of the fundamental right to freedom of speech.

Online Advertising Cases

Rulings about online advertising against non-member entities have occurred since Autocontrol's inception. These rulings have been based on Autocontrol's Confianza Online code of conduct and on other sectoral codes that directly or indirectly relate to the online advertising topic.

The types of complaints submitted to the Jury include the unsolicited sending of commercial communications via e-mail and text message (SMS and MMS); non-compliance with rules to protect minors (CARAHER, LANDON & DALMENY, 2006); non-compliance with rules on interactive advertising promotions; the exercise of the right to object to the use of personal data, such as newsletter unsubscribe requests; violations of truth in advertising regulations; infringement of intellectual and industrial property rights; and violation of regulations prohibiting discrimination based on race, sex, sexual orientation, religious or political beliefs, or any other personal or social circumstance.

Even if the company does not adhere to the self-regulation system that rules against it, the company can accept the decision by withdrawing, rectifying, or correcting the online advertising that precipitated the complaint. It can also oppose the ruling or just decline to respond. Because the company never committed to the self-regulation system, any response to its decisions is purely voluntary.

Use of the Legal System to Address Cases of Non-Compliance with Jury's Decisions

When a defendant refuses to comply with the Jury's decision to withdraw or rectify a piece of online advertising, the case can be pursued in a court of law. However, legal proceedings of this nature only

address the unlawfulness of the advertising in question. In other words, the validity of the Advertising Jury's decision will not be resolved by the court.

A court ruling will never formally confirm an Advertising Jury decision. This is not the objective of the legal proceeding. However, a court can, and often does, concur with the Jury's decision.

When adjudicating a case, the judicial body may not consider the codes of ethics upon which the Jury's decision is based; it may only apply the legal and regulatory rules applicable to the advertising in question.

CONCLUSIONS

Although tight control of all online advertising would be desirable, this is not currently possible. In any case, the Internet itself should employ selfregulating mechanisms to increase the overall level of accountability of the industry as a whole and to better protect consumers and/or users. The purpose of self-regulation is to try and bridge the gap between the law's minimum requirements and the maximum level of ethical behaviour for online advertising. This should not be achieved through coercion but through the free and voluntary dedication of those involved.

Self-regulatory initiatives in the field of interactive advertising exist at both the European Union (EU) and national levels. One such initiative implemented at a national level stands out as a positive example for others. We are referring to Spain's Autocontrol, which has instituted several codes of conduct.

Self-regulation mechanisms can be triggered by Autocontrol's Advertising Jury when an instance of advertising has violated one or more rules of the relevant code of ethics. This prestigious watchdog organisation is a recognised moral authority in the field and an extrajudicial mechanism for settling disputes concerning interactive advertising. Although it normally adjudicates cases in which the parties have already voluntarily committed to complying with its decisions, it also adjudicates cases involving third parties or non-member companies. This may lead to questions about whether such decisions are an expression of the constitutional right to freedom of speech or whether they represent a clear act of unfair competition.

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The Content of the Right to Internet Access

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ABSTRACT

[Purpose] Having internet access is essential for the full enjoyment of many human rights. Therefore, this Article aims to determine the minimum essential content of the right to the internet in order to both understand the extent to which it deserves protection and to verify compliance with the obligations it entails. We describe the evolving nature of internet and broadband access due to technological developments and social needs. We also present different positions regarding internet access as a human right or not, as well as how this right is acknowledged in the Mexican Constitution.
[Methodology/Approach/Design] The methodology was the review and analysis of norms, case law, academic and public policy documents, as well as references to relevant statistical data. The scope of the paper is framed in the discussion of fundamental and human rights.
[Findings] The right to internet access has both a negative dimension and a positive one. The negative dimension consists of a State obligation not to limit or restrict the right to internet access. The positive dimension must be determined using the economic, social, and cultural rights standard of the four As, namely, availability, accessibility, acceptability, and adaptability. Finally, we propose the minimum essential content of the right to internet access on those four characteristics.
[Practical Implications] - This Article provides arguments and bases for the minimum essential content of the right to internet access and broadband which are relevant for policymakers, judicial decisions, and civil society. Also, the academic debate is and will be open on the subject matter of this paper insofar as the evolutionary nature of technology, demands a constant review and update of the minimum essential content of the right. [Originality/Value] There is currently no literature regarding what a right to internet access and broadband would include as obligations to States and other parties.

Keywords: Right to the Internet. Broadband. Human Rights. Minimum Essential Content. Digital Divide.

INTRODUCTION

The SARS-CoV-2 pandemic confined a large part of the population to their homes. Yet, because so many were able to continue their activities online, it did not paralyze the world. This spread awareness about the fact that the fulfillment of many human rights depends on online networks, thus undoubtedly making them a necessary good today.
Seen in this light, internet access guarantees human rights, allowing them to be put into effect. Indeed, the internet allows people to exercise their right to education, their freedom of expression, or their right to information, among other things. However, it can also be considered a right on its own, as recognized by the Mexican Constitution's June 11, 2013 amendment, to offer one example.
Leaving aside the interesting debate about whether internet access merely guarantees other freedoms or if it is a right on its own, the need to specify the content of the right to internet access remains in order to understand the scope of related protection, which is essential for evaluating both compliance and how effective other rights are. Indeed, we could ask whether quality education is achieved when students lack

internet access; whether there can be true political participation or access to justice if only a few people have access to online networks; or whether broadband access should be included as an indicator in poverty measurements.

Therefore, this paper aims to determine the minimum essential content of the right to internet and broadband access in order to understand the extent to which it deserves protection, as well as to evaluate related compliance. This will be done in light of the consideration that it is an open and dynamic concept that depends on factors such as technological evolution and society's growing dependence on online networks.

To do so, we will first analyze the meta-legal concepts needed to understand the content of rights like those related to internet access, broadband, and digital divides; subsequently, we will discuss the inclusion of the right to internet access and, finally, we will study the minimum essential elements found in this right both from a negative perspective and a positive one using the scheme of the four As, namely, availability, accessibility, acceptability, and adaptability.

INTERNET ACCESS, BROADBAND, AND DIGITAL DIVIDES

What are Internet, Broadband, and Internet Access?

> "The internet is a collection of thousands of networks linked through a series of shared technical protocols that allow users of any of these networks to communicate with or use the services of any of the other networks" (Networking Group, 1994).

The internet (Alvarez, 2011) is made up of telecommunications networks of various types (access networks, transport networks) and of different natures (fixed networks, mobile networks, satellite networks), which are located all over the world and, by using common languages (protocols), enable the sending and receiving of communication and interactions as if there were just a single telecommunications network.1

The 'broadband' concept refers to a network that can send, transport, and receive communications at high speeds.2 Depending on the level at which a given country deploys widespread broadband, the criteria for defining broadband may vary.3 Broadband is typically measured based on speed,4 but what is considered high when it comes to speed? No specific speed defines broadband since technological advances require updates to speed (Instituto Federal de Telecomunicaciones, 2021).5 Moreover, the European Electronic Communications Code (2018) mentions that latency, availability, and reliability of communications are increasingly relevant parameters today when determining what can be considered broadband.

Speed-related broadband measurements are made considering both upload and download functions. To be considered broadband, the minimum speed varies from country to country (Instituto Federal de Telecomunicaciones, 2021). In Mexico, parameters that differentiate between wired access (e.g., via

fiber optics) and wireless access (e.g., via cell phone) have been defined as follows: for wired access, the upload speed must be at least 5 Mbps, while the download speed must be 25 Mbps; wireless access must be at least 1 Mbps for upload and 4 Mbps for download (Instituto Federal de Telecomunicaciones, 2021).6 Therefore, broadband is a generic concept that avoids determinations of specific speed or capacity so that it can be updated over time, which also allows for the incorporation of new parameters such as those suggested in the European Electronic Communications Code.

Finally, when reference is made to internet or broadband access, it involves a person being able to make use of the internet and if a certain speed or capacity is in place only then is it considered broadband.7 Internet use can take on many forms, such as surfing the World Wide Web, interacting with applications on a cell phone, communicating with other people by videoconference or e-mail, interacting through social networks, carrying out commerce on platforms for the exchange of goods, accessing audiovisual content via streaming, and so on. The European Union states that broadband internet access should support, at the very least, e-mail, search engines that allow one to browse for and obtain all kinds of information, basic online training and education tools, online press or news, the purchasing or ordering of goods or services online, job searches and job search tools, professional networking, internet banking, the use of e-government services, social networks and instant messaging, and telephone or video calls (standard quality) (European Electronic Communications Code, 2018).

The Relationship between Internet Access and Human Rights

Regardless of whether or not internet access is conceived of as a human or constitutional right, it is widely recognized as indispensable for the full exercise and enjoyment of multiple human rights. The relationship between internet access and each of these rights would merit an Article in itself, nevertheless, here, we will briefly highlight this relationship, as this is also the reason for suggesting the essential elements found in the right to internet access.

Freedom of expression and the right to information are the best examples of human rights when emphasizing the importance of internet access in the exercise and enjoyment of such rights (Alvarez, 2011; Anzures, 2020; García Mora and Mora-Rivera, 2007; Pérez, 2005; Poullet, 2000 & Voitsikhoyskyi, et al. 2021). Mexico's Supreme Court of Justice of the Nation (Suprema Corte de Justicia de la Nación or SCJN) stated that "the Internet has become a fundamental means for people to exercise their right to freedom of opinion and expression" (Mexican Supreme Court of Justice, 2017b) while setting a precedent for the exercise of the right to freedom of expression. At the same time, it set a precedent regarding public servants' use of digital social networks by ruling against one public servant's blocking of a citizen's Twitter account; there, the SCJN considered it a violation of the right to access public information (Mexican Supreme Court of Justice, 2019). In addition, when ruling on situations in which blocking a website would be appropriate and those in which it would not, the court mentioned the

internet as "a fundamental means for people to exercise their right to freedom of opinion and expression" (Mexican Supreme Court of Justice, 2017a & Mexican Supreme Court of Justice, 2017b).

Internet use has enhanced the freedom of association in multiple political and social manifestations around the world, while socio-digital networks favor the association of people with common interests. Thus, internet access enables new ways of association (Skepys, 2012 & Brown, 2016), including across borders.

In addition, with a growing human presence in cyberspace, internet access also promotes the free development of one's personality, which allows for greater autonomy in defining one's own life project (Alvarez, 2022; Anzures, 2020 & UNESCO, 2003). An instrument that guarantees lifelong learning, rather than just that which takes place during childhood, internet access is required when exercising the right to education in contemporary society (Becerra et al, 2015; Voitsikhovskyi et al, 2021 & García-Mora and Mora-Rivera, 2007). As for the right to health, internet access enables the fulfillment of various functions, such as a network of telemedicine and telehealth services and the dissemination of and access to relevant health information (Alvarez, 2011 & García-Mora and MoraRivera, 2007). For their part, political participation and democracy are related to internet access8 (Lucena, 2014; Poullet, 2000 & Voitsikhovskyi et al, 2021) while, at the same time, it allows for the freedom to work and engage in commerce in contemporary society (Anzures, 2020).

Digital Divides

At the dawn of the internet boom, mention was made of the digital divide in the singular form, which sought to differentiate those with internet access from those without it.9 However, over time, it has become clear that multiple gaps and various factors produce a variety of divides. Moreover, inequalities in the real world translate into cyberspace (Alvarez, 2011 & Becerra et al, 2015). These digital divides highlight the need to clearly identify the essential elements of the right to internet access, as well as the obligations that are derived therefrom.

Digital divides can be grouped into different types, including urban/rural or regional (INEGI, 2015 & INEGI. 2020),10 generational (older adults), gender (e.g., use by women or girls) (Centro México Digital, 2022), disability, economic (individual or household income levels),11 local context (Galperin, 2020), and so on.

These divides can be established according to degrees. The first degree corresponds to physical access to telecommunications networks and devices. The second degree pertains to digital skills, and the third involves evaluating the benefits of internet use (Scheerder, van Deursen, and van Dijk, 2017; van Deursen and van Dijk, 2014). According to this classification, not all digital divides fall within the essential content of the right to internet access, as will be explored later in this Article.

In short, Martínez identified older age, low-skilled occupations (e.g., day workers), and geographic

location as the factors that increase digital divides in Mexico, while those that reduce them include higher education levels, digital skills, and higher income (Martínez, 2018). At the same time, van Dijk refers to biographical categories (age, gender, ethnicity, intelligence, health, ability) and positional categories (work, education, home, networks), and ultimately considers personal categories to have the greatest impact on the extent to which one experiences a digital divide (van Dijk, 2020).

THE RIGHT TO INTERNET ACCESS

Debate exists over whether or not the right to internet access can be considered a human right, although opposing positions agree that internet access is necessary for the exercise of human rights.

Vinton Cerf, recognized as one of the fathers of the internet, opposes the existence of a human right to the internet because human rights are inherent to human dignity, and no matter how much contemporary society may depend on the internet, it is not thereby made a human right. He accepts that the right to internet access may be formulated as a civil right, but maintains his belief that internet access should be considered an enabling and instrumental technology rather than a right (Cerf, 2012).

Custers suggests that the right to internet access is among the new and so called digital rights (Custers, 2022). Brown argues that the human rights provided for in the Universal Declaration of Human Rights must include new technologies, while Skepys rejects internet access as a human right (Skepys, 2012). Cotino states that, instead of creating a new constitutional right to internet access, it would be better to update informational freedoms based on new guarantees that emanate from the internet (Cotino, 2020).

Mathiesen upholds that there is a human right to the internet, but views it as a secondary right, meaning that it is more specific than a primary human right (e.g., freedom of expression is a primary human right, while the right to internet access is a secondary human right) (Mathiesen, 2012).

Anzures, meanwhile, seems to accept that internet access is a human right, and confirms that it is instrumental to the exercise of human rights (Anzures, 2020),12 with which García-Mora and Mora-Rivera also agree (García-Mora and Mora-Rivera, 2007). Voitsikhovsky et al. conclude that the right to internet access is a human right that is

> "fundamental to ensure dignified existence to all and social development under the formational and developmental conditions proper to the information society" (Voitsikhovskyi et al, 2021).

In the case of Mexico, there is no need to enter into the discussion of whether or not internet access is a human right since it is already a constitutional right provided for in the Mexican Constitution, and, therefore, a definition of its essential content is required. Determining its essential content is relevant regardless of the designation or category that internet access may be granted in a given country.

Internet and Broadband Access in the Mexican Constitution

As a result of the 2013 reform in telecommunications, the Mexican Constitution establishes the right to internet access and broadband in the following terms:

> "The State shall guarantee the right of access to information and communication technologies, as well as to broadcasting and telecommunications services, including broadband and internet. For such purposes, the State shall establish effective competition conditions regarding the provision of such services". (Article 6, Third Paragraph, of the Mexican Constitution)

The inclusion of this right within the chapter on Human Rights was controversial, but the political moment in which it was established gave the impression that, by being in the Constitution, the population would automatically have internet and broadband access. Nothing could be further from the truth. In terms of internet users and fixed and mobile broadband connections, Bravo demonstrated that six years after said constitutional reform, Mexico performed modestly and worse compared to other Latin American countries that did not reform their constitutions (Bravo, 2020). Almost a decade after this right was established in Mexico, more than 28 million people aged six years and older still lack internet access (INEGI, 2021).

However, to date, there is no precise or generally accepted definition of the elements that make up the right to internet access (Papakonstantinou, 2022).13 Álvarez argues that this right obliges the Mexican State to (1) establish an environment that enables the private sector to provide internet and broadband services, (2) implement mechanisms so the population can receive services where the private sector does not provide them (because, for example, they are not profitable or they are in remote areas), (3) carry out specific and affirmative actions for access among those in vulnerable situations (e.g., the poor or elderly), (4) implement necessary measures to provide equal access to persons with disabilities, and (5) promote digital skills (Alvarez, 2018).

Meanwhile, Bravo (Bravo, 2020) points out that the right to internet access and broadband is linked to Mexico's constitutional obligation to integrate the population into the information and knowledge society through a universal digital inclusion policy.14

If the right to internet access and broadband is provided for in the constitution, as in the case of Mexico, determining its essential content goes beyond an academic concern and becomes a legal necessity, as this Article addresses.

THE ESSENTIAL CONTENT OF THE RIGHT TO INTERNET ACCESS

Following the 2013 reform of the Mexican Constitution, Article 6 recognizes the right to broadband and internet access, ordering the establishment of "effective competition conditions in the provision of such services." The first statement establishes the right itself, while the second can be interpreted as a constitutionally recognized right that requires lawmakers to intervene to regulate the conditions required

for its exercise (Anzures, 2020).

Regarding the second statement related to the creation of effective competition conditions, these are the type of rights that require a law to provide them with content (Jimenez, 1999 & Pérez, 2004), and therefore cannot be exercised in the absence of law (Díez-Picazo, 2005). This means that, constitutionally, the only obligation corresponds to creating a proper legal environment that establishes the bases to guarantee full internet access and use, without having its own constitutional definition (Anzures, 2020). It is a programmatic right to the extent to which the public authorities' obligations arise from the law, not from the Constitution (Fossas, 1993).

However, rights classified as constitutionally recognized are considered to have minimum constitutional content that lawmakers cannot freely dispose of, but which, on the contrary, must be both respected and provided for in the law. In this regard, they do not lack constitutional content, and, when compared to other rights, there is only a difference in quantity, rather than quality, i.e., those related to development would need more intervention than others (Díez-Picazo, 2005).

Thus, for example, in the case of due process, a typical right that requires further development, although a law is required to define the formalities of notifications, there is a minimum constitutional content that lawmakers cannot change. For example, the defendant must receive a summons, otherwise, he or she would be left defenseless (Soberanes, 2018).

Thus, the right to internet access has a minimum constitutional content, which must be guaranteed by public authorities (Papakonstantinou, 2022).15 It is this specific object of the right that we will try to clarify in the next section.

The Negative Dimension of the Right to Internet Access

In his classic work, Alexy argues that the analytical foundation of rights is based on a threefold division, consisting of rights to something, freedoms, and capabilities (Alexy, 1991). Internet access is a right to something, as it allows its holders to demand action from someone and, therefore, does not imply the possibility of choosing between doing or not doing something without state interference, as happens with freedom-based rights (Alexy, 1991); or the permission to change one's legal status, as happens with capabilities. (Alexy, 1991).

Rights to something, as Alexy himself explains, can involve negative or positive actions (Alexy, 1991). Negative actions translate into the agent's duty not to do something, a duty not to hinder the exercise of a given right or status. Positive actions, on the other hand, entail the agent's duty to do or provide something, so that a new status is created. The German author explains this by referring to the right to life. Its negative side obliges the State not to kill, while from the positive viewpoint, it imposes the obligation to protect the life of the holder with respect to arbitrary interventions from third parties (Alexy, 1991).

When it comes to the right to internet access, which allows for use of the internet, its negative side implies the state's duty of restraint, which consists in neither limiting a given service nor restricting it (Alvarez, 2018; Skepys, 2012 & Voitsikhovskti et al. 2021). The Mexican Constitution declares that the State shall guarantee open internet access without arbitrary interference (Article 6 Paragraph B Section II of the Mexican Constitution). Voistsikhovskyi et al. suggest that the content of the right to internet access is found in the possibility that individuals have of accessing the internet through an internet service provider (Voitsikhovsky et. al, 2021). At the same time, Skepys states that governments should also refrain from interfering "with the propagation of ICTs [Information and Communications Technologies] and with the infrastructure required to access the internet" (Skepys, 2012). Undoubtedly, the notion of restricting the exercise of state power is one of the dimensions of the right to internet access that derives from the obligation to respect human rights (Corte Interamericana de Derechos Humanos, 1988).

Along these lines, cutting off entire populations or certain segments there of from internet access has been considered a human rights violation, as well as imposing an obligation to register with service providers, which cannot even be justified based on public order or national security (United Nations et al, 2011). Therefore, the United Nations considers measures that prevent or disrupt a person's ability to search for, receive, or transmit information online a violation of this right (United Nations and Human Rights Council, 2018).

But the inability to obtain access to part of the internet, blocking content based on political criteria through what García Mexía calls 'veils' (García, 2012) would also contravene this negative side. The same author explains that this can happen through authorities' direct action, such as Iran's bottleneck, or through service providers that follow the government's political instructions, as in China (García, 2012).

It is clear that there is a growing recognition of the responsibility that large internet platforms have in terms of internet users' exercise and enjoyment of their human rights. However, this merits an investigation in itself, which goes beyond the scope of this Article (European Union, 2022; García, 2012 & Observacom et al., 2020)16

To conclude this section, it is important to note that violations of the right to internet access are also violations of other human rights that can be exercised through the internet, such as freedom of expression, since, as the Council of Europe indicates, "disconnecting individuals from the Internet, as a general rule, represents a disproportionate restriction of the right to freedom of expression" (European Union, 2016).

The Positive Dimension of the Right to Internet Access

In addition to the obligation to respect, another general obligation that all rights impose is that of

guarantee, which implies the existence of conduct that ensures the full exercise of these rights (Corte Interamericana de Derechos Humanos, 1988). The European Court of Human Rights has recognized the obligation that States have to guarantee internet access as part of the right of access to information to ensure participation in the information society (Voitsikhovsky et. al, 2021, referring to the case of Ahmet Yildirim v. Turkey).

In the case of the right to internet access provided for in Article 6 of the Mexican Constitution, the State's duty is recognized by the express statement that the "State shall guarantee," thus emphasizing this obligation.

Therefore, while implying duties of restraint, prohibiting interference in people's connection to and in the deployment of networks, the right to internet access also implies the power to demand (Alvarez, 2018; Anzures, 2020; Becerra et al 2015 & Mathiesen, 2012) real positive action towards a new social right (Cotino, 2020).

Thus, we are dealing with a right that is uniquely carried out by the State provider, and this requires making organizational and procedural forms available to people to make it effective (Orbegoso, 2021). Thus, the State must ensure the existence of necessary telecommunication infrastructure so that everyone can connect to the internet.

Because this statement may be somewhat intangible, as is the case with rights to benefits stated as principles, it needs to be made somewhat more concrete. It has been said that everyone should be guaranteed an available and accessible connection to the internet (Anzures, 2020). Similarly, the European Electronic Communications Code (2018) specify the right in terms of minimum services, of a certain quality, available to all users at an affordable price (Articles 84 and 85, and Annex V).

The characteristics described below (availability, accessibility, acceptability, affordability) seem to fit into the scheme of the 'Four As', which the United Nations Committee on Economic, Social and Cultural Rights considers to be 'commonplace' when documenting and monitoring social rights (Tomasevski, 2004). They are referred to as the 'Four As' because they refer to four characteristics that begin with the letter 'A', namely availability, accessibility, acceptability, and adaptability.

These characteristics help define the content of the right to internet access and, therefore, will be analyzed below.

Availability

Availability is the first requirement to be provided regarding the right to internet access, e.g., the existence of the necessary infrastructure to allow for connection. It is limited to the system's existence and does not touch on qualitative assessment. Infrastructure and internet access services may be provided by the public or private sector, yet it must be highlighted that it would be a violation of this right

for a person not to have -within easy reach-, wired, wireless, or satellite connection points.

Thus, the right to internet access requires the existence of the infrastructure without which the right would not exist and, therefore, is part of its essential content. In Mexico, the right to internet access and broadband establishes the State's constitutional obligation to provide an environment of effective competition that allows for its fulfillment. An environment that enables the expansion and availability of infrastructure is a positive government obligation (Alvarez, 2018 & Skepys, 2012).

From the perspective of service providers, investment in certain areas may not be attractive due to technical difficulties and low profitability. In these cases, the competitive mechanism mandated by Article 6 of the Mexican Constitution to effectively implement this right is not ideal. The corresponding right of people living in remote areas where this infrastructure has been impossible to install is violated.

In this regard, the right to internet access is a constitutional right and a right related to the effectiveness of human rights (Alvarez, 2011; Alvarez, 2018 & Skepys, 2012), and, therefore, internet access is an essential public service.

A ruling rendered by Costa Rica's Constitutional Chamber serves as an illustrative example. The Chamber considered it a violation of the right to internet access for a housing development to lack internet coverage without the Costa Rican Electricity Institute having any project to allow for access (Costa Rica's Supreme Court of Justice, 2010).

Another decision by the Constitutional Chamber of Costa Rica's Supreme Court of Justice is also enlightening. It indicates that conditions such as the remoteness of an area or a lack of profitability in the construction of the necessary infrastructure are not valid justifications, as internet access is a public service associated with constitutional rights that obliges both the State and provider companies (Boza, 2015).17

This obligation cannot be fulfilled overnight. It is a right to which the progressive principle applies, as established in the International Covenant on Economic, Social and Cultural Rights and in the Mexican Constitution. Accordingly, in all social rights, a minimum basis must be met, upon which progress must be made (Vazquez, 2011). This means that deliberate, concrete measures must be launched (United Nations-Committee on Economic, Social and Cultural Rights, 1990), in favor of the establishment of universal availability, which implies using all the resources available to the State (Abramovich, 2004 & Limburg Principles, 1986).

Therefore, in areas where it may be physically difficult to implement the infrastructure necessary to guarantee universal internet access, certain public internet access points should at least be established, such as at post offices, schools, libraries, and others (Anzures, 2020).

Accessibility

Strictly speaking, accessibility implies that internet connection should be possible for everyone, without discrimination. Custers, when suggesting a right to internet access as part of the new digital rights, states that it must be a right for all because if some lack access to the internet or have limited access, they will be at a clear disadvantage compared to the rest of the population (Custers, 2022). Therefore, everyone who wants to connect should be able to do so. according to availability, there must be an infrastructure that guarantees the existence of a network, accessibility gives rise to issues regarding the device(s) needed to connect, the affordability of services, and the skills that people must have in order to access the internet.

On personal use devices, such as cell phones or tablets that allow for roaming, connection can take place through cellular data service or Wi-Fi. Fixedaccess computers, such as those available in homes and offices, for example, can also be used.

Therefore, even if a signal exists, a person without a device would not be able to access the internet and, therefore, the right to access would be violated. In this regard, a Mexican district judge ruled in a case in which a claim was made that a girl did not have the necessary equipment to continue her education during COVID-19-related stay-at-home orders, thus obliging the State to provide her with a device as a safeguard (Eighth District Court in San Luis Potosí, 2020). Similarly, another Mexican judge granted a suspension to provide a school with the necessary technologies to guarantee its students' rights (Fifth District Court in San Luis Potosí, 2021). Also in Mexico, an injunction was granted to a young student so that his school would be given information, communication technologies, and internet access to guarantee his right to education (Eighth District Court in San Luis Potosí, 2019).

Now, if a person lives in an area where access to internet services is available and also has a device, but does not know how to use it, they will also be deprived of access. For reference, not knowing how to use a computer is the number three reason in Mexico for households not to have one (INEGI, 2016; INEGI, 2017; INEGI, 2018; INEGI, 2019 & INEGI, 2020). Regarding this dimension of the right to internet access, there are three relevant factors, namely, (1) non-discrimination, especially when it comes to the most vulnerable groups, (2) economic accessibility or affordability, e.g., the costs incurred by right holders, and (3) the need for digital skills.

Access among Vulnerable Groups

Regarding the first point, it is important to point out that, as a social right, access to the internet aims toward equality (Becerra et al, 2015). Prieto Sanchís argues that equality promotes the integration of individuals into society so that they may enjoy effective freedom (Prieto, 1990). Therefore, the impossibility of exercising this right can cause inequalities between those with and without access. The latter would not be able to continue their education during a pandemic, as in the judicial case described above. This is why some groups should have preferential access and be the beneficiaries of actions that secure access to ICTs (Alvarez, 2018).

The principle of equality in the law is not an end in itself, but a means toward achieving material equality (Bobbio, 1993). Material inequality cannot be fixed with legal equality because those who are marginalized will always be at a disadvantage. This is the paradox of equality: To achieve material equality, there must often be formal inequality (Elósegui, 2003).

The need for unequal treatment may derive from explicit obligations of a higher order. The Mexican Constitution requires that certain persons or situations be treated exceptionally, as is the case of indigenous people, who are subject to special regulations that guarantee the devices needed to access the internet (Article 2nd of the Mexican Constitution in Section B).18

There are also cases in which, although the Mexican Constitution does not expressly order differentiated treatment, not providing it would be unreasonable. This is the case for persons with disabilities. If they are treated in the same way as other people, unjust situations that prevent them from having equal access to material opportunities can arise.

People with disabilities are one of the population's most vulnerable groups and, for this reason, agencies that provide public services are obliged to provide them with special attention in order to fully respect their rights.19

In this case, however, an international standard exists in the form of the Convention on the Rights of Persons with Disabilities (CRPD), which establishes several obligations for member states, including Mexico. Alvarez summarizes the CRPD provisions in connection with internet access as follows:

> "States must adopt the necessary measures to: (1) ensure access to ICTs and emergency services for persons with disabilities under equal conditions, (2) promote access to ICTs (including the Internet) for persons with disabilities, as well as promote their accessibility in terms of design; and (3) that persons with disabilities exercise their freedom of expression and right to information under equal conditions, for which –among other things- the States must (a) facilitate information and allow for the use of accessible formats and technologies, (b) encourage the private sector to provide information and services on the Internet in accessible formats, and (c) encourage media outlets that provide information over the Internet to open up their accessibility to persons with disabilities. Additionally, in accordance with Article 4 of the CRPD, States are obliged to promote the availability and use of ICTs (authors' translation)" (Alvarez, 2018).

When it comes to persons with disabilities, the essential content of the right to internet access includes the obligation to provide devices that allow these individuals to use the internet and thus to more fully exercise their human rights in cyberspace.

Children and teenagers are another group that should be mentioned. In this case, in addition to access, restricted access is necessary for the sake of their wellbeing and development. Therefore, the Mexican Supreme Court argues that recognizing them as holders of this right does not imply access to the content of any nature, but rather, given that wider access increases with maturity, the information to which they may have access should only correspond to that which positively contributes to the fulfillment of their rights (Mexican Supreme Court of Justice, 2018).

Economic Accessibility of Affordability

The second point regarding accessibility has to do with cost. Economic accessibility, or affordability, implies that a person can cover the associated cost without it being an unjustified burden or negatively impacting the user's ability to manage their other expenses. It should be evaluated based on the region or country's level of consumer prices (OECD, 2006 & European Electronic Communications Code, 2018). Custers refers to the fact that an effective right to internet access should prevent technological costs from becoming an insurmountable barrier (Custers, 2022).

It is important to remember that all social rights have a financial impact, which has led some to argue that they are not constitutional rights (Arango, 2004).

Regardless of this debate, which continues to exist20investment must be made to achieve universal internet access. According to the National Survey on Availability and Use of Information Technologies in Households (ENDUTIH for its initials in Spanish), which has been conducted annually since 2015, lack of economic resources is the main cause of not having a computer or internet connection in Mexican households (INEGI, 2015; INEGI, 2016; INEGI, 2017; INEGI, 2018; INEGI, 2019 & INEGI, 2020).

European Electronic Communications Code (2018) guarantee the affordability of internet service prices for the majority of the population, recognizing that certain groups will require support when broadband internet service is not affordable for them. In Mexico, the reform that recognized this right sought to reduce prices through effective competition, as provided for in Article 6 of the Constitution. In Switzerland, the State set a price (Anzures, 2020). Whether through competition, price fixing, or subsidies, internet access invariably has a price.

The right in question is different from others in that the holder, and not the entities with obligations to ensure this right, bears the cost. Indeed, while the rights to education or health protection are relevant line items in public budgets to make services free of charge for those who hold the right, in the case of the right to internet access, it is the user who must generally pay for this service. In other words, exercising this right involves a cost. The exercise of other rights may indeed involve a cost, for example, when a person decides to attend a private school or a private hospital. However, this is a personal decision, as they have the option to enroll in a public school or to be treated by the state health system. In the case of internet access, the possibilities of connecting to a free public network are scarce and, therefore, to exercise the right, a service provider must be paid.

In connection to what has been pointed out above, the extent to which public budgets should bear the cost of internet access should be questioned, as well as whether it should be covered for vulnerable groups or whether there should be free connection points in certain places. Other aspects that deserve analysis include ideal connection mechanisms for the disconnected and ensuring that this connection is meaningful for the exercise of human rights, without undermining the conditions of competition that the

Mexican State, by constitutional mandate, must establish.

Digital Skills

There are important differences between the skills that a person must have in order to access the internet compared to other means of communication, such as print media, where one simply needs to know how to read, or radio and television, which can be accessed at the push of a button. This is not the case with the internet, which requires having some knowledge of how to use a related device, how to access the internet, and how to take advantage of its services and applications (e.g., the use of e-mail and search engines or browsers). Therefore, the concept of digital literacy has become a necessary term for identifying the minimum skills a person must have to access the internet.

As noted above, the second level of the digital divide is generally recognized as a lack of digital skills. Without them, both the availability of infrastructure and the access to a device are useless. Therefore, if a right to internet access is recognized as such, and if it is necessary for the full exercise of human rights, then it must include within its minimum essential content the obligation to provide people with the instruction they need to develop digital skills (Custers, 2022). This instruction should not in any way be limited to children, and should also include, often more emphatically, the elderly.

Acceptability

The acceptability mandate supposes that the user will experience better quality internet service. This criterion goes beyond the availability of a network or the possibility of access, and instead focuses on the provision of better service. Thus, in the field of social rights, it has been equated with the principle of quality, which is often linked to 'corporate' visions of new public management and efficiency (Cotino, 2012).

In many places, the challenge presented by the right to internet access may not only be in terms of coverage, but also in ensuring that services are provided under high-quality conditions, with the additional requirement that this benefit reach all citizens.

Quality, from the legal point of view, is a principle. Principles, in Alexy's words, are optimization mandates and respond perfectly to his idea that they demand something to be carried out to the greatest extent possible within current, real legal possibilities (Alexy, 1991).

Since this right's objective is constantly evolving and improving, it is difficult to establish quality indicators in advance. Therefore, European Electronic Communication Code (2018) states that all citizens must have access to broadband internet to enable their social and economic participation in society, although some countries, such as Finland, have established minimum connection speeds, and in the case of Mexico, the Federal Telecommunications Institute established minimum speeds for a service to be classified as broadband.

In any case, based on percentiles regarding user access time, transmission speeds achieved, the proportion of failed data transmissions, the percentage of successful connections, and average delay, certain parameters could be established to evaluate whether or not a given service is acceptable.

Adaptability

Finally, we come to adaptability, which involves the flexibility of the right in two senses. First, it must adapt to constantly changing technologies, and second, it must adjust to the needs of people in varied cultural and social contexts.

Regarding the former, technologies are clearly in constant development, and these changes impact the content and scope of the right. This is true of all rights. For example, the adequate provision of the right to education would not exist if we follow teaching standards from sixty years ago and fail to include new realities. For example, if there were no digital education, children would be condemned to digital illiteracy. And if new immunizations were not included in the government's free and compulsory vaccination schedule, health protections would be deficient. Similarly, technological innovation has an impact on the right to internet access and, therefore, minimum connection speeds, for example, are constantly evolving.

With the advent of new functionalities through the internet, such as virtual and augmented reality--the Internet of Things (IoT)—, van Dijk warns that there will be new digital divides and inequalities because, while some people will have access to advanced internet applications, others will only have access to one type of application (van Dijk, 2020). There is no need to declare at this point whether or not virtual and augmented reality, for example, will be part of the right to internet access, but it is important to emphasize at this point that, within the realm of adaptability, technological evolution may be relevant.

At the same time, adaptability represents a property of utmost importance when it comes to ICT access by persons with disabilities; this is because technological evolution must comply with universal design and functional equivalence to avoid leaving out persons with disabilities and thus allow them to have access on equal footing with others (Alvarez, 2018).21 If the situation in which people with disabilities live is not considered, technological evolution will cause unintentional exclusion.

Regarding the latter, it is important to emphasize that adaptability challenges the idea that people must adjust to the service conditions imposed by providers and, in contrast, demands that the latter adapt to the needs of users, considering the social and cultural context in which they live.22 As a constitutional right, the person, and not the provider, should be the focus.

CONCLUSIONS

The internet allows people to use the services of interconnected networks and is now indispensable for

the exercise and fuller enjoyment of multiple human rights. Several countries have begun to consider, as in the case of the Mexican Constitution, internet access in itself a human right.

The right to internet access has essential elements that must be guaranteed since violations thereof also represent violations of other human rights. This essential content manifests itself through negative and positive obligations. The negative side involves the State's duty to refrain from certain things like limiting or restricting internet access service, interfering with the proliferation and expansion of infrastructure and equipment to provide such service, depriving the entire population or certain segments of the internet, hindering access to parts of the internet, and blocking access to internet content.

The positive side of the right to internet access entails a number of guarantees that can be identified using the 'Four As' of the United Nations Committee on Economic, Social and Cultural Rights, namely availability, accessibility, acceptability, and adaptability.

Availability requires the existence of infrastructure needed to connect to the internet, without which the right would not exist. In Mexico, based on the Constitution, the States are obliged to generate and preserve an environment that enables the expansion and availability of infrastructure throughout the country. Of course, full telecommunications infrastructure coverage cannot be fulfilled immediately, so the progressive principle must govern.

Accessibility involves at least three aspects, which include access for various social groups without discrimination, especially those in vulnerable situations, such as indigenous people, people with disabilities, children, and adolescents; affordability, which mandates that a person be able to cover the cost of internet access service without it being an unjustified burden or negatively impacting their ability to satisfy other basic needs; and the provision of digital skills training for all people regardless of age.

The acceptability element of the right to internet access is linked to the quality that the service must have for a person to be able to take advantage of the benefits associated with the digital era. As a principle—an optimization mandate—quality obliges its fulfillment to the greatest possible extent. Given constant evolution and technological improvement, quality indicators will change from time to time. Thus, in some countries, such as Mexico, quality is measured in terms of download and upload speed and with different parameters for wired and wireless access, while in the European Union, latency, availability, and reliability are considered elements that define broadband.

The last characteristic, adaptability, is closely related to technological advances and necessary adjustment based on the needs of individuals in varied cultural and social contexts. In the case of people with disabilities, adaptability requires the adoption of universal design and functional equivalence so that technical progress does not become a means of unintentional exclusion.

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Solving the Problem of Forensic Identification of a Person's Appearance Based on Video Materials: An Integrated Approach

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ABSTRACT

[Purpose] The purpose of this study is a comprehensive investigation of modern techniques and developments for recording and analyzing data about the criminal.

[Methodology/Approach/Design] Theoretical and empirical methods, such as statistical analysis, synthesis, induction and deduction, were used for the study. The practical scope of this article includes research by Chinese, Ukrainian, Russian and English researchers in this field. Scientists studied the theoretical and practical scientific literature on the topic, as well as the achievements of modern science in the field of improving video surveillance systems, in order to analyze.

[Findings] It was found that in the context of digitalization, law enforcement agencies can gain access to personal biometric data of citizens, which, on the one hand, simplifies the search for an alleged criminal, and on the other hand, intrudes into the privacy of citizens, thereby violating the law. However, modern security systems and artificial intelligence built into surveillance cameras undoubtedly help solve crimes.

[Practical Implications] The applied value of this study lies in the identification of current issues of both Ukrainian criminal legislation and legislation related to the protection of personal data and their use by law enforcement agencies of such states as the People's Republic of China, the United States of America, the United Kingdom, the Russian Federation.

Keywords: Personal Identification. Video Surveillance System. Forensic Portrait Examination. Forensic Examination. Appearance Features.

INTRODUCTION

In the scientific literature, the issues of forensic identification of a person's appearance from video materials is an urgent and debatable issue. This subject touches on several issues at once, namely the preservation of personal data, including biometric data, the legality of obtaining evidence, modern means and methods of identifying a person's appearance, damage or intentional modification of video material, the choice of the most successful examination. All these questions come before investigators, forensic scientists, and experts in the investigation of crimes. Therefore, it is important to know how modern CCTV cameras work, and what methods are used for identification. The analytical work carried

out in this study comes down to the following theses.

Today, Ukraine uses a video surveillance system comprising 4 thousand cameras (gordonua.com, 2022). Video recording within the framework of various programs also functions in such countries as the United Kingdom, USA, China. All these video recording systems are aimed at the safe presence of citizens in public areas: airport, metro, parks, hospitals, shopping centers, and more. The footage in this case is direct evidence of the presence or absence of a crime.

Due to the complete consolidation of the mechanism of committing an offense, there are no special difficulties in constructing versions. However, the procedure for identifying the perpetrator of this incident rarely yields positive results and requires additional efforts (PODVOLOTSKY, 2015). The conventional approach to a video frame, as an analog of a photographic image, which lies in the examination of the elements of appearance from twodimensional photographs, is ineffective due to inferior quality. It is impossible to differentiate the signs of the facial part of a person's head on a videogram (BULGAKOV, 2014). Furthermore, criminals can use techniques of intentionally masking their faces with clothing items and intentionally tilting their heads (PODVOLOTSKY, 2015; CHERNIAVSKYI et al., 2019). In such cases, it is difficult for an expert to use conventional comparative methods of portrait examination since all kinds of negative factors have a substantial impact on the display of appearance features (KHARITONOV, 2013). Today, forensic science has advanced further and uses a complex forensic examination.

The practice of assigning examinations of video recordings is replete with examples of assigning studies called "complex", combining questions from the field of portrait and video technical examinations (ZININ, 2003). As for the improvement of video surveillance systems, it is impossible not to mention the following innovations. For example, in the United States, a computer software is actively used that can take biometric data of a person, which allows identifying the criminal with a higher probability.

The most advanced device embedded in the CCTV camera system is a total station, which allows analyzing the appearance features of a person remotely and comparing them with the data archive. The results of comparing the sizes, shapes, absolute and relative magnitudes of objects (or elements of appearance) located at the scene of the incident will first determine the degree of suitability of the video presented from the scene for identification, and then identify the appearance of a person from the presented videos (BULGAKOV, 2014; KORZHYK et al., 2017b). Chinese video surveillance systems are also aimed at perceiving, to a greater extent, the dynamic properties of a person: their gestures, movements, gait (LIU and WU, 2021).

The relevance of this study is conditioned upon the fact that modern forensic science is currently discussing the use of personal data that citizens voluntarily give to computer programs, as well as the video recording system. To regulate and clarify objective opinions, it is necessary to address the means and methods of forensic science in the investigation of the appearance of persons suspected of committing a crime. The originality of this study lies in the comprehensive investigation of the approaches of various authors to this issue. The subject under study is considered from the standpoint of Russian, Ukrainian, English, and Chinese authors of modern science. The main elements of scientific originality lie in an in-depth study of statistical data, modern approaches and legislative methods of regulation.

MATERIALS AND METHODS

The main methodological tool of this study was an integrated approach to the phenomena identified in the subject under study. The main general scientific methods of cognition in the analysis of information were empirical and theoretical methods. The fundamental method of research is to highlight the systematic and statistical analysis, thanks to which the statistical data of the Prosecutor's Office of Ukraine, theoretical works of Ukrainian, Russian, Chinese, and American researchers, as well as the criminal procedure legislation of Ukraine were considered. The theoretical framework of this study included the articles and papers of the following authors: E. G. Barkovskaya (2009), I. N. Podvolotsky (2015), V. G. Bulgakov (2014) and others. This study was carried out in several stages.

During the first stage of this study, theoretical methods were used, such as analysis, synthesis, concretization, generalization. The study mainly involved methods of system analysis of data from both Ukrainian and Russian studies. The authors of the present paper applied a comprehensive approach to the study of the material. The logical construction of this article lies in the consideration of means and methods of modern forensic science in identifying appearance features of a person who has potentially committed a crime. On this basis, the thesis is put forward that modern video surveillance systems in some cases have shortcomings in quantitative and qualitative indicators, which leads to incorrect identification of the criminal's identity. An integrated approach suggests the theoretical nature of the study.

The second stage of this study investigates the problematic issues of improving the video surveillance system in more detail. Using the induction method, the mechanisms of operation of CCTV cameras and defects were identified, such as damage to the material, low quality, lack of sound, and more. The theoretical framework of the second stage of the study included the research conducted by A.V. Kharitonov (2013), A.M. Zinin (2003), and others. Thanks to the use of deduction methods in this study, sequences of hypotheses were deduced, as well as an assessment of the test results. Statistical analysis revealed that modern legal science has controversial issues in the use of biometrics and other personal data identified during the study of video materials. Within the framework of this study, the main positions regarding the identification of the criminal's identity by appearance features were established.

At the third stage, as a result of this study, the work of system data analysis was completed, theoretical and practical conclusions were clarified, the results obtained were generalized and systematized during the use of an integrated approach to the study of the subject under consideration. Within the framework of this methodology, this paper considered many studies on the means and methods of investigating crimes and identifying a person suspected of committing a crime by appearance features. This paper critically examines and evaluates the use of complex forensic expert opinion upon considering video materials, as well as the comparison of appearance features by static and dynamic characteristics of a person. The study focuses on the use of new developments in the video recording system. Thus, using the methods of scientific analysis, the development vectors of forensic science are identified according to modern technologies already operating in Ukraine, Russia, China, the USA, and the UK.

RESULTS

Forensic Methods of Personal Identification by Video Images

According to Article 84 of the Criminal Procedural Code of Ukraine (2012), evidence in a criminal case is various factual data, based on which, according to the procedure established by law, the body of inquiry, the investigator, and the court establish the presence or absence of a socially dangerous act, the

guilt of the person who committed this act, and other circumstances relevant to the correct resolution of the case. For any evidence used by a person to be legitimate, it must meet the criteria of relevance and admissibility (HORSMAN, 2021). The person conducting the investigation evaluates the evidence according to their inner conviction, based on a comprehensive, complete, and objective analysis of all the circumstances of receiving the video, as well as its content according to the general rules. In the modern world, video cameras are a way of recording events and in some cases constitute a direct evidence base, recording the presence or absence of a crime, therefore, the analysis of the video image can reveal the qualification of the offence.

The video allows identifying both obvious things such as the time of year, time of day, the scene of the incident, the number of participants and some other data, as well as hidden circumstances: information about the filming conditions, about the technical settings of the filming camera, about the inviolability of the video recording from unauthorised interference, about the correctness of the playback of the recording, about the adequacy of the display of appearance features, about the belonging of the display of the incident participant to a particular person, etc. (PODVOLOTSKY, 2019). However, it is important to understand that the video surveillance system cannot always register personal features and identify a particular person from quantitative and qualitative characteristics. This circumstance is related to the particular qualitative characteristics of the video camera such as:

(1) quantitative indicator: single cameras, cameras placed in inaccessible places, cameras that take an overview from one angle or point;
(2) quality indicator: low-quality resolution, noise on video, video without sound or in black and white image.

These characteristics lead to the fact that an essential part of the human appearance—the facial part and the head cannot be detected, and the criminal may also intentionally use disguise items such as hooded clothing, a face mask, a certain tilt of the head (BAI et al., 2021). A critical issue for criminal law is the complexity of video recording as evidence base material. The study of video footage is not only a complex procedure, but also a process that affects various areas of research. Thus, the following specialists are involved in personal identification:

(1) technical issues of obtaining video images are handled by experts in the field of video technical expertise;
(2) identification of a person by appearance features—specialists of portrait examinations;
(3) identification of a person by the image of a corpse and its remains— specialists of medical and forensic examinations (PODVOLOTSKY, 2019).

In forensic investigative practice, sometimes there is a problem of identifying a person by photographic images in which a person's face is missing or unsuitable for identification, but there are images of

individual body parts – hands, whole hands, bare feet, individual naked body parts (SHEN et al., 2021). In these ambiguous circumstances, a forensic medical examination is prescribed, where an expert can compare the structural features, the condition of the skin, the relative values of the elements of the human body, and in certain cases, if there are a sufficient number of coincident features forming a unique complex, a categorical positive identification conclusion is possible. If there are substantial differences in the structural features of the body parts depicted in the photograph and the structure of the corresponding body parts of the person being verified (identified), it is necessary to formulate a categorical negative conclusion (ROMANKO et al., 2017).

Thus, during the investigation of a crime, the following actions are performed in front of forensic experts and investigators. Firstly, as part of the preliminary study, the received video materials are analysed in parallel with the investigator's decision on the appointment of an expert examination (CRIMINAL PROCEDURAL CODE OF UKRAINE, 2012). Secondly, their external design should correspond to the description in the resolution. Thirdly, the specialist compares the technical parameters indicated on the video information carrier (device type, recording format, time and place of recording, etc.). Finally, the possibility of an expert laboratory in studying the content of the video is determined.

Proceeding from the legal regulation of examining the video recordings as evidence, when identifying appearance features, it is necessary to comply with the requirements for the description of the appearance not only by a forensic specialist, but also by other subjects involved in establishing (identifying) a person's identity (CRIMINAL PROCEDURAL CODE OF UKRAINE, 2012). The improvement of the video surveillance system is also necessary to increase the detection of crimes. This thesis is confirmed by the statistical data of criminogenic circumstances in Ukraine for 2021. According to the statistical portal that generates the Crime Index, Ukraine as of 2021 ranks 54th in the world (out of 135) in terms of crime (Analytical portal word and case, 2022). The most common crime in Ukraine is theft. According to the article "Theft" in 2013 there were 242.769 offenses, in 2014 – 226.833, in 2015 – 273.756, in 2016 – 312.172, in 2017 – 261.282, in 2018 – 238.492, in 2019 – 197.564, in 2020 – 138.562 (Analytical portal word and case, 2022) (see Fig. 1).

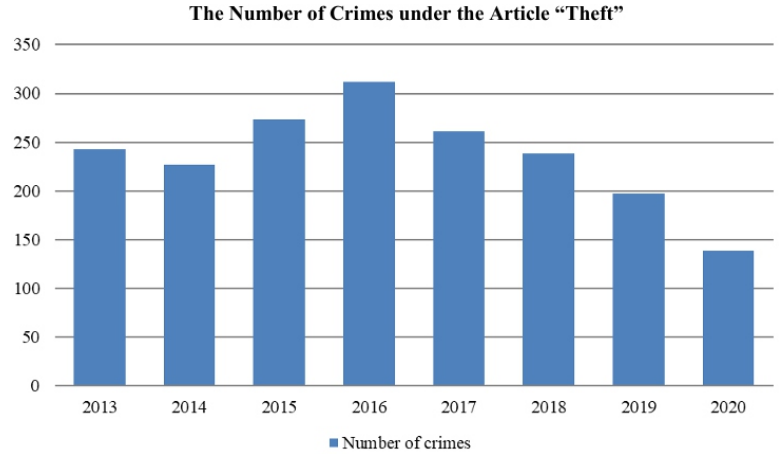

Figure 1 – Crime Analysis from 2013 to 2020

Prospects for Improving the Video Recording System for Identifying Criminals

To solve such issues in forensic science, a promising direction has been identified related to the development of computer software for the process of identifying a person based on video footage, which allows comparing not only static, but also dynamic characteristics of a person (PODVOLOTSKY, 2015; ZAKHAROVA, 2017). Even though portrait identification by dynamic features is still in its infancy, analysis and comparison of the parameters of the amplitude of movements of the head, arms and legs, increasingly often allows establishing the volume of unique dynamic characteristics for each person that is sufficient for solving identification tasks (KHARITONOV, 2013). Some techniques of modern computer technologies are already actively involved in personal identification, e.g., the use of "3D technologies". To create three-dimensional "3D images", the programmes "Liberty" by Chiron, "Harmony" by Integrated Research, "Matador" by Parallax, "Media Suite Pro" by Avid are used. Software packages "Flint, Flame and Inferno" by Discreet Logic, "Pandemonium" by XAOS, as well as "StereoPhoto Maker", "Axara 2D to 3D Video Converter", "3D Maker" and "Free 3D Video Maker", etc. (PODVOLOTSKY, 2015). These programmes help forensic scientists and experts recreate models in real configurations and volumes, which leads to the most detailed identification of the victim's identity.

The practices of the USA demonstrate positive statistics, where computer software is used to take biometric data of a person and draw parallels and identities between them. This quality of work contributes to a prompt response and allows timely signalling the security panel to take measures to detain the criminal. Another modern way to solve the shortcomings of video surveillance cameras is a total station—a device in the camera that allows remotely analysing the appearance features of a person and compare them with a database (BLOKHIN et al., 2011). This instrument measures distance and angular magnitudes, records the coordinates and placement of individual points, and includes an optoelectronic device that records the time and metric results of laser beam reflection (PODVOLOTSKY, 2015; KORZHYK et al., 2017a).

The results of comparing the sizes, shapes, absolute and relative magnitudes of objects (or elements of appearance) located at the scene of the incident will first determine the degree of suitability of the video presented from the scene for identification, and then identify the appearance of a person from the presented videos (BULGAKOV, 2014). The main advantage of these improvements is the creation of exact three-dimensional models of appearance, which can be identified with models stored in the archives of law enforcement agencies. The new generation of video recording systems is aimed precisely at the dynamic characteristics of a person: their gait, facial expressions, gestures.

Thus, modern video surveillance systems help forensic experts investigate crimes by reconstructing the appearance of persons who arouse suspicion, as well as to identify appearance features with models stored in data records. Substantial improvements of the cameras would be the introduction of special

systems for recognising the dynamic parameters of a person's appearance into their operation, as well as the analysis of the structure, thermal, colour and tone complexion features.

DISCUSSION

In historical retrospect, the issues of identifying human appearance were the key in the investigation of crimes. The tasks of diagnosing and identifying a person by individual parts of the body were solved at the dawn of criminal registration, when the forehead, cheeks, hands were branded, or self-mutilation was carried out by cutting off fingers, pulling out nostrils, etc. After the introduction of anthropometric identification and fingerprinting in the 19th century, the task of establishing identity was being solved using techniques developed in these systems (KRYLOV, 1975; VILKS and BERGMANIS, 2018). Therewith, the methodological framework of such examinations was the basics of trace evidence. The scientific foundations and methods of forensic portrait examination were developed within the framework of the forensic doctrine of the person's appearance features, which is a branch of forensic technology that investigates the patterns of imprinting the appearance features of a person in various representations. The description and use of portraits at the initial stages of personal identification contributed to the solution of identification tasks.

Thus, it became possible to identify a person in the presence of substantial deviations from the norm, traces of surgery, for example, deformity of the fingers, other diseases that individualize the hand (ROMANKO et al., 2017). This approach should also apply to images of other parts of the body, proceeding from the provisions of the theory of forensic identification, the expert should have data that note the features of objects that have an individual nature, which requires the involvement of various branches of medicine, along with anatomy. The terminology of identification of personality and its features has numerous issues in science. For example, in forensic science, the term "personal identification" is interpreted as the identification of a particular person who has an individually unique complex of innate and acquired anatomical, functional, genetic, and mental properties (GETMAN and KARASIUK, 2014). These properties are called personality traits.

Thus, it is possible to identify the identity of a living person (criminal, detainee) and a corpse (dismembered, skeletonized, unknown person) (ROMANKO et al., 2017). When the identification of a person is carried out in the investigation, first of all, one contemplates the image, and the factual object of the investigation is the head of a person, their face as including a set of appearance features that determine the individuality of a person and are used to establish the identity. As N.V. Terziev (1956) noted, such a role of the head and facial features is determined by the fact that this object can be described by more than a hundred features. V.A. Snetkov (1979) believed that the number of the largest features of the face is more than fifty, while he explained that in each large feature, with an in-depth study of it, it is

possible to distinguish comprising elements characterized by a certain set of features.

Thus, a person's face can be described by a much larger number of features than 50, going by the degree of detail of these features. However, it is not always possible to distinguish so many features. The researchers' calculations were performed proceeding from the signaletic photographs that most fully display the personal features to identify them, but even portraits made for identity documents, where the face is presented only full-face, allow for the identification of a person by the appearance features (VON BOTH and SANTOS, 2021). At the same time, there are cases of identification of a person by the image of a part of the face (including the eye, temple, cheek, and ear), the hand and other parts of the human body (in the presence of individualizing signs) (Gusev, 2003). Today, photo portraits and video portraits are exposed to a complex of factors that can change the reliability of the displayed person's appearance features. The key ones are as follows:

(1) factors of technical characteristics of video recording devices;

(2) factors of the video recording process;

(3) factors of the video playback process;

(4) factors of operation of the video recording medium (PODVOLOTSKY, 2019).

A review of the content of groups of factors allows noticing the presence of several key circumstances affecting the completeness and reliability of the appearance on the video (ILYIN, 2018). Among the disadvantages of the classification, attention is drawn to the excessive allocation of "factors of video recording conditions", since they are absorbed by "factors of the video recording process". It appears that the group of "factors of video storage conditions" should be supplemented with information about the parameters of the use of the video recording medium, which can be renamed into an operational factor that combines both the use and storage of the video recording medium. An urgent task of a preliminary study of portrait video recordings obtained using digital technologies of shooting and file processing is to detect signs and establish the fact of intentional interference with the original. In fact, this task is equivalent to determining the fact of changing the original content of an electronic document. Modern digital editing tools allow retouching not only static photo portraits, but also entire films, where fragments recorded in different settings and at separate times are combined (ILYIN, 2018).

To date, operational solutions in the field of identifying a video recording and its signs with a particular person have been achieved in the UK and the USA. One of the most technologically equipped cities is London, where about 420.000 CCTV cameras are installed, as well as in Beijing, where 470.000 cameras are installed, and Washington is in third place in the world with a massive gap – only 30.000 cameras. Some elements of facial recognition technology are used not only by the police, but also by Transport for London, the public transport operator, to monitor passengers, and British hospitals – for patients (NEWS PORTAL VEDOMOSTI, 2022). This facial recognition system, albeit helping the

police timely identify the criminal, still invades the privacy of citizens. At present, there is no legislative framework in the state that could regulate the privacy of citizens while satisfying the economic and legal component (VILKS and KIPANE, (2018).

There is also an issue in the United States concerning the introduction of advanced video surveillance cameras in public places and educational organizations. Schools create databases with photos of people who are forbidden to be on their territory, and if the SN Technologies software integrated into the cameras identifies them, the school administration receives an alert. In addition, the SN Technologies software can identify weapons in the hands of people (NEWS PORTAL VEDOMOSTI, 2022).

Within the framework of the "Safe City" program, over 4 thousand video cameras with a facial recognition system have been installed in Kyiv, which were primarily equipped with cameras at metro stations (GORDONUA.COM, 2022). For example, the practices of Japan demonstrate that it is possible to develop a security system that identifies a person by the pattern of blood vessels on the palm. For this, a camera is used that takes a picture of the user's palm, after which the built-in computer compares this picture with the images stored in the database (MELE et al., 2021). The camera operates in the near-infrared wavelength range, so the images reveal blood vessels located under the skin, the pattern of which is unique to each person, as well as the pattern on the retina and iris of the eye. When identifying a person, a special algorithm is used, which considers the number of blood vessels, their location, and localization of their intersection points (ALEKSANDROV, 2017).

As noted earlier, an innovation in the video recording system is the recognition of dynamic human properties, which include such features as voice, gait, facial expressions, handwriting, gestures, keyboard handwriting, personal signature, as well as behavioral characteristics based on features typical of subconscious movements in the process of reproducing any complex action. It appears very promising to use the biometric parameter "face geometry", where about 12–40 characteristic elements from the full available set are scanned. No less promising is the use of the biometric parameter "face thermogram", which uses cameras that capture infrared radiation and can operate even in complete darkness.

The recorded information signs do not depend on the facial temperature, nor on the plastic surgeries performed on it, nor on the ageing of the subject, and the infrared camera allows receiving a thermogram even at a considerable distance from the person who is its carrier. Such systems are already used for access control with a high degree of responsibility and reliability. They provide close to 100% recognition accuracy (ALEKSANDROV, 2017). As for the People's Republic of China, researchers have progressed in improving the video surveillance system and have done their studies in this area. In particular, in the 3D module, aligned local appearance images extracted using a dense three-dimensional assessment of a person's appearance are used in combination with global image and video embedding streams to study more detailed identification functions (SHI et al., 2022).

Furthermore, to overcome the influence of modality mismatch, the CMIL module provides a link between global image and video streams, interactively distributing temporal information in the video to the channels of image characteristics maps. Other Chinese scientists are developing a video-based reidentification system that is attracting increasingly more attention from researchers (LIU and WU, 2021). The critical issue for this task, in their opinion, is to learn how to reliably represent the characteristics of the video, which can be weakened by the interference of factors such as occlusion, lighting, background, etc. Many previous works use spatiotemporal information to represent pedestrian video, but correlations between parts of the human body are ignored. To take advantage of the interconnection between various parts, the researchers propose a new neural network of intra-frame and inter-frame graphs (I2GNN) to solve the problem of re-identification of a person based on video.

These facial recognition systems are used at Hong Kong International Airport, where new biometric technologies are used for faster and unhindered interaction with passengers at the airport. For example, a modern system called SmartGate is used in Australia. This is an automatic system that enables the passengers arriving at international airports in Australia to independently complete passport control without the airport staff. It uses biometric passport data and facial recognition technology to perform customs and immigration checks, which are usually performed by border service officers. The increasing use of facial recognition leads to the expansion of facial databases and an increase in the number of tracking cameras (BYLYEVA and LOBATYUK, 2021). However, such a number of cameras using biometrics and other data of citizens can be a potential threat when databases leak, which will generate a new number of crimes (VILKS and KIPĀNE, 2020).

Thus, the main problem for forensic investigation at this stage of the development of surveillance cameras is the inferior quality of recording and images. This problem leads various researchers to solve by using advanced software technologies (SUMARI et al., 2020). This practice demonstrates the advisability of research not only within the framework of using one type of expertise, but through a comprehensive examination, namely using special knowledge in the field of computer technology, habitoscopy, video technical expertise. In turn, the lack of an integrated approach and methodology leads to inefficient expenditure of not only human resources, but also the time frame that could be used.

CONCLUSIONS

This study is aimed at a full and comprehensive approach to considering the role of video materials in identifying the appearance features of a potential criminal. Based on the data obtained, the following conclusions were made. Firstly, the criminal procedure legislation of Ukraine is based on the principles of international law, which obliges to attribute any evidence to certain compliance parameters, within which they must be observed. In particular, it is necessary to observe the nature of relevance,

admissibility, and reliability. Within the framework of the subject under study, video materials involving a citizen should not only specifically name statistical features of their appearance, but also reliably correlate them with dynamic features. Today, the use of video surveillance systems involves such issues as quantitative and qualitative deformations of video material. To solve this problem, many states, such as the United Kingdom, the United States, and China, introduce modern achievements of computer software for better recognition of appearance. Such systems are total station, improved lenses, artificial intelligence system, infrared radiation, biomaterial collection, and quantitative magnification of video cameras.

Secondly, video materials obtained from CCTV cameras need to be analyzed. In these cases, personal identification is performed using forensic methods and invited experts. Thus, to identify the appearance features, the following examinations are performed: forensic, forensic medical, forensic portrait examinations, as well as numerous methods developed by the forensic science. To use the video as an evidence base in court, it is necessary to meet the criterion of legality. In this case, it is necessary to strictly observe the verified sources of information, without coming into contact with the private lives of other citizens. This condition is difficult to meet in the period of digitalization and globalization of society, which makes the scientific discussion on this subject an international issue. An increase in the number of methods and systems for recording a person's appearance, its static and dynamic features, is necessary for the recognition of persons who have committed a crime. Due to the fact that criminals are constantly improving ways of hiding their appearance features, forensic scientists, experts, law enforcement agencies face the task of developing a new diagnosis of the criminal's identity not only by external, but also by biometric and other data. An enormous amount of research is involved in this area,which allows recognizing gait, movement, sound, if there is such a recording, as well as editing and video recording errors.

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