

## Chapter 5: Brazil

**Pedro N. Mizukami, Oona Castro,  
Luiz F. Moncau, and Ronaldo Lemos**

**Contributors:** Susana Abrantes, Olívia Bandeira, Thiago Camelo, Alex Dent, Joe Karaganis, Eduardo Magrani, Sabrina Pato, Elizete Ignácio dos Santos, Marcelo Simas, and Pedro Souza



We have some problems in Brazil at this time.

—*Jack Valenti, president of the Motion Picture Association of America*<sup>1</sup>

### Introduction

As in many other developing countries after World War II, Brazilian approaches to intellectual property were shaped by import substitution strategies designed to foster the growth of local industry. High tariffs on imported goods and a narrow scope for patentable technologies were important elements of these strategies. In the case of pharmaceutical patents—which Brazil abolished in 1969—health policy also played a large role: for many categories of medicine, Brazil had sufficient capacity to meet its own needs at low cost.

As the United States led the push for stronger global IP norms in the late 1970s and 1980s, most IP-exporting countries revised their laws to extend protection to emerging fields of technical innovation, including pharmaceuticals and software. Most developing economies were reluctant to follow. Brazil, India, and South Korea, in particular, maintained lower IP protection for such goods, resulting in sharp disputes with the United States in the 1980s.<sup>2</sup>

Tensions over intellectual property protection dominated the Brazil-US relationship during the period, first in the context of US efforts to roll back Brazilian protection of its nascent computer industry (1985) and later in relation to US attempts to force Brazilian adoption of pharmaceutical patents (1987). Brazil acceded quickly to US demands in the first case, establishing copyright for software and removing import restrictions on computer equipment. But it held its ground on pharmaceuticals, leading to US-imposed sanctions under Section 301 of the US Trade Act (Sell 2003:90; Bayard and Elliott 1994:187–208). With negotiations over the new World Trade Organization (WTO) drawing to a close, however, and broader IP obligations for pharmaceuticals imminent, Brazil gave up this position in 1990. Consistent with its obligations under the WTO's TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement, Brazil established pharmaceutical patents in 1996.

1 See Valenti (2003).

2 For a thorough overview, see Bayard and Elliott (1994).

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## Acronyms and Abbreviations

<b>ABCF</b>	Associação Brasileira de Combate à Falsificação (Brazilian Association for Combating Counterfeiting)	<b>ESAF</b>	Escola de Administração Fazendária (Superior School of Public Revenue Administration)
<b>ABDR</b>	Associação Brasileira de Direitos Reprográficos (Brazilian Association of Reprographic Rights)	<b>ETCO</b>	Instituto Brasileiro de Ética Concorrencial (Brazilian Institute for Ethics in Competition)
<b>ABES</b>	Associação Brasileira das Empresas de Software (Brazilian Association of Software Companies)	<b>Fecomércio-RJ</b>	Federação do Comércio do Estado do Rio de Janeiro (Rio de Janeiro Federation of Commerce)
<b>ABPD</b>	Associação Brasileira de Produtores de Discos (Brazilian Record Producers Association)	<b>FGV</b>	Fundação Getulio Vargas (Getulio Vargas Foundation)
<b>ABPI</b>	Associação Brasileira da Propriedade Intelectual (Brazilian Intellectual Property Association)	<b>FIESP</b>	Federação das Indústrias do Estado de São Paulo (São Paulo Federation of Industries)
<b>ABRELIVROS</b>	Associação Brasileira de Editores de Livros Escolares (Brazilian Association of Textbook Publishers)	<b>FNCP</b>	Fórum Nacional contra a Pirataria e a Ilegalidade (National Forum against Piracy and Illegality)
<b>ACTA</b>	Anti-Counterfeiting Trade Agreement	<b>GDP</b>	gross domestic product
<b>AmCham</b>	American Chamber of Commerce	<b>GIPI</b>	Grupo Interministerial de Propriedade Intelectual (Inter-Ministerial Intellectual Property Group)
<b>ANGARDI</b>	Associação Nacional para Garantia dos Direitos Intelectuais (National Association for Safeguarding Intellectual Rights)	<b>GNCOC</b>	Grupo Nacional de Combate às Organizações Criminosas (National Group for Combating Criminal Organizations)
<b>APCM</b>	Associação Antipirataria Cinema e Música (Film and Music Anti-Piracy Association)	<b>GSP</b>	Generalized System of Preferences
<b>BPG</b>	Brand Protection Group	<b>HADOPI</b>	Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet (High Authority for the Diffusion of Works and the Protection of Rights on the Internet)
<b>BSA</b>	Business Software Alliance	<b>IDC</b>	International Data Corporation
<b>CBL</b>	Câmara Brasileira do Livro (Brazilian Book Chamber)	<b>IDEC</b>	Instituto Brasileiro de Defesa do Consumidor (Brazilian Institute for Consumer Defense)
<b>CNC</b>	Confederação Nacional do Comércio de Bens, Serviços e Turismo (National Confederation of the Commerce of Goods, Services, and Tourism)	<b>IEL</b>	Instituto Euvaldo Lodi (Euvaldo Lodi Institute)
<b>CNCP</b>	Conselho Nacional de Combate à Pirataria e Delitos contra a Propriedade Intelectual (National Council on Combating Piracy and Intellectual Property Crimes)	<b>IFPI</b>	International Federation of the Phonographic Industry
<b>CNI</b>	Confederação Nacional da Indústria (National Confederation of Industry)	<b>IIPA</b>	International Intellectual Property Alliance
<b>CPI da Pirataria</b>	Comissão Parlamentar de Inquérito da Pirataria (Parliamentary Commission of Inquiry on Piracy)	<b>IMC</b>	Inter-Ministerial Committee on Combating Piracy (Comitê Interministerial de Combate à Pirataria)
<b>DEIC</b>	Departamento de Investigações sobre o Crime Organizado (Department of Investigations of Organized Crime, São Paulo Civil Police)	<b>INPI</b>	Instituto Nacional da Propriedade Industrial (National Industrial Property Institute)
<b>DRCPIM</b>	Delegacia de Repressão aos Crimes contra a Propriedade Imaterial (Police Unit for the Repression of Crimes against Immaterial Property, Rio de Janeiro Civil Police)	<b>IP</b>	intellectual property
<b>ECAD</b>	Escritório Central de Arrecadação (Central Collecting Office)	<b>IP address</b>	Internet protocol address
<b>ESA</b>	Entertainment Software Association	<b>ISP</b>	Internet service provider
		<b>LAN</b>	local area network
		<b>MPA</b>	Motion Picture Association
		<b>MPAA</b>	Motion Picture Association of America
		<b>PEL</b>	“Projeto Escola Legal” (Legal School Project)
		<b>P2P</b>	peer-to-peer
		<b>RIAA</b>	Recording Industry Association of America
		<b>SENAI</b>	Serviço Nacional de Aprendizagem Industrial (National Learning Service of Industry)

## Acronyms and Abbreviations

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<b>SINDIRE-CEITA</b>	Sindicato Nacional dos Analistas Tributários da Receita Federal do Brasil (National Syndicate of the Tax Analysts of the Brazilian Federal Revenue Service)
<b>SNEL</b>	Sindicato Nacional dos Editores de Livros (National Union of Book Publishers)
<b>TBA</b>	Tri-Border Area (between Brazil, Paraguay, and Argentina)
<b>TPM</b>	technical protection measures
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UBV</b>	União Brasileira de Vídeo (Brazilian Video Union)
<b>UFRJ</b>	Universidade Federal do Rio de Janeiro (Federal University of Rio de Janeiro)
<b>Unafisco</b>	União dos Auditores Fiscais da Receita Federal do Brasil (Union of the Fiscal Auditors of the Brazilian Federal Revenue Service)
<b>Unicamp</b>	Universidade de Campinas (University of Campinas)
<b>USP</b>	Universidade de São Paulo (University of São Paulo)
<b>USTR</b>	Office of the United States Trade Representative
<b>WIPO</b>	World Intellectual Property Organization
<b>WTO</b>	World Trade Organization

The respite from US pressure was short-lived, however. By the end of the 1990s, Brazil was again in the crosshairs of the Office of the United States Trade Representative (USTR)—this time for alleged failures of copyright enforcement. In 2000, the International Intellectual Property Alliance (IIPA) filed a petition requesting a review of Brazilian trade privileges under the US’s Generalized System of Preferences (GSP) program—a request the USTR granted in 2001. In 2002, the USTR placed Brazil back on its “Priority Watch List,” where it remained through 2006. Since the creation of the Special 301 process in 1989, Brazil has appeared on the “Watch List” nine times, the “Priority Watch List” ten times, and the “Priority Foreign Country” list—the highest level and the prelude to trade sanctions—once (see table 5.1).

**Table 5.1** Brazil’s Special 301 Status, 1989–2010

1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
PWL	PWL	PWL	PWL	PFC	SM	PWL	WL	WL	U	WL
2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL

The Brazilian government responded to this new round of pressure by revamping its approach to enforcement. Special 301 warnings clearly played a role, as did fear of a wider deterioration of trade relations.<sup>3</sup> As one private-sector consultant recollected in an interview:

It was a big scandal because . . . what happened? Shoe exporters, for example, panicked. People in Rio Grande do Sul went nuts: “I, a shoemaker, who makes shoes for the US . . . I’m going to lose my benefits because there’s DVD piracy in Brazil? What do I have to do with that?” Then they lobbied through the CNI [National Confederation of Industry], in Brasilia, to improve protection.

Industry groups had also become much better organized and better able to coordinate pressure on governments, both domestically and internationally. By the turn of the millennium, all of them were pushing to expand enforcement in major emerging markets.

As in many other countries, IP enforcement in Brazil was restructured through policy changes at the legislative and executive levels. And as elsewhere, the scaling up of enforcement was challenging for both state and private actors, resulting in several major reorganizations in less than a decade. The first such effort in Brazil was the creation, in 2001, of an Inter-Ministerial Committee on Combating Piracy (IMC) tasked with coordinating enforcement

<sup>3</sup> Throughout the 1990s, the United States was Brazil’s largest trading partner by a significant margin, with roughly US\$20 billion in exports and US\$26 billion in imports in 2009. The United States was surpassed for the first time by China in April 2009 (Moore 2009).

## Anti-Piracy Spectacle

In Brazil, as elsewhere, the government's commitment to enforcement gives rise to public spectacles meant both to educate the public and to signal cooperation with industry. In 2005, a federal law established December 3 as the National Day of Combating Piracy and Biopiracy. Since then, every December 3 has been marked by the Federal Revenue Service's public destruction of thousands of pirated and blank CDs and DVDs

and large quantities of counterfeit goods. In 2009, this spectacle involved the destruction of three tons of seized merchandise.

Globally, such events have given rise to one of the few iconic images of the enforcement wars: the destruction of large piles of pirated disks (crushed by steamrollers, smashed with sledgehammers, or trampled by schoolchildren or, in India, elephants).

efforts across the different agencies and ministries with a stake in the issue. Industry concerns about the responsiveness of the committee manifested themselves quickly.<sup>4</sup> Under pressure from the National Congress, the federal executive established a Parliamentary Commission of Inquiry on Piracy (CPI da Pirataria) in 2003. The recommendations of this commission, in turn, resulted in the 2004 creation of a new anti-piracy organization within the Ministry of Justice, called the National Council on Combating Piracy and Intellectual Property Crimes (CNCP). In response to industry demands, both government ministries and private-industry groups were seated on the council, providing industry groups a level of direct access to government that the USTR has described as a model of public-private partnership (USTR 2007:30).

The CNCP soon became the main forum for anti-piracy efforts in Brazil and—through regular media coverage—the main public face of Brazilian enforcement. It also became the principal forum for developing IP enforcement policy at the federal level, culminating in the release of a National Plan on Combating Piracy in 2005 (and a substantially revised version in 2009).

Government attentiveness to the enforcement agenda was soon rewarded: Brazil was demoted from the Priority Watch List to the Watch List in 2007. Industry complaints have not stopped, though. Although the USTR (2010:29) expresses satisfaction with the government's efforts, noting that "Brazil continued to show a commitment to fighting counterfeiting and piracy and to strengthening its enforcement efforts," it still complains about "significant levels of piracy and counterfeiting." Concerns about patent law, book and Internet piracy, and

4 Less than a year after its creation, the IIPA complained that "the IMC has not produced any document, has not taken any action, nor has it manifested any indication that it intends to take any action. Indeed, the only thing that we have heard from the commission is that it needs considerably more time to develop its ideas. This lackadaisical attitude in the face of debilitating piracy is simply not tolerable, and should not be countenanced. The private sector has plenty of ideas about actions that the government could take that would begin to address the piracy situation. The IMC cannot be permitted to ruminate indefinitely" (IIPA 2002:73).

Brazil's refusal to sign the WIPO (World Intellectual Property Organization) Internet Treaties are also cited as reasons for keeping Brazil on the "Watch List." The IIPA, which in 2006 noted Brazil's "definite shift in political willingness" to combat piracy, has also kept up the pressure. In its 2010 recommendations to the USTR, it continues to complain about the lack of deterrent penalties for piracy, the low number of convictions, and the spread of online copyright infringement, among other issues, leading to an extensive list of demands for further legislative action and government engagement.

Given its extensive cooperation with both the US government and IP stakeholders, the Brazilian government now routinely contests the portrayal of Brazil as a pirate nation. The self-promotional activities of the CNCP, which celebrate cooperation with the private sector and CNCP victories against piracy, are an important part of this pushback (Ministério da Justiça 2005a, 2005b, 2006, 2009).

Major changes in Brazilian policy regarding the Internet, intellectual property, privacy, education, and law enforcement hinge on the stakeholder politics and evidentiary practices underlying these two narratives: Brazil, the pirate nation, and Brazil, winning the fight against piracy. Although Brazilian legal literature on copyright law has grown and, on balance, improved in the past decade, the wider interaction of law, policymaking, enforcement practices, and consumer behavior remains very poorly documented and, perhaps above all, very poorly integrated into broader synthetic accounts that can provide perspective on these issues.

This chapter is an attempt to tie together several of these lines of inquiry, enabling what should become much more routine scrutiny of public debate and policymaking on copyright, piracy, and enforcement. In contrast to the other country chapters in this report, the Brazil chapter focuses primarily on the domestic politics of enforcement policymaking, on the evidentiary discourses that frame policy debates, and on the wider efforts to build an "intellectual property culture" in which piracy withers away.

After nearly a decade of expansion of enforcement activities, and as Brazil faces decisions about extending enforcement practices to the Internet, we also think that some effort to evaluate the country's overall enforcement campaign is timely. From our perspective, the choice between Brazil as a pirate haven and Brazil as a stalwart in the war against piracy is inapt. Although the Brazilian government has done a great deal in the past decade to comply with US demands, we have seen no evidence—in Brazil or elsewhere for that matter—that suggests that piracy is on the decline.<sup>5</sup> On the contrary, it shows every sign of growing as technologies for copying and sharing media become cheaper, more widespread, and more varied.

What we see, instead, is an enforcement debate in which the cooperation of the Brazilian state, not the impact of its initiatives, has become the main measure of success. We see a debate in which the common front between state and industry actors against hard-goods counterfeiting hides considerable disagreements over how to move forward in the emerging "culture of the

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5 In absolute terms, at least. Piracy may, on the other hand, make up a shrinking share of some markets as they grow—as the Business Software Alliance argues with respect to software piracy in Brazil.

copy” (Sundaram 2007), with little government or public enthusiasm for the expansion of “repressive measures” and little industry interest in conversations about business models or access to media. “Educational measures” have become the preferred way out of this stalemate, in the hope that “respect for intellectual property” can be built over time. But a close look at the content of these measures reveals a degree of disconnection from consumer experience that makes such cultural change extremely unlikely. What we can hope for, instead, is a more honest, transparent, and accountable politics of intellectual property in Brazil, in which policymaking is calibrated to the needs—and realities—of contemporary Brazilian life.

## The Legal Framework for Copyright Enforcement

Brazil’s law enforcement agencies, various municipal authorities, and prosecutors all have authority to enforce copyright infringement. More resources should be provided to law enforcement.

- *IIPA 2009 Special 301 Report: Brazil*

During the first years of the Special 301 process, Brazil was subject to constant criticism of its allegedly inadequate standards for protecting intellectual property. Brazil’s problems, the USTR and American industry groups argued, included both weak laws and weak enforcement of those laws.

When Brazil introduced new, TRIPS-compliant IP legislation in the mid-1990s, the USTR responded approvingly. As a reward for the 1998 enactment of “modern laws to protect computer software and copyright” (USTR 1998), Brazil was delisted from Special 301 for the first (and so far, only) time in the history of the program.

Brazilian copyright law now exceeds TRIPS requirements in key respects. When the current copyright statute came into force in 1998, the term of protection was increased from the life of the author plus sixty years to life plus seventy years—both in excess of the Berne Convention standard adopted in TRIPS. The circumvention of technical protection measures (TPM), such as encryption on DVDs, was made a civil offense, and the list of exceptions and limitations to copyright was significantly narrowed. In practice, some of the most obvious exceptions and limitations in Brazil fall well short of international standards, with the rules governing the reproduction of “small excerpts” of larger works (Law 9.610/98, Article 46, II), for example, ambiguous to the point of providing no meaningful guidance (Mizukami et al. 2010; Souza 2009; Branco 2007). Consumers International’s *IP Watchlist Report* rates Brazilian legislation as the seventh worst in the world due to the obstacles it creates to access to knowledge (2010:2).

Further strengthening of IP protections, especially with regard to the Internet, remains a major industry concern. Brazil has notably refused to adopt some of the post-TRIPS standards

that have emerged in the past fifteen years, such as the 1996 WIPO Internet Treaties.<sup>6</sup> But since the late 1990s, enforcement, not stronger laws, has been the central preoccupation of industry stakeholders, the IIPA, and the USTR. Much of their attention has fallen on two issues: (1) the expansion of police investigations and arrests (*ex officio*) and (2) faster, more reliable punishment through the criminal justice system.

For the most part, industry groups and the USTR have continued to praise the institutional side of Brazil's efforts in these areas—notably the role of the CNCP and corresponding improvements in coordination between law enforcement agencies at the federal level. But the courts are a different story: there have been very few convictions for piracy and fewer serious fines or prison sentences. The IIPA (2010:146) blames “a long litany of systemic problems and bottlenecks” in both civil and criminal cases for this situation, as well as a lack of “prosecutorial attention” to copyright infringement.

As the IIPA itself notes, however, these problems are not specific to IP enforcement but relate to Brazilian law enforcement in general. A crowded prison system,<sup>7</sup> complex procedural law,<sup>8</sup> and a court system operating well above capacity<sup>9</sup> are simply unable to manage the flow of cases that would follow from mass enforcement of copyright laws, particularly when there are so many more serious offenses to be prosecuted. In the words of a software industry representative:

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6 According to an informant within government, there is strong sentiment that these treaties are not in Brazil's best interests and that current international IP law provides an adequate level of protection for rights holders. The main reason for Brazil's refusal to sign the WIPO Internet Treaties, according to this informant, is concern that requirements for the legal protection of technical protection measures used for digital media could override the already scant limitations and exceptions included in domestic copyright law, coupled with skepticism about their efficacy. This stance is largely political: Brazilian copyright law already provides protection for TPM and rights-management information in Law 6.610/98, Article 107, at a level that some authors view as compliant with the treaties, even if the IIPA claims otherwise (Ascensão 2002). Brazil has also objected to other treaties that legitimize the WIPO Internet Treaties as “soft law” standards, such as the Budapest Convention on Cybercrime, which relies in part on the WIPO Internet Treaties.

7 According to official data, in December 2009, Brazil had a total prison population of 473,626 prisoners (all imprisonment regimes included) within a system designed for 294,684. Ministry of Justice, Prison System Database, <http://portal.mj.gov.br/etica/data/Pages/MJD574E9CEITEMID-C37B2AE94C6840068B1624D28407509CPTBRNN.htm>.

8 Procedural law is mainly found in the lengthy Civil Procedure Code and Penal Procedure Code. Together with the copyright and software laws, these form the core of copyright and enforcement legislation. Border regulations are also relevant (Decree 6.759/09), as are a few municipal ordinances, mainly in the context of street-level piracy.

9 Brazilian state courts of appeal had an average workload of 2,180 cases per judge in 2009 (CNJ 2010:133). At the lower level, state courts had an average workload of 2,931 cases per judge (*ibid.*:228).

It's not that few people get arrested; they do get arrested. It's just that few people remain in prison. Why? Because of the order of priority between murder, robbery, rape, and the crime of piracy. So I think what frustrates authorities the most is not just arresting criminals but keeping them under arrest. Why? Because the Brazilian prison system is in need of restructuring, and [that] frustrates some of these professionals, who could be fighting this crime in a more effective way.

Industry requests for special IP courts and dedicated police units are easy to understand in this context but also hard to justify when weighed against other social needs. For the most part, the Brazilian government has ignored these requests, shielded by Article 41.5 of TRIPS, which states that members have no obligation to create a judicial system for IP enforcement distinct from the enforcement of law in general. Nor are members required to dedicate more public resources for IP enforcement than for law enforcement in general.<sup>10</sup> A major restructuring of the Brazilian criminal justice system of the kind desired by the IIPA (and by many other critics) will not happen anytime soon, nor will resources for law enforcement dramatically increase in the near future. The future of enforcement in Brazil, in this environment, looks much like the present.

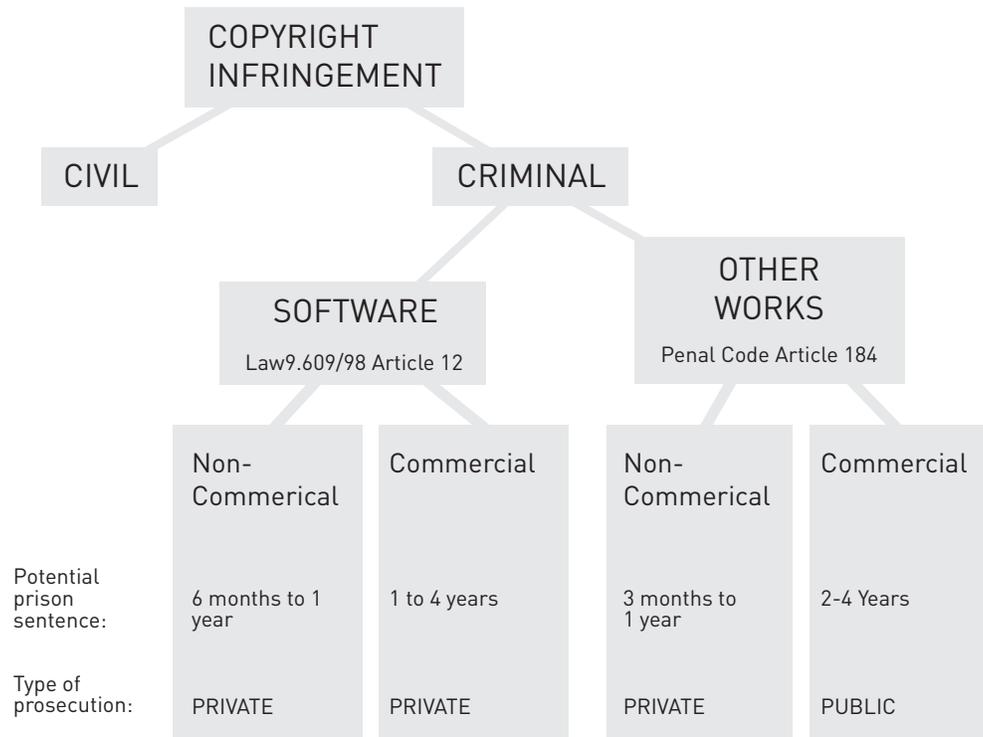
### **Criminal Enforcement**

Under Brazilian law, all infringement is subject to criminal prosecution. Two laws are paramount here: Article 12 of the Software Law and Article 184 of the Penal Code (which applies to all copyrightable works other than software).<sup>11</sup> Infringement can be pursued as either a criminal or civil matter, but in practice industry stakeholders place most of the burden on criminal law, reflecting assumptions about the deterrent effects of criminal penalties and—more important—industry preferences for shifting enforcement costs to the public sector. Criminal prosecution is usually carried out by public prosecutors and other law enforcement authorities. The costs of civil litigation, in contrast, fall more heavily on plaintiffs.

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10 TRIPS Article 41.5 was based on a proposal by India and is one of the few provisions in the enforcement section of the agreement where “developing countries’ views made a difference” (UNCTAD/ICTSD 2005:585). It effectively serves as a safeguard against industry demands for preferential judicial systems.

11 This dual track has led to differences in the penalties and types of prosecution applicable to otherwise very similar types of infringement. When the last major copyright-related legislation was passed in Brazil in 2003—Law 10.695, which reformed parts of the Penal Code and the Penal Procedure Code—the Software Law (Law 9.609/98) was not updated to match its counterparts.

**Figure 5.1** Penalties for Copyright Infringement under Brazilian Law

The high demands on police and judicial resources mean that criminal copyright enforcement in Brazil is highly selective. For the same reason, Brazilian judges are generally reluctant to apply the full penalties available under the law. The informally observed minimum-penalty policy ensures that penalties throughout the system are usually applied at the minimum required level (Nucci 2009). When a case of commercial copyright infringement is successfully prosecuted, consequently, the initial result may be a two-year sentence, but this is nearly always commuted to a less severe penalty, such as community service. Where crimes have a minimum penalty of one year or less of imprisonment—as with non-commercial software-related infringement—prosecution can be suspended at the discretion of the prosecutor and judge.<sup>12</sup> This has nothing to do with commitments to IP enforcement per se, but rather with the triaging of cases in an overcrowded criminal justice system.

Although the general rule in Brazil is that crimes are publicly prosecuted, Brazilian criminal law also has provisions for private prosecution before a criminal court. In the copyright field, this applies in cases of software infringement and non-commercial infringement, which must be privately prosecuted.<sup>13</sup> In such cases, police have a duty to investigate if the victim requests

12 Law 9.099/95, Article 89.

13 This is one of the major differences between enforcement under the Software Law and the Penal Code—and a source of irritation for the software industry, which would like to shift prosecution costs to the public sector. There is a basis for this, according to the IIPA (2010:153), in a provision of the 1998 Software Law for any crime of software copyright infringement that also involves tax evasion

it, but prosecution is conducted entirely by the victim, rather than by a public prosecutor. Copyright infringement for commercial purposes, in contrast, is always investigated by the police and publicly prosecuted—though prosecutors can petition judges to archive cases based on lack of evidence and are not required to follow up on indictments made in the course of preliminary investigations.<sup>14</sup>

Despite or, arguably, because of the scope of criminal copyright liability, large categories of infractions fall below the enforcement threshold—especially those committed by consumers. No one has been arrested or criminally prosecuted for taping a TV show, for example, despite the fact that time-shifting is technically illegal in Brazil. Because non-commercial infringement requires private prosecution, it is almost never pursued in court, nor is the buying or receipt of pirated and counterfeited goods, even in commercial settings (despite the criminalization of *receptação*, the act of receiving goods that are illegally obtained or produced).<sup>15</sup> The Ministry of Justice has endorsed this policy through the CNCP and generally speaks of educating rather than prosecuting consumers.

### Civil and Administrative Enforcement

With the notable exceptions of the Business Software Alliance (BSA) and ECAD, the Brazilian performance rights management organization, civil litigation is rarely pursued by rights holders in Brazil.<sup>16</sup> The non-commercial infringement subject to such litigation rarely warrants the time and expense. BSA use of the civil system is different, first because its primary targets are businesses, and second because it has succeeded in characterizing infringement within businesses as the publication of “fraudulent editions” of the work, which are subject to very high penalties.<sup>17</sup>

Following in the footsteps of the Recording Industry Association of America (RIAA) in the United States, the IFPI (International Federation of the Phonographic Industry) and its Brazilian affiliate the ABPD (Brazilian Record Producers Association) have explored civil

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to be publicly prosecuted. However, fiscal offenses in Brazil only result in criminal prosecution once administrative procedures have come to a close (see Súmula Vinculante 24, issued by the Supreme Federal Court).

- 14 Private prosecution is still the rule for the crimes of trademark and patent infringement, making this a major item on the legislative agenda for IP industry lobbyists, who would like to see prosecution costs shifted to the public sector. Penalties related to patent and trademark infringement include fines or imprisonment, ranging from three months to a year. Some specific cases, such as the sale of fake medicines, are more severely punished, with penalties of between ten and fifteen years in prison (Penal Code, Article 273).
- 15 Penal Code, Article 180.
- 16 Criminal prosecution is left in the hands of the local software association, the ABES (Brazilian Association of Software Companies).
- 17 Law 9.610/98, Article 103. The law provides for damages of up to three thousand times the value of the infringing work in such cases, allowing for very high awards even where routine office software is concerned. For further background on these cases, see Souza (2009:297–305).

litigation strategies for consumer infringement. In 2006, suits were initiated against twenty users of P2P (peer-to-peer) networks as a test of the receptiveness of Brazilian courts to mass litigation against file sharers. This effort has been unsuccessful so far, primarily due to concerns that requests for identification of the users would violate privacy protections. When a judge ordered ISPs (Internet service providers) to comply with IFPI requests for information, the process also ran up against a lack of data-retention requirements in Brazilian law, which made the identification of users impossible (IIPA 2009:161–62).

To the annoyance of the copyright industries, Luiz Paulo Barreto, then president of the CNCP (and, from February 2010 to January 2, 2011, Brazil's Minister of Justice), came out against the lawsuits. The IIPA, in particular, was not pleased: "The head of the CNCP has expressed publicly his disagreement with the campaign, which has had a detrimental effect on judges evaluating the cases and diluted the needed deterrent" (IIPA 2007:215).

Administrative law offers an additional set of enforcement strategies for rights holders. These are often faster, less rigorous, and most important, cheaper for rights holders than judicial procedures—not least because the burden of storing or destroying seized goods falls entirely on the public sector.<sup>18</sup> Border-control, zoning, commercial-licensing regulations, and customs and sales taxes all provide common triggers for administrative action. At Brazil's borders, for instance, suspect cargo can be seized by customs agents either following a complaint from rights holders or *ex officio* (without a complaint) if copyright or trademark infringement is suspected. In cases where goods have already entered the country, administrative procedures can be invoked if infringement can be associated with tax evasion or the misuse of public space. Zoning ordinances, for example, have been used repeatedly to shut down pirate markets (usually only temporarily), including one of the most famous in São Paulo, the Galeria Pagé (G1 2009). Police investigations and criminal charges are generally unnecessary in these contexts.

## The Legislative Agenda

Industry representatives interviewed for this project unanimously shared the view that stronger enforcement is necessary but expressed different degrees of satisfaction with the current framework. Improved enforcement of existing law was, overall, a more frequent concern than demands for substantive legislative change. Nonetheless, industry associations have devoted considerable time and energy to building a legislative agenda on enforcement involving modifications to procedural law, higher penalties for copyright infringement, and stronger measures against online infringement.

Legislative proposals incorporating many of these recommendations have been taken up by a congressional commission of the Chamber of Deputies, the CEPIRATA (Special Commission to Analyze Legislative Proposals that Aim to Combat Piracy). Between May 2008 and August 2009, the CEPIRATA held a number of hearings and seminars to evaluate legislative strategies

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18 In a criminal proceeding, industry bears the costs of the storage of goods seized in raids until the case is finally adjudicated. Every seized item, moreover, must be examined by a publicly appointed expert.

for strengthening enforcement. These included diminished requirements to retain and store seized goods for evidence; the right to base charges on a sample of infringing goods, rather than a complete itemization of them (a relevant issue when dealing with large quantities of pirated discs, for example); and the harmonization of penalties for software and other types of infringement (Câmara dos Deputados 2009b). The first two demands are now part of Bill 8052/2011, presented to the National Congress by President da Silva on December 31, 2010 and drafted based on CNCP recommendations.

### **INTERNET LEGISLATION: THE STATE OF PLAY FOR 2011**

There is no specific legislation regarding data retention or ISP liability in Brazil. Current general-liability rules offer no strong guidance on the issue, and judges have tended to apply strict liability based either on the Civil Code or the Consumer Rights Code, though divergent opinions do occur (Lemos et al. 2009). The application of copyright law to online intermediaries and their users, consequently, remains unsettled in Brazil.

Data-retention requirements and a number of other measures for facilitating the policing of online activity came to the foreground in a debate catalyzed by the 2005 “Azeredo Bill” (Bill 84/99), so named after its main proponent in Congress, Senator Eduardo Azeredo. The Azeredo Bill is an attempt to strengthen the legal infrastructure for investigating and prosecuting Internet crime. It is partly inspired by the Council of Europe’s 2001 Budapest Convention on Cybercrime but has origins in older Brazilian proposals as well. The bill is backed by a number of powerful public and private organizations, including the FEBRABAN (Brazilian Bank Federation), the Brazilian Federal Police, and the IIPA. The IIPA supports the bill in the hope that it will facilitate the prosecution of individuals and non-commercial intermediaries involved in file sharing and other forms of online infringement—in the first instance, by requiring longer retention of data on user behavior by service providers. In interviews, a private-sector informant involved in enforcement described the bill specifically as an instrument for suing users of file sharing networks.

Public reaction to the Azeredo Bill, however, was strongly negative and well organized. Concerns about user privacy and anonymity became the basis for a large-scale campaign called the Mega Não movement (literally, “mega no,” as in a big “no” to Bill 84/99), which staged a number of public demonstrations and media debates. Perceptions of the bill as a stalking horse for stronger copyright enforcement also featured prominently in this opposition.

In 2009, the intensity of resistance led to calls for a wider public consultation on potential changes to Internet law. In response, the Ministry of Justice initiated an ongoing process, called the “Marco Civil,”<sup>19</sup> that aims beyond policing and enforcement toward a broader spectrum of Internet regulation issues, including net neutrality, Internet access, and users’ rights. Public consultation concluded in May 2010, and a draft bill will be sent to Congress in early 2011.

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19 Roughly translated, the Marco Civil means “a civil framework” for Internet law, as opposed to the criminal framework proposed by the Azeredo Bill.

The Marco Civil does not deal with IP law directly but rather with securing the openness of the Internet, with fundamental user rights and principles, and with ISP liability for infringement conducted over their networks. These boundaries also reflect a decision to separate consideration of copyright issues proper into a second draft bill presented for public consultation in mid-2010 by the Ministry of Culture.

Predictably, the Marco Civil consultation revealed a wide range of tensions between different rights and interests. Freedom of speech, anonymity, privacy, and access rights were topics of heated debate. Around two thousand contributions were received, including some thirty by organizations such as the IIPA, the IFPI, and the Brazilian consumer rights association the IDEC (Brazilian Institute for Consumer Defense).

Meanwhile, the Azeredo Bill has stalled. According to an informant within Congress, “projects that are controversial with the social networks [that is, civil society groups] are being avoided by government.” An attempt in 2009 by Deputy Bispo Gê to introduce “graduated-response” legislation that would require ISPs to disconnect users accused by rights holders of multiple infringements resulted in so strong a backlash that he had to withdraw the proposal (Pavarin 2009b).

### **GRADUATED RESPONSE**

Despite the failure of the Bispo Gê bill, graduated response is still a central part of the industry agenda for Brazil. Some of the contributions to the Marco Civil, such as that of the ABPD, explicitly asked for a regime based on either the French HADOPI (High Authority for the Diffusion of Works and the Protection of Rights on the Internet) model or the British Digital Economy Act—both of which include procedures for terminating the Internet access of repeat infringers. The Marco Civil’s net neutrality provisions were also criticized for failing to differentiate legal from illegal content and for creating obstacles to technological solutions to curb P2P file sharing.

Changes to statutory law, however, are only one of the ways forward for graduated response in Brazil. Responding to recording industry requests, the Ministry of Culture has been presiding over an ISP working group that facilitates meetings between ISPs, telecommunications companies, and the recording, film, and software industries. The working group is focused on achieving a consensus between ISPs and copyright industries on the issue of P2P file sharing. In the words of a private-sector member:

We can find out who is [infringing on copyrights], via the IP [Internet protocol] address of that user. The biggest discussion is around who owns the information regarding this IP address . . . And then we discuss to what extent the ISP is responsible for the crime, or not. Does the ISP invade [users’] privacy or not? Does the ISP have that right or not? That’s what we discuss concerning Brazil and Brazilian legislation . . .

As IP owners, we believe that yes, the ISP is co-responsible and that it should act at least in educating users that they cannot commit this crime. A comparison that I like to make is the following: I'm the landlord of a house. Do I lack responsibility for what goes on inside? Depending on the actions of my tenant, yes I'll be held responsible. So why not take this same concept to ISPs? [ISPs] are the landlords [of the Internet], but what about what happens there? We have great support from ISPs, not in relation to peer-to-peer, but for example, in [certain cases of] piracy. Pirate software being sold through the Internet, [fake] certificates of authenticity being sold through the Internet. When we discover that, we ask providers to take down that information, and they effectively take them down. What we're discussing along with the Ministry [of Culture] is the question of peer-to-peer specifically.

Unlike the Marco Civil consultation, this discussion has been carried out entirely behind closed doors. News of the working group's existence emerged only in 2009. The IIPA's 2009 country report for Brazil mentions it, as do the Ministry of Justice and the ABPD in their sections of the annual report from the CNCP (Ministério da Justiça 2009). Media coverage of these meetings has so far been nonexistent.

In our interviews, members of the ISP working group expressed fear that the negative publicity and controversy surrounding similar laws in other countries (such as the French HADOPI law) could hurt attempts to implement graduated-response measures in Brazil. Informants mentioned that the preferred strategy was to associate the Brazilian approach with the "British model," which at the time (before the passage of the Digital Economy Act and the June 2009 publication of the Digital Britain report) envisioned only reducing the bandwidth of so-called heavy uploaders rather than cutting off their Internet access altogether.

Although this work was far from reaching its conclusion when our interviews took place, there seemed to be consensus among industry representatives that bandwidth reduction was the appropriate penalty for P2P infringement, exercisable through the guilty party's ISP contract. As one film industry representative observed:

I'm not in favor of the invasion of anyone's private life, or for the surveillance of whatever someone's doing . . . No one is. I just think that there should be controls, in the sense that the contracts that people sign with provider companies be enforced. Every contract between an individual and an ISP presupposes that the individual will not engage in illegal conduct, will not make [illegal] downloads. That's in the contract. So I'm not in favor of knowing the sites you browsed last night, but if there is [an illegal] download, there should be a manner for us to alert this person and to make him or her stop doing that.

This means of implementing graduated response has the notable advantage, for rights holders, of diminishing or obviating the role for judicial or administrative oversight: rights holders

would simply notify ISPs that infringing content was shared by a particular IP address, and the ISP would relay the notification to the user. After repeat violations (the so-called three strikes), the ISP would impose the penalty. If subscribers were to challenge this action, they would do so in the context of a contractual dispute, not as a deprivation of a basic right. This strategy also sidesteps the need for new law.

The compatibility of such penalties with existing Brazilian law, especially consumer law, remains an open question, even in the context of voluntary contracts for services. Variations on this model in which the courts play a role have also been discussed, including versions based on France's HADOPI law, which incorporates a brief judicial review of disconnections. None of the industry representatives interviewed for this report, however, described a need for checks and balances, or the involvement of public authorities, or a procedural framework that would allow users to respond when charged with infringement. Such issues, in our view, are likely to create serious legal hurdles for the implementation of a graduated-response model in Brazil.

### **COPYRIGHT REFORM**

Copyright reform began to be discussed seriously at the Ministry of Culture in 2005, leading to a series of conferences collectively called the National Forum on Authors' Rights. The forum was established with the goal of bringing attention to the shortcomings of Brazilian copyright law and to announce the Ministry of Culture's intention to work on a copyright reform bill. Beginning in December 2007, eight multi-stakeholder conferences were held, focused on specific aspects of copyright law. One of the main topics was the role of the executive branch in copyright matters, including its proposed return to active supervision of societies that collect royalties for music rights holders. Parallel to the forum, the Ministry of Culture has consulted with representatives of all the copyright industries and with the ECAD (Central Collecting Office), the association of collecting societies for recorded music, as well as with a few non-industry NGOs (non-governmental organizations). In June 2010, the Ministry of Culture published its draft copyright reform bill and placed it under public consultation in a form similar to that of the Marco Civil.

Among the affected industries, the publishing sector has emerged as the most adamant opponent of the reform process, holding the position that current legislation is adequate. Together with the ABPD and the collecting societies, the publishers have formed a coalition called the National Committee on Culture and Authors' Rights (CNCDA) to campaign against the public supervision of collecting societies, which they present as the "statization of authors' rights."<sup>20</sup> On the opposite side, a network of individuals and institutions favorable to the general contents of the draft bill has formed to defend the need for copyright reform.<sup>21</sup>

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20 See the CNCDA website at <http://www.cncda.com.br/>.

21 A list of the parties involved can be found on the Reforma da Lei de Direito Autoral (Reform the Copyright Law) website at [http://reformadireitoautorale.org.br/lda/?page\\_id=317](http://reformadireitoautorale.org.br/lda/?page_id=317).

From a consumer perspective, the Ministry of Culture’s draft bill is a clear improvement over current Brazilian law. The current draft would significantly expand the list of exceptions and limitations to copyright, greatly facilitating access to educational materials and bringing the law into closer alignment with actual practice in most educational institutions.

The draft bill also takes a rational approach to technical protection measures for digital goods, authorizing the circumvention of TPMs and rights-management information for works in the public domain or in other contexts where limitations and exceptions to copyright apply. It also treats the creation of obstacles to the legal use of copyrighted works, or to the free use of works in the public domain, as analogous to improper circumvention and subject to the same penalties. This position is already drawing fire from industry groups, which view current Brazilian law as “weak on technological protection” (IIPA 2010:152).

## The IP Enforcement Network

3.1 (3) Each party shall, as appropriate, promote internal coordination among, and facilitate joint actions by, its competent authorities responsible for enforcement of intellectual property rights.

3.1 (4) Each party shall endeavor to promote, where appropriate, the establishment of formal or informal mechanisms, such as advisory groups, whereby its competent authorities may hear the views of right holders and other relevant stakeholders.

- *Anti-Counterfeiting Trade Agreement (ACTA), final text, November 15, 2010*

Organizations specializing in copyright enforcement are not a recent phenomenon, with some dating to the early twentieth century (Johns 2009:327–55). In Brazil, the video distributors association the UBV (Brazilian Video Union) is one of the older living examples, with a history of anti-piracy activism going back to the early days of the home-video market in the 1980s (Bueno 2009). Two features of the current enforcement environment, however, set it apart from earlier efforts.

The first is the appearance of strong coordinating bodies designed to bring together public and private actors who would not otherwise cooperate easily. Since 2004, this role at the federal level in Brazil has belonged to the CNCP. Other organizations from the private sector, such as the FNCP (National Forum against Piracy and Illegality), the FIESP (São Paulo Federation of Industries), and the American Chamber of Commerce (AmCham) act as inter-industry coordinators at the federal and state levels.

The second and related feature is the emergence of a complicated ecology of enforcement functions and roles, with a loose division of labor across institutions. Where before it was possible to look at enforcement as the product of a handful of specific state and private actors, today we need to speak more properly of the consolidation of an enforcement industry, whose

products include legal, training, and advocacy services operating across the public and private sectors. The Brazilian version of this industry, in turn, needs to be understood as part of the broader international IP advocacy and policymaking network—the local branch of a larger enterprise.

The rapid proliferation of such organizations in the past decade makes any comprehensive account challenging and somewhat tedious for the non-aficionado. We have accordingly focused only on the most active organizations in the Brazilian enforcement landscape. All such organizations, in any event, engage in some combination of the following activities:

1. Enforcement support, involving the provision of direct assistance to authorities in the investigation and prosecution of IP infringement and related crimes. Assistance can be either material (including funding provided by rights holders) or logistic, with the provision of training and operational support for enforcement measures, such as raids.
2. General advocacy, in the form of public relations, lectures, education, the production of research, and anti-piracy/pro-IP marketing.
3. Lobbying, or advocacy targeted directly at lawmakers and focused on specific legislative change.
4. Coordination of the above activities between different sets of actors. Increasingly, such activity drives the enforcement ecosystem.

With the formation of the CNCP, the National Council on Combating Piracy and Intellectual Property Crimes, industry succeeded in creating a powerful forum for coordination at the federal level. The CNCP has emerged as a platform for both interagency and public-private coordination and has furnished a model for similar efforts at the state and municipal levels.<sup>22</sup> One sign of the CNCP's effectiveness is the adoption of strong anti-piracy discourse by the government, with the National Plan on Combating Piracy as its centerpiece. Piracy is now very much a part of the public agenda in Brazil.

To a large extent, the CNCP and the National Plan are the products of international pressure brought to bear in Brazil over the past decade—primarily by the US government but also by the multinational copyright industries. But it would be wrong to see these developments simply as impositions. Informants from the public sector who are involved in IP policymaking in Brazil were all supportive of the institutional outcomes that followed US pressure in the early 2000s. Nevertheless, there are considerable differences in the agendas of the public and

22 The IIPA claims that industry relationships with federal authorities are now good and that the “bottle-neck as far as physical piracy of music and movies is concerned lies in the federation state and municipal levels” (IIPA 2010:148). Accordingly, the IIPA now focuses on law enforcement coordination across levels of the Brazilian federation and has pushed for the creation of joint state and municipal task forces (IIPA 2010:140).

private sectors (and even within those sectors) that result in important differences in what stakeholders mean by “combating piracy.”

### The Enforcement Decade

After bruising struggles with the United States over IP policy in the 1980s and early 1990s, the renewed USTR and industry push on enforcement in 1999 and 2000 met with considerable cooperation on the Brazilian side. The IIPA's 2000 petition to the USTR set out the terms of this dialogue. The petition cited Brazil for “unacceptably high levels” of piracy in all industry sectors, non-detering criminal penalties, a low number of convictions, and delays in civil and criminal cases. Between 2001 and 2005, facing the threat of the removal of trade privileges, Brazil developed institutional arrangements for addressing private-sector concerns on enforcement.

**Table 5.2** Brazilian IP Enforcement Timeline

<b>2000</b>	The IIPA petitions the USTR to put Brazil under GSP review (asking for the removal of Brazil's trade privileges).
<b>2001</b>	The IIPA's request is granted by the USTR. The Brazilian government establishes the IMC.
<b>2002</b>	The USTR promotes Brazil from the Special 301 “Watch List” to the “Priority Watch List.”
<b>2003</b>	The CPI da Pirataria begins its proceedings. In parallel, a Congressional Anti-Piracy Caucus is created, as well as the private, cross-industry association that would become the FNCP.
<b>2004</b>	The CPI da Pirataria publishes its final report, recommending the creation of a new public-private entity to replace the IMC. The CNCP is created.
<b>2005</b>	The CNCP publishes its first National Plan on Combating Piracy, listing ninety-nine anti-piracy and anti-counterfeiting initiatives.
<b>2006</b>	The USTR ends its GSP review of Brazil. The IIPA recommends Brazil's demotion to the “Watch List.”
<b>2007</b>	The USTR demotes Brazil from the Special 301 “Priority Watch List” to the “Watch List.”

In some respects, little changed on these fronts in the ensuing years. By 2010, complaints regarding online infringement had eclipsed those regarding optical disc piracy, but the underlying industry concerns with high rates of piracy and weak enforcement remained largely

the same. With respect to the politics of cooperation, however, much had changed. Recent IIPA reports show government and industry on much better terms, visible in the greater “political willingness” of the Brazilian government to combat piracy (IIPA 2006:199).

The IMC, the Inter-Ministerial Committee on Combating Piracy, was created in 2001 as a direct response to the threat of exclusion from US trade privileges under the Generalized System of Preferences. The IMC was composed entirely of representatives of government ministries, including the Ministry of Justice, the Ministry of Science and Technology, the Ministry of Culture, the Ministry of the Treasury, the Ministry of Foreign Affairs, and the Ministry of Development, Industry, and Foreign Commerce. The private sector contributed to IMC activities on an invitation-only basis.

The major industry associations were dissatisfied with this relationship<sup>23</sup> and continued to press for changes to the institutional framework for enforcement policy. Industry dissatisfaction also meant USTR dissatisfaction. Trade pressures on Brazil were maintained throughout the early 2000s and led to the Parliamentary Commission of Inquiry on Piracy, established by the Chamber of Deputies in 2003.

The commission held a full year of hearings and investigations, involving representatives from all the IP industry associations, as well as law enforcement authorities and US government emissaries. Legislative ties with the United States were established, and a group of Brazilian deputies traveled to Washington, DC, to meet with members of the US Congress’s International Anti-Piracy Caucus. Among its several recommendations, the commission proposed the creation of a public-private forum for coordinating and developing anti-piracy initiatives. This proposal became the CNCP.

Much of the commission’s inquiry was focused on counterfeiting and contraband rather than piracy. But the copyright industries were the most vocal stakeholders in the process and were heavily represented in the initial formation of the CNCP. The recording, software, publishing, and film industry associations all had individual seats on the new council, with only a single seat provided for the industrial-property sector, given to ETCO (Brazilian Institute for Ethics in Competition), representing fuel, beverage, medicine, tobacco, and software companies.

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23 “Several IIPA members have met individually and in small groups with the IMC chairman, as well as other senior Brazilian officials, including the Minister of Justice. A list of suggested actions was presented to the IMC chairman; however, the IMC never implemented these suggestions. The industry has never met with all members of the IMC. The industry has never received any official communication from the IMC regarding any of its decisions or actions, although informally, the copyright industries were advised that no decisions were made and nothing was planned. In sum, the IMC has not shown any willingness to work with the private sector or the U.S. government. Furthermore, the IMC chairman promised enforcement actions in October and November 2001, but nothing was done. The IMC has no agenda for 2002, as far as the industries are aware” (IIPA 2002:73).

## The National Council on Combating Piracy

The CNCP is essentially the older IMC restructured to meet industry demands. Membership was expanded to include seven organizations representing the private sector. A panel of external partners was also created, which participates in the council's sessions on an ad hoc basis. To date, this panel has included almost exclusively individuals and organizations with ties to the IP industries.

There have been a number of changes in the composition of the CNCP over the six years in which it has been active. The publishing industry representative, the ABDR (Brazilian Association of Reprographic Rights), was one of the initial members but did not have its seat renewed. The IP lawyer association the ABPI (Brazilian Intellectual Property Association) also left, after two two-year terms. The CNC (National Confederation of the Commerce of Goods, Services, and Tourism), the CNI (National Confederation of the Commerce of Goods, Services, and Tourism), and the BPG (Brand Protection Group), all industrial-property groups, were included to create a more balanced distribution across the different IP industries. In its current incarnation, the copyright industries have three seats on the CNCP, reduced from an initial four.

**Figure 5.2** CNCP Composition, December 2009 to Present

<b>Public Sector, Legislative</b>	<b>Public Sector, Ministeries</b>	<b>Federal Law Enforcement</b>	<b>Private Sector, Copyright</b>	<b>Private Sector, Industrial Property</b>
Chamber of Deputies	Justice*	• Federal Highway Police	ABPD (Recording Industry)	Brand Protection Group
Senate	Culture	• Federal Police	ABES (Software Industry)	National Confederation of Industries (CNI)
	Development, Industry, and Foreign Commerce	• National Public Security Office	MPA (Film Industry)	National Confederation of Commerce (CNC)
	Foreign Affairs	Federal Revenue Service**		
	Labor			ETCO (fuel, beverages, cigarettes, medicine, software)
	National Treasury			
	Science and Technology			

\* *President of CNCP*

\*\* *organized under the National Treasury*

Members from the public sector are split into three groups: (1) seven participants from different ministries, all with responsibilities that intersect piracy and counterfeiting; (2) two members from the technical staff of the houses of the National Congress; (3) and four representatives from federal law enforcement agencies, under the authority of either the Ministry of Justice or the Ministry of the Treasury (figure 5.2). The president and executive-director of the CNCP are appointed by the Ministry of Justice.<sup>24</sup>

As a consultative body, the CNCP has several functions ranging from studying and proposing anti-piracy measures to supporting the training of law enforcement agents. Among these, the most important has been the drafting and execution of the National Plan on Combating Piracy.

### The National Plan

Prior to the creation of the CNCP, one of the IIPA's chief complaints about Brazil was the absence of a national plan for combating piracy that incorporated the demands of the private sector. The CNCP addressed this deficiency shortly after its creation with the release of the first National Plan in 2005.

According to a public-sector CNCP participant interviewed for this report, the 2005 plan was crucial from a political standpoint: Brazil was still under GSP review and “there was an atmosphere of reciprocal accusations” between the public and private sectors. Writing the report brought both groups to the table to discuss conflicts that had been simmering for a long time. For this informant, the creation of the CNCP and the publication of the National Plan represented important steps both internally, for stakeholders, and externally, in gaining US government recognition that Brazil was engaged in the fight against piracy. The desire for a truce between public and private sectors drove the drafting of the plan, trumping practical considerations in many respects. The result, in the words of another informant, was “not very manageable.” The report announced some ninety-nine activities to be undertaken. Many of these were not under the authority of the CNCP or the federal government but belonged to the judiciary or state and municipal administrations.

The weaknesses of the plan were not lost on the CNCP. In 2009, a second plan was released, which pared back the ninety-nine action items to a somewhat more manageable twenty-three.

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24 Changes in leadership have partly set the tone for the CNCP's activities. The first executive-director, Márcio Costa de Menezes e Gonçalves, was an IP lawyer appointed by industry, who left to found the anti-piracy organization the ICI (Intellectual Capital Institute) at the end of his mandate in 2008. The second executive-director, André Barcellos, was a career public servant from the Ministry of Planning. Some industry informants expressed clear nostalgia for the Gonçalves era, when they believe there was greater industry control of CNCP activities. Luiz Paulo Barreto served as president of the organization through early 2010, and subsequently replaced Tarso Genro as Minister of Justice. He left that office in early 2011.

This narrowing of the focus was not welcomed by all participants due to concerns that it turned government approval for anti-piracy efforts into a comparatively scarce resource. According to one private-sector informant, the most valuable assets of the CNCP are its brand and stamp of approval on awareness campaigns, and the new plan made the latter more difficult to obtain.

**Table 5.3** The CNCP's Priority Projects

Project	Objective	Coordinator
<b>Piracy-Free Cities</b>	Create public-private anti-piracy councils at the municipal level.	ETCO
<b>Legal Fair</b>	Reduce the supply of illegal goods in street markets and popular fairs.	ETCO
<b>Commerce against Piracy</b>	Unite shop owners in a national awareness campaign against piracy.	CNC
<b>Anti-Piracy Portal</b>	Build an interactive web portal to provide a better communication channel between the CNCP and its members and the public and to disseminate awareness campaigns.	ABES
<b>Partnerships with ISPs</b>	Find solutions to the problem of P2P file sharing and online copyright infringement based on "partnerships" between industry and ISPs.	Ministry of Culture

Among the five priority projects selected from the twenty-three (table 5.3), the furthest along, as of late 2010, is the Piracy-Free Cities project, which involves the creation of regional anti-piracy councils to coordinate efforts at the municipal level.<sup>25</sup> This project was first implemented in the city of Blumenau, in the state of Santa Catarina, in 2007. The model was subsequently extended to the cities of Curitiba, Rio de Janeiro, São Paulo, Brasília, and Ribeirão Preto, with more to come according to the project sponsor, ETCO (2009:30–33).<sup>26</sup>

25 A complete list of National Plan projects (some of which are not really "projects" at all) can be found on our project website at <http://piracy.ssrc.org/resources>.

26 There have been other attempts to replicate the public-private structure of the CNCP at the state level, but not systematically. São Paulo's Inter-Secretarial Committee on Combating Piracy (Comitê Inter-

So far, these state and local councils have not departed much from existing policy and are limited to dealing with street markets for infringing goods. They act as fora for pressuring municipal authorities to use their powers of regulating and policing public space, and they participate in awareness campaigns. They have no special powers over online infringement, with the exception of local ordinances affecting cybercafes, or LAN (local area network) houses, as businesses offering Internet access in Brazil are known, and other physical sites of Internet access.

### The GIPI and Brazilian IP Policy

In theory, the CNCP is a strictly consultative body, with no clear authority to deliberate on legislation. Despite the participation of congressional staff members from the Senate and the Chamber of Deputies, the inclusion of a “legislative fine-tuning” project in the current National Plan (which so far has contributed to the pending anti-piracy legislation Bill 8052/2011), the CNCP’s main function is to coordinate enforcement actions under the existing authority of its participating public agencies. Similarly, private-sector lobbying is mostly done outside the CNCP, directly between private-sector groups and members of Congress.

Brazil maintains an important—if not always clear-cut—distinction between enforcement policy and general IP policy, with the final word on Brazilian domestic and international IP policy set not by the CNCP but by the higher-level Grupo Interministerial de Propriedade Intelectual (Inter-Ministerial Intellectual Property Group), or GIPI. Although representation within the GIPI significantly overlaps that of the CNCP (see figure 5.3), the GIPI is a purely public body, with an explicit mandate to balance the interests of rights holders and the public in setting IP policy. The GIPI’s role in enforcement is accordingly much different than that of the CNCP and is framed in terms that require the consideration of enforcement’s “broader meaning”: its “social accordance with intellectual property legislation in its ensemble, acknowledging both the rights granted to rights holders and the limitations and exceptions that are present and necessary in every legislation.”<sup>27</sup>

According to a public-sector participant in both the CNCP and the GIPI, discussions about enforcement policy that shade into general IP policy are systematically moved to the GIPI, as are sensitive issues more generally. The move to the GIPI ensures, in particular, that there will be “no pressure from the private sector.” The government’s position on any bill involving intellectual property rights is formed within the GIPI, including, for example, the Ministry of

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secretarial de Combate à Pirataria) was formed in 2006 (a private-sector informant who used to be a member of the committee described it as “not very active” as of late 2009).

27 According to the “Lines of Action” for the GIPI as listed by the Ministry of Development, Industry, and Foreign Commerce on its website, <http://www.mdic.gov.br/sitio/interna/interna.php?area=3&menu=1783>.

Culture's draft copyright reform bill. This does not mean that the GIPI ignores input from the private sector, but the existence of different levels of policy fora ensures that public-sector opinion on IP policy has some autonomy from private-sector influence. In our interviews, opinions about this autonomy tended to split along predictable public-private lines, with private-sector representatives regretting the independence of the GIPI (one noted in particular the greater influence of the private sector on the GIPI prior to the formation of the CNCP) and public-sector informants describing that independence as "a very positive thing within the state."

**Figure 5.3** GIPI and CNCP Overlap

**GIPI CNCP**

- Chambers of Foreign Commerce (CAMEX)
- Civil House
- Ministry of Health
- Office of Strategic Affairs (SAE)
- Ministry of Agriculture
- Ministry of Environment
  
- ● Ministry of Justice
- ● Ministry of Culture
- ● Ministry of Science and Technology
- ● Ministry of Foreign Affairs
- ● Ministry of Development, Industry, and Foreign Commerce
- ● Ministry of the National Treasury
  
- Ministry of Labor and Employment
  
- Federal Police Department
- Federal Highway Police Department
- National Public Security Office
- Federal Revenue Service
  
- Federal Senate
- House of Deputies
  
- National Confederation of Industry
- National Confederation of Commerce
  
- Brazilian Record Producers Association (ABPD)
- Brazilian Association of Software Companies (ABES)
- Brand Protection Group (BPG)
- ETCO

In practice, the GIPI's independence allows it to act as a de facto graveyard for the more extreme enforcement proposals. When the Motion Picture Association of America (MPAA) tried to gather the CNCP's support for an anti-camcording bill that would have made carrying

a camera into a movie theatre a crime,<sup>28</sup> debate was moved to the GIPI, where the proposal was rejected.

The participating ministries in the GIPI specialize in different fields of IP law, sometimes with further in-house divisions. The Ministry of Culture bears overall responsibility for copyright policy, managed through the Directorship of Intellectual Rights (the DDI), as well as issues related to traditional knowledge. Software copyright policy (including software policy more generally) is an exception to this rule and belongs under the Ministry of Science and Technology. Patent and trademark policy is concentrated in the Ministry of Development, Industry, and Foreign Commerce and the INPI (National Institute of Industrial Property), a.k.a. the Brazilian patent office, which, although not a permanent member of the GIPI, sits at every meeting involving industrial IP. Although it is linked to the Ministry of Development, the INPI is an autonomous body and tied to the global patent-office network described by Peter Drahos (2010). Traditional knowledge is handled by the Ministry of Agriculture and the Ministry of Environment, which houses the CGEN (Genetic Resources Management Council). The Ministry of Foreign Affairs, for its part, has the DIPI (the Division of Intellectual Property), which relays Brazil's internal policy positions to international IP forums like WIPO and the WTO.

### Know Your Enforcement Authorities

Copyright enforcement, and particularly criminal enforcement, involves coordination between authorities at three levels—federal, state, and municipal—as well as efforts by rights holders to train and support enforcement agents (see figure 5.4).

**Figure 5.4** Law Enforcement Authorities

<b>Federal</b>	<b>State</b>	<b>Municipal</b>
Customs/Federal Revenue Service	Civil Police	Municipal Guard
Federal Highway Police	Military Police	Municipality
Federal Judiciary	State Revenue Service/Patent Office	
Federal Police	State Judiciary	
Federal Prosecution Service	State Prosecution Service	

28 Stronger anti-camcording provisions are a universal feature of MPAA and IIPA lobbying. In Brazil, camcording movies is already a crime, and by IIPA accounts an infrequent one: in 2010, the IIPA noted only twenty-three cases.

## THE POLICE AND THE MUNICIPAL GUARDS

Brazilian police are divided into federal and state forces and further into forces that specialize in either the prevention or the investigation of criminal offenses. Each Brazilian state has a Civil Police force, tasked with the investigation of criminal offenses and the gathering of evidence, and a Military Police force, in charge of crime prevention and immediate response. At the federal level, the Federal Highway Police acts as the preventative police force, complementing the work of investigative Federal Police. In piracy-related matters, the Federal Police is highly constrained and can only act if the criminal activity involves contraband or the irregular entry of goods into Brazilian territory.<sup>29</sup> Otherwise, state Civil and Military Police are the competent authorities.

A few states have created specialized Civil Police units for IP enforcement. The most significant is Rio de Janeiro's DRCPIM (Police Unit for the Repression of Crimes against Immaterial Property), created in 2003 for "political reasons" related to industry pressure and "furnished and equipped mostly by private funds," according to a law enforcement expert interviewed for this report. The DRCPIM is often referred to as a success story and a model to be followed by other states.<sup>30</sup> In the early 2000s, the state of São Paulo also established a specialized anti-piracy unit, under its DEIC (Department of Investigations of Organized Crime). Bahia, for its part, has the GEPI (Special Intellectual Property Protection Group) within its Civil Police, established in 2007. The creation of additional special units is part of the current National Plan, but the actual decisionmaking resides with state government authorities.

Cybercrime units are being created throughout the state Civil Police departments, with an initial focus on bank fraud, child pornography, and hate speech—and a mandate that could plausibly be extended to copyright infringement. The flagship cybercrime division is the Federal Police's URCC (Cybercrime Repression Unit). The Federal Police is also one of the strongest supporters of the Azeredo Bill, which would amplify police powers in the investigation of online crimes, including file sharing.

Municipalities do not have police forces but are authorized by the Brazilian Constitution to maintain a Municipal Guard for the purposes of protecting local "goods, services and facilities" (Article 144, § 8). Not every municipality has such a force, and they sometimes coexist with city-hall staff in charge of fiscal or zoning matters. The tension between these authorities and street vendors is one of the main local factors shaping street piracy in Brazil.

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29 Or, occasionally, in cases authorized by the Minister of Justice where there are "interstate or international repercussions" and a need for "uniform repression." Law 10.446/02.

30 The CNCP's fourth report, *Brasil Original*, describes the DRCPIM's activities in glowing terms (Ministério da Justiça 2009:71–79).

## REVENUE, CUSTOMS, AND THE PATENT OFFICE

There are independent revenue services at all three levels of the federation, each with authority over different types of taxation. Taxes on imports and exports, for example, are the domain of the Federal Union, and consequently, of the Federal Revenue Service, which also manages Customs. These authorities play an important role in combating street-level piracy. Better coordination between the Federal Revenue Service and the Federal Police is one of the most visible results of the CNCP's activities.

An employee union at the Federal Revenue Service, the SINDIRECEITA (National Syndicate of the Tax Analysts of the Brazilian Federal Revenue Service), which represents fiscal analysts, has also become involved in anti-piracy education via its sponsorship of the “Pirata: Tô Fora” (Piracy: I’m Out) public awareness campaign. The campaign is an outreach initiative tied to the notion of “fiscal education”—of educating citizens to pay their taxes—that informs a number of SINDIRECEITA activities. Similar concerns inform anti-piracy education efforts at the ESAF (Superior School of Public Revenue Administration) under the Ministry of the Treasury.

The INPI, the Brazilian patent office, plays a key role in training, education, and IP advocacy, broadly in the service of “promoting a culture of respect for intellectual property rights” (INPI n.d.:21). The INPI has been heavily invested in education since 2005, sending staff to anti-piracy seminars and workshops, offering courses through its Intellectual Property Academy, and collaborating with the industry association FIESP in publishing intellectual property primers.

## THE PROSECUTION SERVICES AND THE JUDICIARY

As of late 2010, Rio de Janeiro is the only state that has a special public prosecution office for IP crime.<sup>31</sup> Piracy and contraband do get the attention of other public prosecutors, and particularly in São Paulo there has been increased activity following the creation of a special Integrated Action Program (PAI) on piracy. A national prosecutors group, the GNCOC (National Group for Combating Criminal Organizations) had also become known in recent years for encouraging federal and state prosecutors to ramp up activity against IP crimes, but sources say its activity on this front has dropped off.

Judges and prosecutors, for their part, have considerable autonomy and are free, in particular, of the strong hierarchical constraints that shape police and executive-branch agendas. A few judges and prosecutors have taken on piracy as a personal cause and publicly speak on the subject; prosecutor Lilian Moreira Pinho and judge Gilson Dipp are the most visible examples. But there has been very little broader institutional capture: both the judiciary and the prosecution services are comparatively insulated from industry influence.

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31 The Sixteenth PIP (Criminal Investigation Prosecution Office). This is the office that receives the cases investigated by the DRCPIM special police unit.

## Copyright Industry Associations

The ABPD is the Brazilian branch of the global recording industry and is affiliated with the IFPI.<sup>32</sup> The recording industry also has strong political influence via the ECAD, the umbrella organization for collecting societies in Brazil. Although it is not involved in anti-piracy enforcement, the ECAD is a major actor in IP lobbying and advocacy and is one of the main opponents of the copyright reform draft bill presented by the Ministry of Culture in 2010.

The film industry is represented in Brazil by the MPA (Motion Picture Association), the international arm of the MPAA. Video distributor association the UBV is also very vocal in lobbying and general IP advocacy.

The ABES represents Brazilian and foreign software companies and provides enforcement support for the business and entertainment software sectors. It includes the US-based BSA and the ESA (Entertainment Software Association) as special members and has often acted in concert with them. The BSA, for its part, also operates independently in Brazil and carries out a wide range of civil litigation against companies suspected of copyright infringement.

The publishing sector is represented by several organizations. The book trade, including distributors and retailers, is represented nationally by the CBL (Brazilian Book Chamber) as well as the ABDR. The ABDR was founded in 1992 to act as a reproduction rights organization and is currently the main representative of publishers in the enforcement network. It focuses on enforcement support, especially in regard to copy shops and universities, but it is also the main IP advocacy and lobbying organization for publishers. Also important in the publishing sector are the SNEL (National Syndicate of Book Editors), the ABRELIVROS (Brazilian Association of Textbook Editors), and the ABEU (Brazilian Association of University Presses).

## Enforcement Support Organizations

Industry associations have created a variety of units (or, occasionally, separate organizations) to support enforcement. This work ranges from interventions with public authorities, such as making complaints to the police, assisting with investigations and prosecutions, and participating in the training of public agents, to broader surveillance and direct action, such as monitoring the Internet and sending takedown notices when infringing content is found. Several of these groups also provide material and financial support directly to law enforcement.

Arguably the most active of these groups is the APCM (Film and Music Anti-Piracy Association), an anti-piracy organization created in 2007 through a merger of the main film and recording industry enforcement groups. The software industry has a working group within the ABES that acts as its enforcement support unit. The ABDR plays a similar role within the larger matrix of organizations representing the publishing industry.

32 Its current members are EMI Music, Sony Music Entertainment, Walt Disney Records, Universal Music, Warner Music, the Argentinian company Music Brokers, and the Brazilian companies MK Music, Paulinas, Record Produções e Gravações, and Som Livre.

The APCM is involved in a wide range of activities, including the creation of awareness campaigns and more general copyright advocacy and lobbying. But it is best known as an enforcement organization. To date, its work has primarily targeted street vendors and online communities engaged in infringement rather than individuals. In the online environment, the APCM has pursued the service providers and administrators of file sharing sites and similar platforms, issuing cease-and-desist letters or takedown notices when infringing content can be identified. Police became involved for the first time in such an action in 2010, following the APCM's complaint that infringement conducted within the online community *Brasil Séries* constituted a commercial service subject to public prosecution (Zmoginski 2010). When users of these services protest, the APCM—not the recording and film industries—receives most of the backlash. It is probably best to understand this buffering function, too, as part of the APCM's role.

Other groups operate more narrowly in the anti-counterfeiting arena but partly overlap anti-piracy efforts. The BPG (Brands Protection Group) is one such group, founded in 2002 and recently admitted as a CNCP member. The BPG supports investigations, raids, and prosecution on behalf of its associates: Nike, BIC, Swedish Match, Louis Vuitton, Chanel, Henkel, Souza Cruz, and Philip Morris.<sup>33</sup> The ABCF (Brazilian Association for Combating Counterfeiting) is another, representing Souza Cruz, Xerox, Abbot, Mahle, Technos, Philips, Motorola, and Johnson & Johnson, among others. On its website, the ABCF claims that one of its chief contributions to enforcement is the direct financial support of police stations.<sup>34</sup>

### PRIVATE FUNDING, PUBLIC ENFORCEMENT

Although by law, policing is a strictly public function in Brazil, in practice, organizations such as the APCM are deeply involved in most aspects of law enforcement, including investigations, raids, and prosecutions. Boundaries between public and private law enforcement have been blurred to the point of irrelevance in this area. As Alex Dent has argued, it is often more accurate to characterize the relationship as an official stamp on private enforcement rather than as private support for a public function. This is how a typical APCM operation unfolds:

The process begins with their hotlines: the public calls in to report instances of piracy, which the APCM then organizes into files. As soon as these files are coherent, they are sent to the mayor's office and to the Civil Police. If the police are short of officers to go on a raid, the APCM can send along extra people. Similarly, if the police lack the necessary transportation for people and confiscated product, the

33 In 2009, the BPG struck a partnership with the São Paulo Public Prosecution Service to provide public prosecutors with “technical and operational support” as well as “human and material resources” (Ministério Público do Estado de São Paulo 2009).

34 See “Doações,” under “Realizações,” on the ABCF website, <http://www.abcf.org.br/>.

APCM rents a van. The APCM is often called upon to provide the garbage bags into which the offending products are placed. It takes the confiscated product, catalogues and then destroys it. The APCM may then need to call a locksmith to repair a door that was broken in the course of a raid. And finally, the association often buys printer cartridges so that the police officers can print their reports on police-station printers. The agency views all this as crucial support, since the red tape and hierarchy of Brazil's police forces cause requests for action of any kind to move very slowly. The APCM, the staff pointed out, have a very quick response time and need not go through elaborate procedures just to get ink, rent a truck, buy garbage bags, or hire a locksmith.

The point is that organizations such as the APCM are on the front lines of the actual policing, providing both the impetus and the logistical support.<sup>35</sup>

Dent describes the situation in São Paulo, but our team witnessed similar arrangements in Rio de Janeiro's special enforcement police unit, the DRCPIM. Due to the finite resources of the private organizations, however, such partnerships have been limited to a handful of states and cities in the Brazilian federation.<sup>36</sup>

In our interviews, law enforcement agents generally expressed appreciation for the financial and logistical support. As one informant noted, "They have resources we don't have, and we can do work they can't." Private involvement with the public functions of the law does, nonetheless, raise concerns about the independence of police functions. In 2009, the São Paulo Public Prosecution Service launched an investigation of the APCM's donations to the DEIC, the São Paulo Civil Police unit in charge of intellectual property crimes. According to the prosecutor, these donations—which include a refrigerator and a new floor for the police unit—could lead to charges of "administrative improbity" (Tavares and Zanchetta 2009), possibly resulting in serious civil and administrative penalties.<sup>37</sup> Such arrangements also make it impossible to determine the actual size and budget of enforcement efforts—a basic and, to date, missing datapoint in a debate about the expansion of public responsibilities.

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35 Alex Dent, unpublished working paper, 2009.

36 The APCM's workforce of thirty is concentrated mostly in the state of São Paulo. Four employees in São Paulo are "intelligence agents," responsible for monitoring street markets and gathering information on cases of copyright infringement. The states of Minas Gerais, Rio de Janeiro, Rio Grande do Sul, Pernambuco, and Santa Catarina have one intelligence agent apiece. When necessary, the APCM hires freelance workers (to help, for instance, with collecting pirated media in raids). Six employees work exclusively on monitoring of the Internet and online communities (Muniz 2009b).

37 The APCM's director, a former member of the Federal Police, has claimed that all its donations are legal. As of late 2010, the matter remains unresolved.

### CROSS-INDUSTRY COORDINATORS

Over the past decade, the copyright industries have become much more adept at making common cause with other industry sectors—including sectors with business models that do not rely heavily on IP. A number of cross-industry associations have emerged to ensure that common elements in the agendas of different industries become opportunities for collaboration and resource sharing. There are many such groups, but much of the action revolves around the FNCP and ETCO, which represent the industrial and manufacturing sector; the CNI and the CNC—the Brazilian confederations of industry and commerce, respectively; the American Chamber of Commerce and the US Chamber of Commerce; and the IP lawyer association the ABPI.

The FNCP (the National Forum against Piracy and Illegality) was founded by lawyer and economist Alexandre Cruz during the Parliamentary Commission of Inquiry on Piracy to assist manufacturers in combating piracy, counterfeiting, and related crimes such as smuggling and tax evasion. The organization was formally established in 2004, and Cruz served as its president through 2009. Its members include 3M, HP, Xerox, Adidas, and Philip Morris, but at present no major media companies or copyright industry associations.<sup>38</sup> The FNCP's activities, according to a private-sector informant, have become “too broad” to justify membership for the copyright sector, but it seems more likely that the opposite is true: despite areas of overlap between the enforcement agendas of the copyright industry and other IP industries, the FNCP focuses only on hard-goods piracy and related legislative lobbying.

The CNI and the CNC, the Confederation of Industry and the Confederation of Commerce, represent employers within the “syndicate system” that organizes much of Brazilian economic life. Both are national bodies that confederate state-level associations, which in turn aggregate sector-specific syndicates ranging from clothing to steelworks to filmmaking. Individual businesses occupy the lowest level. Through this organizational structure, the CNI is said to represent over 350,000 businesses. The CNC claims to represent more than five million. Because the Brazilian Constitution forbids the creation of more than a single syndicate covering the same “economic or professional category” in the same territorial area (Article 8, II), connections to the CNI or the CNC are ubiquitous in the business sector.

Both organizations are highly influential and experienced participants in the Brazilian legislative process. Both are members of the CNCP, and both manage a variety of affiliates that play more specialized roles in the copyright and enforcement arena, including an alphabet soup of educational and cultural organizations, such as the SESI (Industry Social Service), the SENAI (National Learning Service of Industry), and the IEL (Euvaldo Lodi Institute) under the CNI and the SESC (Commerce Social Service) and the SENAC (National Learning Service of Commerce) under the CNC. The IEL, for instance, in partnership with the SENAI and the INPI (the Brazilian patent office), maintains the Intellectual Property Program for

38 The ABDR used to be a member and still claims to be on its website, <http://www.abdr.org.br/site/>

Industry, which hosts IP training seminars and publishes primers for journalists and educators as part of its effort to “disseminate intellectual property culture” (IEL 2009:44). Other affiliates have also acquired important roles in the anti-piracy ecosystem, sometimes overshadowing the role of the larger associations. This is the case with the FIESP, the industry federation of São Paulo, and with the Fecomércio-RJ, the commerce federation of Rio de Janeiro, both of which are active in IP advocacy and anti-piracy efforts.

The US Chamber of Commerce is one of the main actors in international IP lobbying and has been an active force in Brazilian intellectual property advocacy since 2004.<sup>39</sup> As we discuss later in this chapter, it is the primary sponsor of one of the main longitudinal domestic surveys on the consumption of pirated and counterfeited goods.

The American Chamber of Commerce, or AmCham as it is usually called, is easy to confuse with the US Chamber of Commerce and has many of the same interests, but is in fact a different organization. There are 115 AmChams around the world, all affiliated with the US Chamber but governed independently. Among AmCham Brazil’s five thousand members, roughly 85% are Brazilian and 10% American.<sup>40</sup> AmCham’s claim to fame in enforcement networks derives mostly from its “Projeto Escola Legal” (Legal School Project) campaign in Brazilian schools, which is sponsored by several industries and enjoys the support of the CNCP. AmCham also maintains an anti-piracy taskforce, which contributes to the training of public agents and maintains relations with the USTR and the US Trade and Development Agency.

ETCO (the Brazilian Institute for Ethics in Competition) is one of several organizations that lobby on behalf of manufacturers in Brazil and help promote anti-piracy discourse in the private and public sectors.<sup>41</sup> ETCO was founded in 2003 and has been a CNCP member since the beginning. Its membership draws primarily on the beverage, pharmaceutical, fuel, and tobacco industries but also includes information technology companies such as Microsoft. Judging by ETCO’s publications, ethics in competition means campaigning for reductions in business taxes, cutting regulation, making labor legislation more flexible, and fighting to eradicate the informal economy and piracy (both depicted as “scourges”). ETCO literature is highly moralizing<sup>42</sup> but also tends to be more grounded in academic work than that of other organizations.

Last but not least in our overview, the ABPI (the Brazilian Intellectual Property Association) is an association of IP lawyers that has become active in IP advocacy and lobbying (though its stated mission relates more to studying intellectual property and related fields). Because

39 Interview with US Chamber representative Solange Mata Machado, published in the SINDIRE-CEITA’s (2006) online anti-piracy bulletin.

40 AmCham Brasil, “Quem Somos,” <http://www.amcham.com.br/quem-somos>.

41 Others—all significantly smaller than ETCO—include the ANGARDI (National Association for Safeguarding Intellectual Rights) and the IBL (Legal Brazil Institute, or Brazilian Institute for the Defense of Competition), which represents electronics manufacturers.

42 ETCO’s slogan is “now illegality will have to face ethics.” ETCO, “Quem Somos,” <http://www.etc.org.br/texto.php?SiglaMenu=QSM>.

most ABPI members provide legal services for industry, its work has a clear industry tilt. The ABPI publishes a journal on IP law, organizes conferences, and has a number of working groups dedicated to a wide range of IP topics, including enforcement. It was a member of the CNCP for most of the council's history, before losing its seat in 2010 to the BPG. It also serves as the Brazilian chapter of the AIPPI (International Association for the Protection of Intellectual Property), self-described as “the World’s leading non-government organization for research into, and formulation of policy for, the law relating to the protection of intellectual property.”<sup>43</sup>

## How Piracy Works

Every time I go out on the streets and see a street vendor, I feel like kicking his stall.  
 —*Tânia Lima, executive director of the Brazilian Video Union*<sup>44</sup>

Despite the speed of the digital transition, physical piracy still matters in Brazil. Broadband quality is generally poor (IPEA 2010), making large downloads problematic even for privileged users. Only 42% of the population of Internet users in Brazil have access through home connections, with LAN houses the primary means of access for 29% (CETIC.br. 2009).

Accordingly, IP enforcement in Brazil still focuses on the traffic in hard goods, such as optical discs, and on the role of the large informal sector in production, distribution, and retail. Because much of the trade in counterfeit and contraband goods implicates transnational smuggling networks—especially across the porous “tri-border” zone with Argentina and Paraguay—government and private-industry associations have generally found common ground on enforcement. Arguably the most effective measures taken by the CNCP during its first years involved bringing the Federal Police, the Federal Revenue Service, and affected industries into closer coordination on border control. Other widely supported initiatives have focused on the regulation and policing of Brazil’s informal-retail sector, including kiosk malls and street markets.

A convergence of industry and government perspectives may be harder to achieve around Internet and book piracy. These two types of piracy have figured in the past three USTR reports as reasons for keeping Brazil on the “Watch List.” Book piracy—mostly involving the photocopying of educational materials—involves a very different field of actors than those associated with street vending and the optical disc trade. Much the same is true of Internet piracy, leading to different forums and policy coalitions, with outcomes that are harder to predict. The CNCP, in particular, is a less central protagonist in these debates.

43 AIPPI website, <http://www.aippi.org>.

44 NBO Editora (2009).

## The Street Trade

Since the early 1990s, many of Brazil's largest municipalities have tried to formalize their local informal sectors, both as a matter of improving public order and in an effort to bring street vendors into the sphere of regulated and taxed business activity. The relocation of street vendors to centralized, better-policed markets—the so-called camelódromos—has been a central feature of these efforts. Because space in these locations has proved too scarce to accommodate all interested workers, these measures have also produced new forms of informality along this border of relative privilege, notably in the form of illegal markets for permits (Itikawa 2006; Mafra 2005). In addition to the publicly regulated malls, privately owned kiosk malls have also emerged as places where legal and illegal goods are traded.

Vendors, street markets, and malls trade in more than just counterfeit goods. Industrialized junk food, for instance, is one of the main products sold by street vendors (Gomes 2006:220). Regular business occurs alongside illegal activity. Accordingly, rights holders often pursue pirate vendors via regulation outside the framework of intellectual property or criminal law, including municipal ordinances related to zoning and construction. Such actions can disrupt or force the relocation of trade in pirated and counterfeited goods. Some of the more notorious malls, such as the Stand Center and the Promocenter in São Paulo, were closed through the enforcement of such ordinances (Bertolino 2007).<sup>45</sup> But in general, the informal sector remains highly fluid, and commerce can relocate quickly to other areas. In the past few years, Internet auction sites and online communities have also become a channel through which pirated and counterfeit merchandise is sold.

Despite the informality of the sector, street vendors are usually represented by associations through which they act politically and interact with government (Ribeiro 2006; Itikawa 2006; Braz 2002). Such politics is almost always local, and tensions between vendor associations and law enforcement authorities, politicians, and city hall are relatively common. Two CNCP projects focus on these local-level interactions: a program to coordinate law enforcement agents and rights holders at the municipal level (the Piracy-Free Cities project) and a series of efforts to more fully formalize vendor networks (the Legal Fair project). Thus far, these initiatives have had only limited impact. Ultimately, piracy and counterfeiting are only part of the larger set of commodity flows and social interactions that shape the informal economy. Ownership patterns and forms of regulation are quite diverse in these settings, as are the social relations that structure the operation of markets and malls. Markets with a permanent address, for example, have very different dynamics than the more precarious vendor networks that move from one location to the next—often in function of police or other municipal pressure. Even within superficially similar markets, such as the Uruguaiana market in Rio de Janeiro and the Campinas Camelódromo or Galeria Pagé in São Paulo, relationships with police, municipal authorities, and supplier networks can vary widely.

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45 In 2008, the Stand Center's administrators and sixteen storeowners were sentenced to pay R\$ 7 billion to the ABES for software piracy (CBN/O Globo Online 2008).

Vendors often specialize in specific categories or genres of goods and sometimes in quite narrow categories such as the sale of video games for a particular platform or local music subgenres. The distribution chains in these settings also show considerable variation. Some vendors operate on a consignment basis and split profits with their suppliers at the end of each day. Other businesses are structured around wholesaler/retailer networks, while still others employ vendors for a fixed daily rate. Vendors can also operate their own production lines, acquiring blank discs, sleeves, and other materials from networks of suppliers but doing all the burning, printing, and assembly themselves (Pinheiro-Machado 2004:112; Mafra 2005:50–51, 92; Rodrigues 2008:87).

By most accounts, optical disc production is primarily domestic, small-scale, and decentralized in Brazil. As a vendor in the Uruguaiana market in Rio told us, “There’s no Tony Montana here. It’s not like in the drug trade.” Rather than a handful of large, central producers of pirate discs, there are many smaller producers using equipment that is readily available on the consumer market. (In November 2010, duplicators for the simultaneous burning of eleven DVDs could be bought for R\$ 1,390 (\$806) through the auction site Mercado Livre.) Content is usually obtained from online sources and burned to low-priced blank media imported from overseas. In an attempt to break this supply chain, industry groups have campaigned in the past for price floors for blank media (IIPA 2005:67–68). But such proposals are controversial and face major challenges of implementation. Moreover, the window in which the pirate economy might have been vulnerable to such tax strategies is rapidly closing as distribution and consumption shift to all-digital channels.

### THE TRI-BORDER AREA AND CHINA

Although there are nine points along the Brazilian border where three countries meet, industry, government, and media attention focuses overwhelmingly on the “Tri-Border Area” (TBA) with Paraguay and Argentina—the entry point, by most accounts, for a large share of the merchandise distributed in Brazilian street markets. Although clandestine networks and shipping undoubtedly play a role in this traffic, the border zone is also a common destination for organized shopping tours from all over Brazil. Brazilian citizens have a monthly tax exemption of R\$300 (\$180) to bring goods into the country for non-commercial purposes, and many act as *laranjas* (literally “oranges,” meaning proxies) for *sacoleiros* (“baggers”)—informal importers who supply *camelôs* (street vendors) with varied goods. The term commonly used for this activity is *contrabando formiga* (ant contraband), reflecting the small quantities of goods brought by a large number of border crossers.

Life and commerce in the TBA have been well documented in ethnographic work by Rabossi (2004), Pinheiro-Machado (2009, 2004), and others.<sup>46</sup> These accounts tend to

46 Also of note is work by Davi (2008), Rodrigues (2008), Goularte (2008), and Martins (2004). A good source for academic information on the TBA is the Observatorio de la Triple Frontera website: <http://>

emphasize the enormous social and political complexity of the TBA as a migration hub for diverse national and ethnic groups and as a recurring site of social and political conflict on many levels: between Brazil and other states; between laranjas and sacoleiros; between federal, state, and local authorities; between formal and informal workers; and among the culturally and ethnically diverse populations that live there. Descriptions of the TBA as a lawless haven for organized crime, such as those found in copyright industry reports, are not helpful in understanding the area or its many problems—piracy included.

A variety of supply chains serve the informal market in Brazil. Much of the traffic is sourced to China, which has become a major presence in the region's licit and illicit economies.<sup>47</sup> The China-Paraguay route is, by most accounts, the most important of these.<sup>48</sup> But not all counterfeited goods enter in this fashion. Brazilian borders are long enough to provide numerous points of entry for clandestine goods and persons. For some articles, such as counterfeit leather goods and clothing, production also takes place within Brazilian territory.<sup>49</sup>

### **ORGANIZED CRIME, TERRORISM, AND PIRACY**

As in other countries, Brazilian industry groups make claims of connections between piracy, international organized crime, and occasionally terrorism. As elsewhere, such charges tend to trickle down from international reports into the discourse of local enforcement agents. Claims linking piracy and organized crime emerged in the late 1990s, driven initially by music-industry-group reporting on the illicit global CD trade (IFPI 2001). By the early 2000s, the IIPA was inveighing against the role of criminal organizations in the Brazilian trade, arguing that “organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products” (IIPA 2001a:52). In 2010, the argument was much the same: “Organized crime is deeply involved in piracy in Brazil. Not only are Chinese and Middle East groups operating in the border with Paraguay, but they also control the distribution of pirate DVDs in the black markets at the end of a complex chain of command” (IIPA 2010:144).

Statements by public officials regarding organized-crime linkages have become more common since the Parliamentary Commission of Inquiry on Piracy (2003–4), which began the process of public adoption of industry discourse. Key Brazilian authorities have provided

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[www.observatoriotf.com/](http://www.observatoriotf.com/).

47 According to the Brazilian Ministry of Development, Industry, and Foreign Commerce, China became Brazil's largest trading partner in 2009 (Ministério do Desenvolvimento, Indústria e Comércio Exterior 2010).

48 It is also a convoluted route: landlocked Paraguay relies on the Brazilian ports of Santos (São Paulo) and Paranaguá (Paraná) for overseas trade, guaranteed through agreements dating back to 1941 and 1957.

49 Including Minas Gerais and Paraná (O Estado de São Paulo 2009a).

support for these accusations. Luiz Paulo Barreto, the first president of the CNCP and, more recently, the Minister of Justice, has argued that the main target of the government's anti-piracy efforts are the "big mafias that have been established in Brazil, China and Korea" (Agência Brasil 2009)—not the street vendors who are, in actuality, the most common targets of police action. The current CNCP president, Rafael Thomaz Favetti, is even more forceful in stressing connections between piracy and organized crime.<sup>50</sup>

The TBA figures centrally in such accounts and especially in recent industry efforts to link piracy and terrorism. Alleged connections between Arab immigrants in the TBA and terrorist organizations have appeared periodically in the news since 1992, when unknown actors bombed the Israeli embassy in Buenos Aires. The bombing of the Argentine-Israeli Mutual Association in 1994 triggered another round of free association on the subject, even though evidence for viewing the TBA as a terrorist haven, as Costa and Schulmeister (2007:28) put it, is "meagre and imperfect." In contrast to claims of organized-criminal involvement, piracy-terrorism linkages in the TBA have been strongly contested by Brazilian authorities. No direct links between terrorist groups and criminal activity in the region have been established. Instead, accusations rely on purported remittances by Arab immigrants to groups such as Hezbollah (Amaral 2010).

### PROVING THE CONNECTION

In interviews, informants in both the public and private sectors generally argued that there is some sort of connection between piracy and organized crime. But the lack of evidence offered for such assertions was consistently striking. In many cases, informants simply repeated charges found in industry advocacy materials, to an extent that made it clear that industry literature provides the main source of information on the subject. In these cases, links were presented as self-evident, often following "tip of the iceberg" reasoning in which street vendors are cast as the endpoints of vast distribution networks controlled by international criminal organizations. Some informants did try to build stronger cases, generally by describing piracy as part of the wider global traffic in illegal goods, from counterfeit clothing to cocaine, tobacco, and firearms.

The latter argument fits well within the "dark side of globalization" narrative advanced by books such as Moisés Naïm's *Illicit* (2005). Naïm, a prominent journalist and the editor of the American journal *Foreign Policy*, was mentioned explicitly by two informants with ties to the Federal Revenue Service, whose views had clearly been influenced by the book. Naïm has

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50 Favetti has argued that piracy has "no social causes" and that "this idea that people who work in piracy are unemployed or doing odd jobs [to make ends meet] is no longer true. The confidential data we have from the police of Brazil [confirm] that piracy is controlled by organized crime" (Agência Brasil 2010).

been embraced by IP industry groups and has testified on their behalf before the US Senate.<sup>51</sup> In 2008, the US Chamber of Commerce funded a National Geographic documentary based on *Illicit*. A wide variety of other industry-produced reporting also circulates in this space, including the Alliance Against IP Theft's Proving the Connection (n.d.), the IFPI's *Music Piracy: Serious, Violent and Organized Crime* (2003), and the voluminous MPAA-sponsored RAND report on *Film Piracy, Organized Crime, and Terrorism* (Treverton et al. 2009).

Much is at stake in “proving the connection.” Domestically, linking IP enforcement to organized crime is a powerful way to elevate the issue in the eyes of government and public opinion. It is also a strategy for drawing the attention of law enforcement authorities to offenses that police and prosecutors normally consider less serious. Alleged links between piracy and organized crime were crucial for the inclusion of the IP enforcement agenda in certain law enforcement circles. The Civil Police unit in charge of investigating piracy in São Paulo, for instance, is hosted by a department specialized in organized crime, the DEIC; the national public-prosecutor workgroup the GNCOC was created to act against criminal organizations but eventually included piracy in its list of concerns.

Internationally, organized-crime and—still more significantly—terrorist linkages introduce piracy into the circuit of policy communities and fora dealing with bilateral and multilateral security. Pressure for stronger enforcement agreements at the World Customs Organization, and now in the recent Anti-Counterfeiting Trade Agreement (ACTA), reflect this new fusion of security and IP discourse. Tying online piracy to digital threats—identity theft, child pornography, bullying, cyberwarfare, and so on—is an application of the same strategy to fight file sharing. Industry's involvement in the Azeredo Bill debate is a clear example of this shift.

### ORGANIZED CRIME AND BRAZILIAN LAW

There is little consensus about the definition of organized crime—“an ever-changing, contradictory and diffuse construct,” in the words of one of its scholars (von Lampe 2008:7). But in law, the concept exists primarily to set boundaries for the use of exceptional legal regimes to target criminal activities that the regular instruments of law enforcement have difficulty addressing. The application of organized-crime statutes generally requires less concern for the rights of the accused than in less serious offenses and allows for more invasive procedures, such as wiretapping.

Copyright infringement has not traditionally fallen under the umbrella of organized-criminal activity, either in terms of the application of the law or—equally important—in

51 Pirating the American Dream: Intellectual Property Theft's Impact on America's Place in the Global Economy and Strategies for Improving Enforcement: Hearing Before the US Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Security and International Trade and Finance, 110th Congress, April 12, 2007 (testimony of Moises Naïm, Editor in Chief, *Foreign Policy*), [http://banking.senate.gov/public/index.cfm?Fuseaction=Hearings.Hearing&Hearing\\_ID=cd1f3746-1926-4da0-a8b7-6bfd6435e583](http://banking.senate.gov/public/index.cfm?Fuseaction=Hearings.Hearing&Hearing_ID=cd1f3746-1926-4da0-a8b7-6bfd6435e583).

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## Views on Piracy and Organized Crime

“It’s a mob thing. The business of piracy [is] to sell corruption logistics: ‘I can guarantee that your container will arrive there.’ And then I sell [container space] to the toys guy, to the weapons guy, to the drugs guy, to the CD guy, to the DVD guy, to the software guy, to the clothing guy, to everyone. Because even [São Paulo luxury boutique] Daslu had to find a way to get its underpriced clothes to Brazil. How does one do that? How can we get [clothes] through ports, airports, escape routes, and not be searched? To profit as much as they did, what did they do? They brought stuff from abroad. Everybody pays ‘X’; they pay ‘X divided by 10’ and get taxed over that value. [Goods] arrive here cheap as hell. While if I am to manufacture [the goods] at the Manaus Free Zone, I need to hire staff, pay labor dues, pay taxes, all that. Or import legally.” (Private sector, consultant)

“You have large-scale, international piracy; big criminal organizations, like in China. Lots of pirate goods come from China, as they manufacture them on a large scale. . . . And then you have domestic piracy, don’t you, with small salesmen who practice this kind [of piracy] both in manufacture and in commerce.” (Public sector, enforcement)

“Well . . . people insist on that a lot, don’t they? They say there’s a link between piracy and organized crime. I think the link exists, but it’s not the rule. I’ve done fieldwork in piracy. There are lots of small fish doing counterfeiting. Guy has his computer, records a CD, a DVD, and then goes peddling on the streets, without the backing of any criminal organization. Of course, there are [also] powerful people behind [piracy]. The relation occurs more frequently in frontier regions. We often seize cargo and find cigarettes, drugs, pirated goods, CDs; so that shows that the same people doing [drug] traffic are bringing guns to the country, bringing pirated goods. This is the relationship I see with organized criminality.” (Public sector, enforcement)

“It’s not like what many people say, ‘You guys are stretching it, there’s no connection.’ If we follow the reasoning that piracy is an informal activity, drug trafficking is [also] an informal activity. All the money, the resources that are moved informally, the government has no knowledge, no idea of the money that runs through these channels. We can’t, initially, discard the possibility that this connection exists. Both drug trafficking and piracy are activities that run through informal channels. . . . So there is a connection. Resources run through channels that government has no knowledge of. We can’t affirm that all piracy is connected with the drug trade, but a big part of it is, and we’ve been noticing that everyday.” (Private sector, enforcement support)

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## Views on Piracy and Organized Crime, Continued

“Every crime of piracy is, at the end of the chain, linked to more active, broader criminal organizations with all sorts of businesses, involving, among others, drug dealing, arms contraband, and organized crime, terrorism. It’s something that’s very serious. So piracy is a very powerful business all over the world; it moves five hundred billion dollars all over the world, more than drug traffic. Therefore, piracy is absolutely connected to other types of crimes and is a branch of broader criminal organizations.” (Private sector, film industry)

“This connection is not well proven. Since both [drug] traffic and black market deal with illegal goods, it’s natural for piracy to fit within this activity. However, this connection is mostly stressed by media and rights holders in order to capture public attention, [to imply] that if you buy a pirate good, you’re contributing to your son’s access to drugs. Actually, this connection is very, very weak. It’s, as I say, sensationalism, a sort of publicity to call attention to piracy’s negative effects, when in reality [links to the drug trade] are not well established.” (Private sector, consultant).

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terms of the administrative organization of policing and enforcement. As a consequence, industry groups have worked to expand definitions of organized crime to encompass copyright infringement and to produce accounts of piracy that emphasize alleged connections with more conventional forms of criminal activity. The two processes are linked: the broader the definition, the easier it is to prove the connection.

The *Proving the Connection* report, for example, concludes that “the imperative is not to over-elaborate the term, rather to emphasize that it describes ‘a group or network focused on illegally obtaining profits in a systematic way, involving serious crimes with societal consequences’” (Alliance Against IP Theft n.d.:4). The RAND study, for its part, recommends “expanding the definition of organized-crime statutes to include commercial-scale piracy and counterfeiting tied with other criminal activity” (Treverton et al. 2009:145). The IIPA demanded, in its April 6, 2001, post-GSP-hearing brief on Brazil, that the Inter-Ministerial Committee on Combating Piracy draft and propose legislation supporting “the principle that medium- and large-scale piracy falls within the definition of an organized crime scheme” (IIPA 2001b).

Brazilian law has no definition of “organized crime” or “criminal organization” (see, generally, Pitombo 2009), despite the existence of legislation authorizing special means of evidence gathering and investigation for acts practiced by “quadrilha or bando” or “organizations and criminal associations of any kind” (Law 9.034/95, Article 1). There is no definition of what count as “organizations and criminal associations of any kind.” A “quadrilha or bando” is any lasting association between three or more people with the intent of committing crimes—a criterion broad enough to encompass virtually all aspects of the pirate economy, from large-scale smuggling operations to small-scale vending. Membership in such groups is a crime in

and of itself (Penal Code, Article 288).<sup>52</sup>

We are more sympathetic to narrower definitions that emphasize provable links to larger criminal organizations, such as the Camorra, the Yakuza, local or international drug cartels, Brazil's Comando Vermelho, and so on. We see little systematic evidence of these connections to date. Advocacy pieces, for the most part, rely on cherry-picked examples to make the broader case and offer grossly simplified accounts of the dynamics of street markets, street vendors' relations with local authorities, and other features of the informal economy. Industry public awareness campaigns are often the most flagrant in this regard. A recent UBV anti-piracy video, for example, portrays a closed economy tying together drug dealers, street vendors, and consumers of pirated media. Such allegations are important because they associate copyright infringement with "crimes that the public are really scared of" (Drahos and Braithwaite 2002:27), as distinct from the mundane acts of copying and informal commerce in which they routinely engage.

Street vendors involved in media piracy, for their part, tend to view organized crime through a similar lens and often take offense when accused of such associations. None, in our interviews, viewed the simple fact of the organization of the supply chain as significant, and several characterized piracy as an alternative to activities such as drug trafficking. Our interviews in the Uruguaiana market in Rio strongly confirmed earlier ethnographic work on this front (Mafra 2005:94; Gomes 2006:229; Braz 2002) and echo the views of Mexican vendors presented in the next chapter in this report.

### **LAW KIM (KIN) CHONG**

The arrest of smuggler/businessman Law Kim (or Kin) Chong during the initial parliamentary inquiry in 2003–4 became a touchstone in the Brazilian conversation about piracy and organized crime. A naturalized Brazilian citizen of Chinese origin and the owner of several stores in popular shopping centers in São Paulo (O Estado de São Paulo 2009b), Chong came to public attention in 2004 when he was arrested while attempting to bribe Deputy Medeiros, the president of the Parliamentary Commission of Inquiry on Piracy, in an effort to buy protection for his businesses (Rizek and Gaspar 2004). Since 2004, he has had continuous problems with law enforcement and São Paulo municipal authorities. He was arrested again in 2007 and 2008 under accusations of smuggling, tax evasion, and money laundering (G1 2008a, 2008b).

52 Beyond the primary criminal statute, Law 9.034/95, the Brazilian law on drug trafficking (Law 11.343/06) refers to the concept of "organized crime" (Article 33, §4) for the purpose of authorizing judges to reduce the penalties of informers who testify against former associates. The law establishes stronger penalties and a looser threshold for criminal association, now defined as involving two or more people. No more substantive definition is provided. Brazil is also a signatory to the United Nations Convention against Transnational Organized Crime (the Palermo Convention), but the convention's definition of "organized criminal group" applies only to criminal activity that occurs in a transnational context and focuses on the practice of crimes defined as "serious" (meaning, according to Article 2(b), "an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty"). It is thus significantly narrower than the crime of criminal association contained in Article 288 of the Brazilian Penal Code.

Chong served a brief jail term in 2004; the 2008 case was dropped by prosecutors for lack of evidence.

Called a “notorious piracy kingpin” by the IIPA (2006:208), Chong has become the emblematic figure of the Brazilian anti-piracy effort. He has been frequently used as an example of the connections between piracy, counterfeiting, and organized crime and is featured regularly in news articles on these issues.<sup>53</sup> Constant reliance on the Chong case, however, also tends to highlight the lack of a wider case for linkages between organized crime and piracy.

There are many reasons to doubt the broader account of connections, chief among them the rapidly diminishing role of transnational smuggling in the piracy of media goods—in distinction from other kinds of hard goods. The IIPA began to describe this shift as early as 2001, observing that “there are also growing numbers of small duplication facilities which assemble CD burners” in the country and that the “MPA has noted the beginnings of optical disc piracy, previously not present in Brazil” (IIPA 2001a:55–56). The following year’s report observed that “piracy has changed from an international industrial profile to a domestic semiprofessional effort.” While looking for other ways to invoke organized-crime discourse, they noted that “the distribution of product, however, remains highly organized” (IIPA 2002: 76). The conflation of piracy and counterfeiting in most anti-piracy discourse is also very unhelpful in this context. Of the major figures raised into the media spotlight by enforcement efforts in the past decade, including Roberto Eleutério da Silva and, more recently, Paulo Li, only Chong has been accused of media piracy. Da Silva is best known as a cigarette smuggler (Castanheira 2003). Li is associated with cell phones and electronics (Rangel 2010). In our view, the most compelling case for connections between street piracy and transnational groups involves the trade in blank discs, which most accounts describe as originating largely in China. But we see little evidence of more systematic connections beyond the blank disc trade, and the Chong case alone does not provide evidence of wider linkages between the pirate economy and organized crime.

### Internet Piracy

Despite constant complaints about Internet piracy in IIPA reports going back at least to 2001, Brazilian enforcement policy has strongly emphasized hard-goods piracy and commercial-scale infringement over the past decade, consistent with long-standing interpretations of the threshold for criminal liability under TRIPS. This has included a number of actions directed at Internet-based commercial infringers, notably through big operations such as the I-Commerce I and II operations of the Federal Police, which targeted commercial infringement through

53 Chong has also served as a convenient personification of Brazilian anxiety toward Chinese immigration and China’s rise as an economic power. Usually implicit in the coverage of the case, such anxiety sometimes shades into xenophobic stereotypes, as in Deputy Medeiros’s book about the Parliamentary Commission of Inquiry on Piracy, *A CPI da Pirataria*. In the book, Chong is described as a “cold little Chinese man” and a “moral monster” with “painfully slanted eyes,” but also a “predictable” man due to his “millennial obedience” (Medeiros 2005:96–97).

online channels.<sup>54</sup> But until very recently, it has not involved the expansion of enforcement activity to the wide variety of sites that enable individual sharing of files, from BitTorrent trackers to file locker services. File sharing became an explicit government concern only in 2008, when, in response to recording industry demands for more government involvement, the Ministry of Culture convened their ISP working group to develop an agreement on the implementation of a graduated-response system in Brazil.

At present, there are no specific liability rules for ISPs. In practice, however, rights holders, ISPs, and other Internet services have adopted a set of informal norms around notice and takedown that has proved very compliant with industry demands. ISPs have typically acted quickly in response to takedown requests (IIPA 2010:148–49). Major auction sites like Mercado Livre regularly comply with industry notices when infringing goods or advertisements for those goods are found on their sites (Nintendo 2010). Industry groups have generally expressed satisfaction with the level of cooperation from Brazilian ISPs and other services in such cases.

Peer-to-peer file sharing poses a very different problem. With P2P technologies, infringing content is hosted on users' hard drives, not on central servers. Most such systems require only minimal intermediation by torrent-tracker sites or their equivalents (such as ed2k links or Direct Connect servers, both of which are popular in Brazil), raising questions about the liability threshold for P2P services.

The recording industry is the leading actor in the campaign against file sharing in Brazil. The film industry is definitely on board but still sees hard-goods piracy as its main target (IIPA 2010), in large part due to the higher bandwidth and technology requirements of video piracy over the Internet. In 2006, Brazilian record industry group the ABPD (with the support of the IFPI) tested the waters of personal liability by initiating some twenty civil suits against individual file sharers, based mostly in São Paulo. The cases ran into difficulty almost immediately when the ABPD could not obtain personally identifying information from the relevant ISPs based on IP addresses collected through surveillance of P2P sites (IIPA 2008). In one case, a judge refused to grant the orders to force the ISPs to release the data. In another, the orders were granted, but the ISPs had already purged the data, as there was no legal obligation to retain it. Under such circumstances, efficient pursuit of individual file sharers was (and remains) effectively impossible. In 2008, industry support consolidated around the Azeredo Bill, which mandates three-year data retention and ISP cooperation in releasing personal information. Shorter data-retention requirements are likely to become law through the Marco Civil process. To date, government commitment on privacy issues, however, remains strong, and more sweeping measures, such as the “three-strikes” law proposed in 2009, seem unlikely.

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54 In 2006, Operation I-Commerce I, targeting the sale of pirated goods over sites such as Mercado Livre and Orkut, had the Federal Police executing seventy-nine court orders for raids in thirteen states and in the Federal District of the Brazilian federation. Thirteen individuals were arrested in flagrante delicto, and fifty-seven others were formally accused (Tourinho 2006). 2008's Operation I-Commerce II had the same objective, with forty-nine court orders across nine states and the Federal District, mobilizing two hundred police officers (IDG Now! 2008).

As elsewhere, Brazilian enforcement faces growing difficulties as the use of file sharing technologies proliferates. LAN houses, as mentioned, have been an important means of both Internet access and Internet piracy for lower-income Brazilians and enable both local network sharing and an extensive culture of face-to-face transfers of physical media—the so-called sneaker-nets (Biddle et al. 2002).<sup>55</sup> And although we have seen no conclusive studies of the subject, the use of P2P systems is clearly complemented in Brazil by the widespread use of other types of services, including file locker sites such as Megaupload, 4shared, and RapidShare. A variety of community sites and online forums index and link to material stored on these services, creating large communities sharing music, film, books, and software. Industry groups now issue a constant stream of takedown notices to the owners and administrators of blogs and community sites.

### **DISCOGRAFIAS AND ORKUT**

One of the biggest file sharing skirmishes, thus far, has taken place around Discografias—a large community site devoted to music sharing. Discografias is not a P2P site but rather a community built on Orkut, a Google-owned Facebook competitor and the most popular social networking service in Brazil.<sup>56</sup> Within Orkut, any user can set up a public or private “community,” consisting of a list of members and related communities, a message board, and a simple tool for polling. Although limited, these features have proved rich enough to enable large communities to consolidate around shared interests.

The Discografias community specializes in the sharing of music through links to external storage services (for example, file locker sites like RapidShare, Megaupload, and 4shared). Strictly speaking, Discografias is a hub for other communities with more specialized roles in the music-sharing process. One community, for example, is used for the posting of requests for particular songs or albums, which are then answered in the main community. Another is used as a general index.

Founded in 2005, Discografias had, by most estimates, a community of 921,000 registered users by early 2009 and almost certainly a much larger casual-user community: membership is not required for reading the boards and accessing the download links (Muniz 2009a). In March 2009, however, its moderators received a cease-and-desist notification from the APCM, requesting the removal of links to infringing content. The moderators decided to comply with the APCM’s request (Pavarin 2009a), and virtually all the content on the site was deleted. Paulo Rosa, director of the ABPD, celebrated with the following statement: “The closure of the illegal file sharing network is a significant step in curbing online piracy in Brazil. The communities affected represented the largest user group in a social network dedicated to exchanging links for the purpose of illegal copying” (IFPI 2009b).

55 The IIPA (2008) cites record industry studies attributing 20% of online piracy to cybercafes.

56 According to an IBOPE Nielsen estimate, Brazil had an astonishing 39.9 million active Orkut users in August 2010 (Aguiari 2010).

The APCM action succeeded in fragmenting the Orkut music-sharing community but not in destroying or even significantly dissuading it. Several similar communities were created immediately to reconstitute the sharing network. Members of the original Discografias community also quickly rebuilt the database of links and soon launched Discografias-A Original (Discographies-The Original) (Folha Online 2009). By April 2010, membership in the new Discografias had grown to some 760,000 members.<sup>57</sup> Another result of these skirmishes is more clearly articulated resentment of the APCM. In November 2010, the I Hate APCM community had almost 12,000 members.

### FAN COMMUNITIES AND SUBTITLING

Content-distribution networks for film and video in Brazil are strongly grounded in fan culture. Fans have structured themselves into networks of communities engaged in the translation and distribution of foreign movies and, especially, TV shows. These translator (or “legender”) communities have adopted many of the practices of “fansubber” and “scanlator” communities for Asian anime and manga and now often compete to adapt specific series or types of content into Portuguese.<sup>58</sup> The translating work in such communities is resolutely non-commercial: the main incentive is prestige.

Fan-based subtitling tends to be extremely efficient. As soon as a new episode of a popular TV show hits the Internet, typically immediately following its initial broadcast, teams start working on subtitles. A completed set of titles for an episode can be done within four hours of the original broadcast (Agência Estado 2008)—with revisions and refinements processed over the following days. There are at least thirty teams of legenders actively working in Brazil and many independent translators working on their own. Most of those involved meet to publish, discuss, and polish their work on a website called Legendas.tv. Legendas.tv neither hosts nor links to infringing video. It only distributes subtitle files in formats, such as .srt, which contain the text and timing for the translations and which are easily integrated into common video files like .mkv and .avi.

The two pieces—the copied videos and their subtitles—come together on other sites, such as those hosting Orkut communities, online forums, and other file sharing communities.

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57 In November 2010, the community was deleted once again and recommenced the process of rebuilding. Searching for “discografias” among Orkut communities reveals many interrelated communities, some of them very specific, such as Justin Bieber-Discografia (9,000 members as of November 2010).

58 Anime-translator communities based in the United States have engaged in heated debates about the relation of their work to copyright, and some of the larger ones limit their activities to work that has not been licensed for official distribution. Implicitly, and sometimes explicitly, these communities envision themselves as building a global market for anime—with some justification. The extensive pirate fan base led to wider licensing practices beginning in the early 2000s, though these are still only infrequently extended beyond the United States and other major markets. Brazilian fan communities generally translate foreign content regardless of such considerations. When justifications are called for, they usually involve the weakness of Brazilian distribution, which includes broadcasting delays and the limited availability of many categories of legal media goods.

These often link to both the subtitle files and the content they refer to, sometimes conveniently packaged. All these communities overlap considerably: it is difficult to separate the activity of subtitling from the ecosystem of file sharing and fan culture. Regular participants in private or public file sharing communities may be, at the same time, respected members of subtitling groups, active posters on Web bulletin boards, avid purchasers of original DVDs, and file hoarders with extensive collections of pirated films, songs, TV shows, and software. These communities are an example of the wider shift from consumers to users that Yochai Benkler (2000, 2006), among others, has written about.

Conflict between industry and subtitlers in Brazil dates back to 2006, when the ADEPI (Association for the Defense of Intellectual Property), a predecessor of the APCM, sent cease-and-desist notifications to *Lost Brasil*, the largest community site for fans of the ABC TV show *Lost* (Mizukami et al. 2010). Because dialogue is covered under Brazilian copyright, any unauthorized transcription is an infringement. The APCM has continued to target subtitler communities, such as *Legendas.tv* and subtitling team InSUBs. Because these sites were originally hosted in the United States, the APCM was able to serve their Internet hosts with takedown notices under the US Digital Millennium Copyright Act. Both sites were closed and quickly re-established on servers outside US territory. Both actions produced a significant backlash among fans, culminating in an attack on the APCM's website.

As of late 2010, both *Legendas.tv* and InSUBs continue to operate, along with several other related websites. There have been no further legal actions announced against subtitlers.

## Book Piracy

After several years off the USTR radar, concerns about Brazilian book piracy reappeared in the Special 301 reports for 2008, 2009, and 2010. The issue is not a new one, of course. The photocopying of books and articles has been common in Brazilian schools and universities since copy machines became widely available in the 1980s. By nearly all accounts, the phenomenon is highly concentrated in and around higher education, fueled by high book prices, inadequate library collections, and the narrow range of in-print works in Portuguese (Craveiro, Machado, and Ortellado 2008; IDEC 2008).

Brazil is hardly unique in this regard. Academic book copying has been a basic feature of higher education in most developing countries (see, for example, the South Africa chapter in this report) and a basis for recurring international conflicts over copyrights and enforcement since the seventeenth century (see chapter 9). But where most university and publisher groups have sought to compromise—rhetorically, if not always in practice—the Brazilian situation is distinctive for having devolved into a serious and ongoing conflict (Mizukami et al. 2010).

Poor copyright legislation set the stage for this conflict. Article 46, II, of the Copyright Act of 1998 (Lei 9.610/98) allows for a single copy of “small excerpts” of works in the case of personal copying—in other words, when the beneficiary of the copy is also the party doing the copying. There are, however, multiple interpretations of what constitutes a small excerpt,

ranging from 10% at some universities (Craveiro, Machado, and Ortellado 2008) to 49%, according to one legal scholar (Pimenta 2009:80).

The ABDR, a Brazilian publishing industry group, has taken an almost uniformly hard line on licensing and fair use. The ABDR revoked all its licenses to university copy shops in 2004 and ramped up its enforcement, copyright advocacy, and lobbying efforts. Searches and seizures against university copy shops were particularly aggressive in 2004 and 2005 and continue to this day.<sup>59</sup> ABDR members also print their own warnings and legal interpretations in books, typically claiming that even the reproduction of small excerpts is illegal, often with misleading references to the article in the law that explicitly does authorize excerpting (Mizukami et al. 2010; Souza 2009; Mizukami 2007). Within the larger enforcement network, this idiosyncratic enforcement agenda has produced few opportunities for collaboration with other industry groups and resulted in the ABDR's loss of its seat on the CNCP when its term expired.

With the exception of two problematic proposals we describe later in this section, the ABDR has resisted discussing new business or licensing models that might alleviate the problem of access to materials in Brazilian universities. It is also strongly opposed to the copyright law reform bill proposed by the Ministry of Culture (ABDR n.d.b), which offers a broader and, above all, clearer list of exceptions and limitations. Since negotiations with the ABDR have reached a stalemate, copy shops and universities have generally gone their own way, either adopting a zero-tolerance policy against copying books and articles, even when permitted by law, or creating their own parallel interpretations of copyright law.

In 2005, three universities in São Paulo stepped into this debate by issuing policies that clarified and expanded the scope of the private-copy exception, effectively establishing their own *de facto* copyright regime (they were joined by a fourth university, in Rio de Janeiro, in 2010). The new university policies stick close to Brazilian law but offer much broader interpretations of what constitutes a small excerpt. The University of São Paulo (USP), for example, interprets it to include full book chapters or journal articles. Additionally, it has authorized users to fully copy works that have been out of print for more than ten years, foreign works that are not available in the Brazilian market, works in the public domain, and works whose authors have expressly granted authorization to copy. The last two are unquestionably legal to copy; the first two are not. Pontifical Catholic University of São Paulo (PUC-SP) and the Getulio Vargas Foundation-São Paulo (FGV-SP) adopted resolutions similar to USP's (Jornal PUC Viva 2005; PublishNews 2005).

In 2005, students from the three institutions formed a short-lived movement to support the university policies: To Copy a Book Is a Right (Copiar Livro é Direito) (Magrani 2006). In September 2010, a raid by the DRCPIM on the copy center of the School of Social Services at the Federal University of Rio de Janeiro (UFRJ) provoked a similar resolution by that university, authorizing the full copying of book chapters and articles (Boghossian 2010).

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59 These shops are typically independent, formally constituted businesses but are sometimes run by student organizations or by the universities themselves, through their libraries.

These university interventions in the copyright arena have been controversial, to say the least. Predictably, they have provoked the anger of the ABDR and, through the ABDR, come to the attention of the IIPA and the USTR. Pressure from the IIPA, visible in its reports since 2005, has especially targeted the University of São Paulo, which, as a state institution, is under the jurisdiction of the Ministry of Education. Attempts to pressure the Ministry of Education into taking action against photocopying date back at least to the Parliamentary Commission of Inquiry on Piracy, which published a formal recommendation on the subject (Câmara dos Deputados 2004: 276–77). But the ministry has resisted acting and has stayed out of the campus policy battle. It shows no signs of changing its position. Interviews with officials from several ministries revealed considerable resentment of industry’s framing of infringement in educational contexts as piracy. The deliberate blurring of terms, including the conflation of copyright infringement with other forms of hard-goods trafficking and public-safety hazards, appears to have backfired at this level.

Stepping back from the details of the fight, the Ministry of Education has ample basis for circumspection and an understandable reluctance to endorse the idea that educational copying is a form of theft from the private sector. The government is the single biggest buyer of textbooks in Brazil through five ministry programs (Cassiano 2007). And according to one recent study, roughly 86% of the books written in Brazil and used in the country’s universities have benefited from investments made by the public sector (taking into account the variety of ways in which the university subsidizes research and writing) (Craveiro, Machado, and Ortellado 2008:28).

Although the cited dollar amounts are trivial, with the IIPA’s estimated losses implausibly stuck at \$18 million for much of the past decade, the university breakaway represents a challenge to an industry enforcement campaign built on unanimity of rhetoric across a wide public front, if not actual uniformity of practice.

The ABDR and the publishers see other threats as well. The illegal sale of teachers’ versions of textbooks is one area of contention and forms the basis of an anti-piracy campaign by textbook-publisher association ABRELIVROS. Digital piracy, for obvious reasons, is also a growing concern. The ABDR recently created a unit specialized in identifying infringing files and sending takedown notices, following the example set by the APCM.<sup>60</sup>

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60 Generally unmentioned in these complaints are the numerous charges against Brazilian publishers for publishing plagiarized translations of public-domain literature. Translator Denise Bottman’s blog extensively documents the subject: <http://naogostodeplagio.blogspot.com/>.

## Research, Training, and Education

“Many pirate products cause serious harms to health. Are you aware of this information?”

– *A 2008 survey question*<sup>61</sup>

It is impossible to analyze industry research, training, and education programs in Brazil outside the context of IP advocacy. Despite pretensions to objectivity, nearly all these programs are efforts to convince authorities and consumers of the harms produced by piracy and counterfeiting and, conversely, of the benefits of strong IP protection and enforcement. As an ensemble, they are designed to produce a stronger “culture of respect” for intellectual property and a collective hardening of attitudes toward piracy. This is, above all, a campaign of knowledge and ideas, built on efforts to define the terms of the piracy debate. It is also a multimodal campaign that comprises research, outreach in schools and among professional groups, media campaigns, and the very effective capture of print and broadcast journalism, which has made press releases, photo ops, and industry-generated stories into staples of Brazilian news coverage.<sup>62</sup>

There is relatively little about the content of these initiatives that is uniquely Brazilian. Nearly all borrow heavily from international templates, marking another side of the international coordination among industry groups. The strong moralization of anti-piracy discourse is present throughout, whether directed at children or filtered through nationalistic accounts of economic development. The strategic conflation of terms is there, too, notably in the effort to boost the harms attributed to piracy through association with the more dangerous forms of counterfeiting and criminal activity. And the endless gaming of numbers and statistics is there, with a range of local actors producing a circular and opaque Brazilian discourse on piracy losses. The progressive (and increasingly official) undermining of these claims in international contexts and the gradual pullback of the industry from new research has done little so far to stem their use in official Brazilian circles.<sup>63</sup>

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61 From *Pirataria: Radiografia do Consumo* (The Consumption of Pirate Products), commissioned by Fecomércio-RJ (the Rio de Janeiro Federation of Commerce) and conducted by Ipsos in 2008.

62 This section is informed by the gathering of over five hundred news articles focused on the following themes: (1) arrests of street vendors and individuals engaging in the mass duplication of copyrighted content, (2) alleged connections between piracy and organized crime, (3) training and education of law enforcement agents and the public, (4) legislative proposals to strengthen the IP enforcement legal framework, (5) copyright reform, (6) opinions from content producers and researchers on piracy, (7) industry losses, and (8) new business models conceived to deal with the problem of piracy. An unpublished FGV Opinion report analyzing news collected over the period of May through September 2008 also served as a source. No effort to quantify the occurrences of these topics was made; news articles were collected solely for qualitative analysis.

63 This report echoes the growing official skepticism of industry research found in recent Organisation for Economic Co-operation and Development and US Government Accountability Office reports.

The results of these programs and the overall campaign are somewhat contradictory and, we would argue, in flux. Domestically, Brazilian government and industry discourse has converged in recent years around “the fight against piracy” at exactly the moment when the evidentiary discourse around piracy has been delegitimized. We saw this repeatedly in interviews with public officials involved in the enforcement effort, who often discounted industry claims about losses while holding on to the purposes of the anti-piracy agenda. We also see it in the apparent heterogeneity of Brazilian positions in different policy contexts—notably in the disconnect between the domestic enforcement debate and Brazil’s international policy positions on intellectual property, which have been sharply at odds with industry and US wishes at WIPO, the WTO, and other global forums. This latter subject elicited considerable disagreement in our interviews and is examined in more detail in the following pages.

### Anti-Piracy and Poetic License

For a subject that elicits so much public attention, definitions of piracy in Brazilian law are surprisingly scarce. In fact there is only one, in the decree that established the CNCP in 2004.<sup>64</sup> Even here we don’t learn much: the CNCP decree simply states that piracy is understood as copyright infringement. For a definition of copyright infringement, the decree points back to Laws 9.609 and 9.610 of 1998—the Brazilian software protection and copyright acts, respectively. There is no definition of counterfeiting in the decree—an odd omission for an institution largely focused on counterfeiting, but a telling one given the CNCP’s persistent conflation of the two terms.<sup>65</sup>

Nonetheless, the two terms are clearly distinguished in Article 51 (footnote 14) of the TRIPS agreement—the primary framework for international law on copyright and enforcement. TRIPS ties “counterfeiting” to trademark infringement and “piracy” to copyright infringement and uses that distinction to anchor the different protections and enforcement regimes applicable to different types of goods. Goods can infringe one or the other, or in some cases both, when the good reproduces both the expressive content and the brand of an original.

The conflation of the terms in industry discourse is not accidental. It is used to tie copyright infringement to a wide range of public-safety and health hazards associated with counterfeit medicines, toys, and other substandard goods, and it allows industry research to paper over serious gaps in the evidentiary record around copyright infringement—a subject we discuss at more length later. As we have argued repeatedly in this report, the first but by no means only problem with such conflation is that the practices that define piracy and counterfeiting have

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64 Decree 5.244/04.

65 Law 9.610/98, the Brazilian authors’ rights law, defines *contrafação* (counterfeiting) as any unauthorized reproduction of protected content. This definition was inherited from older legislation—it was already part of Law 5.988/73—created for a technological context in which the physical good mattered more than the digital. It is not in compliance with the TRIPS definition.

largely diverged as the pirate economy moves toward cheap, personal digital-reproduction technologies.

The weak legal and factual basis of this conflation is no secret among public- and private-sector actors in Brazil's enforcement debate. In our interviews, private-sector informants were aware that “piracy” and “counterfeiting” are different in law and on the ground but generally had no qualms about using “piracy” as a catchall term. Speaking about industry awareness campaigns, one informant argued, “If we want to develop anti-piracy values, then a DVD is as important as medicines, as adulterated fuel, or any other [counterfeit] product, whether clearly identified or not.”

Even crimes that may be only circumstantially related to IP infringement, such as smuggling and tax evasion, get pulled under the piracy umbrella. As a different private-sector informant described it, “[Piracy] is not a technical term, it's not a legal term. It's a colloquial term that people understand and that the country understands. So we take up [the term] ‘piracy’ and mention ‘illegality’ next to it, under poetic license, so we may be understood. When you speak about ‘piracy,’ everyone understands what that is.”

Informants from the public sector directly involved in IP policy debates were more cautious. The TRIPS definitions matter to them, and they are concerned with setting a clear boundary between the two terms. As one official noted, “So there's this confusion. From a legal standpoint—international, even—there is a very explicit definition [of piracy]: infringement in the field of copyright law. Domestically, this term has been used in a much broader fashion, even beyond intellectual property.”

In its public communications—and even in its use of its name—the CNCP actively propagates this confusion. Although officially named the National Council on Combating Piracy and Intellectual Property Crimes, the CNCP typically drops the “Intellectual Property Crimes” from its title. Press releases usually avoid the word *contrafação*. The Brazilian press, predictably, has picked up the more colorful terminology and extended it further, applying it to virtually any form of fraud or sale of illegal goods. In a typical example, Folha Online, the news website of media conglomerate Grupo Folha, applies the term *piratas virtuais* (virtual pirates) to con artists responsible for “phishing” schemes involving fake online sales or banking sites (Carpanez 2006).

Creative misuse of piracy terminology extends to much of the industry research conducted in Brazil. Here, the conflation also has practical value: it allows for results to be used by more than one industry sector, creating a simplified, self-reinforcing discourse about various types of losses. Rates of piracy or losses due to piracy, in these contexts, commonly refer to “piracy and counterfeiting.” (This is the case, for example, in the Ipsos and IBOPE surveys discussed later in this chapter.) We explore this in some detail in the following pages, in the context of alleged job and tax-loss numbers.

## To Repress and Educate

With the creation of the CNCP and the drafting of the National Plan, all underlying questions about the goals of intellectual property protection and enforcement were swept under the rug. Enforcement policymaking became, on the surface at least, a discussion about which anti-piracy measures were most effective. At the CNCP, these measures were divided into three categories: repressive, economic, and educational.

According to a CNCP informant, the initial negotiations over the National Plan were acrimonious, with public- and private-sector actors trading accusations about who was most responsible for Brazil's high piracy rates and ineffective enforcement. Public-sector actors blamed the unwillingness of the private sector to develop lower-cost business models or to bear more of the burden of investigation. Private-sector actors blamed the inefficiency of the courts and the inability of the police to fully enforce the law. As one public-sector official put it, "Intellectual property rights are private rights. So rights holders, when rights are infringed, can resort to the judiciary to enforce those rights. But it's another thing to create legislation obligating the state to permanently monitor if that right is being enforced."

During the drafting of the plan, the public and private sectors agreed that strictly repressive measures—raids, seizures, arrests, and lawsuits—would not be sufficient to deter piracy.<sup>66</sup> Repressive measures would have to be complemented by economic measures—a gesture toward the range of business-model, tax, and licensing issues that shape markets for goods. There would also have to be new educational measures designed to raise consumer respect for intellectual property. Every agent involved in anti-piracy work interviewed for this report referred to these three categories, even when critical of some of the assumptions of the National Plan.

There was much less agreement, however, on the appropriate balance between the three types of activity. Much of this tension remains unresolved, with the larger consensus providing cover for ongoing disputes over the division between public and private responsibilities. As one public-sector official described it:

For rights holders, the tendency is always to want to strengthen rights and to ensure that those rights are enforced in some way. So it is important to stress that intellectual property rights are essentially private rights. Does the state have an interest [in enforcing those rights]? Yes, of course the state has an interest, but private parties must also assert those interests before the state [by conducting investigations and filing complaints].

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66 The first CNCP report and the submission of the CNCP's then executive-secretary Márcio Gonçalves to the third meeting of WIPO's Advisory Committee on Enforcement also mention a fourth group of "institutional" measures, which are not defined but are described as legislative reform that would facilitate enforcement (Ministério da Justiça 2005; Gonçalves and Canuto 2006). The use of this fourth category has since been abandoned. It still figured in the second CNCP report, also without definition, but was dropped for the third report (Ministério da Justiça 2005b:62; 2006).

The substance of this disagreement is complicated in Brazil. TRIPS makes it clear that intellectual property rights are fundamentally private rights, to be enforced in most cases by the rights holders themselves through civil action. In most countries, industry associations hire networks of private investigators and lawyers to identify infringing activity and file complaints with the police, and it is the complaint that triggers law enforcement involvement. In Brazil, the criminal status of copyright infringement makes the public/private distinction largely moot with respect to print and audiovisual goods.<sup>67</sup> The state has, in principle, assumed the full burden of enforcement, at least as far as commercial infringement is concerned.

In practice, however, police resources are far too limited to fully enforce the law, and the courts and prisons far too overburdened to ensure meaningful rates of prosecution or harsh penalties. Such constraints lead to industry pressure for greater public investment and for stronger criminal provisions. The public sector, in turn, tries to ensure that the private sector continues to play a role in investigations and complaints—relying on the formally private status of copyright to justify this role. The result is the uneasy balance described earlier in this chapter, with extensive private subsidization and coordination of police action.

Coordination between the Federal Police, the Federal Revenue Service, and the Federal Highway Police has improved since 2004, and the number of seizures, raids, and arrests has risen. But this appears to be as far as the public sector is willing to go or, in fact, is able to go. As the main interface between the public and private sectors, the CNCP has come in for criticism from the private sector in this regard. One informant complained that the CNCP's current activities are just “more of the same.” It is hard, nonetheless, to imagine how much more effective the CNCP could be in its current capacity; most of what can be done in coordinating law enforcement at the federal level has been done. Coordination at the state and local levels is still incomplete, but the new National Plan addresses that as well.

The public and private sectors seem to be at an impasse regarding repressive measures. The private sector wants more rigorous enforcement; the public sector either cannot or is not willing to provide it. When the topic turns to economic measures, the situation is reversed. The public-sector view of economic measures generally involves re-engineering business models to address the issues of cost and access that fuel piracy. Private-sector representatives have stonewalled such proposals and responded with requests for tax cuts. Because this is manifestly not a serious response to the problem, the result is another stalemate. Work on economic measures at the CNCP, consequently, has been anemic at best. As one private-sector informant put it: “So the music companies, the recording companies, and the cinema and video companies, the MPA, they can't talk about pricing. Then they say [to the CNCP's former head], ‘Luiz Paulo, we're not going to talk about pricing, and you can't talk about pricing.’ And that's it.”

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67 As explained earlier, software copyright is covered under a separate statute, with private prosecution the rule even in cases of commercial criminal infringement.

Educational measures, in contrast, provide a middle ground where the two sides can generally reach consensus. The basis of this consensus is that neither the public nor the private sector is to blame for the prevalence of piracy and counterfeiting in Brazil. Rather, the blame falls on consumers, who are ignorant of the law, of the harms caused by piracy, or both, and thus in need of education. This implies a longer-term project—a “gradual change of perceptions in society by understanding the harmful effects of illegal products and their high social costs. The aim is to replace the idea that piracy brings benefits and a cheap . . . way to satisfy consumers’ needs” (Barcellos 2009:3).

Educational projects are funded and developed mainly by the private sector, in many cases with the explicit approval of government—indeed one of the CNCP’s roles is to give official government sanction to these initiatives. Nearly all are advocacy campaigns in disguise, promoting industry-friendly narratives on piracy that avoid the controversial issues that generate stalemates in the CNCP (or, for that matter, that describe actual consumer experience with pirated goods). As we describe in more detail later in this section, different types of campaigns target different audiences, from an ABES road tour touting the economic costs of piracy to local authorities, to training programs for judges and prosecutors, to the “Projeto Escola Legal” campaign in Brazilian elementary and secondary schools, which runs children through a truly disgraceful set of propaganda exercises. Self-reflection is not on the menu, and to the best of our knowledge, none of these programs have been subject to independent evaluation. Indeed, like so many other aspects of the enforcement agenda, what they signal is not success or even progress in the struggle against piracy but simply cooperation between industry and public authorities.

### **Mixed Signals**

Little of this domestic political tension is visible on the international stage. In fact, Brazil has been one of only a handful of developing countries to publicly articulate a clear international agenda on IP independent of the enforcement conversation with the United States. In particular, Brazil has played a leading role in establishing a new basis for IP policymaking at WIPO: the 2007 Development Agenda, which requires that social and economic development be the primary consideration in the formulation of new IP policy, including less rigid application of “one-size-fits-all” global IP norms.

Although little of this international conversation has touched directly on enforcement, there are signs of change on this front. After a three-year hiatus, WIPO held a meeting of its Advisory Committee on Enforcement in late 2009, during which Brazil proposed a new, independent research initiative on the impact of piracy and enforcement. Negotiations over the proposed Anti-Counterfeiting Trade Agreement—a maximalist agreement designed to take responsibility for enforcement away from representative bodies like WIPO and the WTO—have also pushed enforcement to the fore. Like the other major industrializing countries that

chart semi-independent paths on intellectual property, Brazil was left off the list of countries invited to develop the new agreement.

Superficially, Brazil's international actions are at odds with the story of convergence between government and industry interests on enforcement, circulated mostly by the CNCP for domestic audiences. When questioned about this, officials responsible for the government's IP policy are often adamant that there is no contradiction. As one official put it:

Sometimes the idea that Brazil acts differently domestically and internationally is advanced by external actors. This is not a fact. It's a deliberate fabrication, made to create obstacles to international negotiations. . . . [Many] of the actors who sit on the GIPI also sit on the CNCP, and through this overlap we've been trying to [harmonize] Brazilian positions.

This obvious anxiety about mixed messages is suggestive of the very delicate line that the Brazilian government walks in regard to foreign audiences on these issues. So far, the WIPO Development Agenda conversation has been relatively silent on the subject of enforcement—in our view reflecting the de facto substitution, in developing countries, of low enforcement for low IP protection after the latter option was foreclosed by TRIPS. The CNCP “convergence” thus occupies a different political space than Brazil's public international positions—a luxury that could disappear if, for example, the ACTA agreement becomes an effective new international standard. In the meantime, the harmonious public face of the CNCP has paid political dividends. The IIPA has held the CNCP and Brazil's National Plan up as models for other countries. The stronger street and border policing facilitated by the CNCP, in particular, won Brazil a respite from its annual inclusion on the Special 301 “Priority Watch List”—and in fact, the CNCP's fourth report suggests that this downgrade was one of the most important outcomes of increased enforcement (Ministério da Justiça 2009:89, 135). These two international stances—the CNCP for dialogue with the United States and the Development Agenda for international forums—represent a balancing act whose equilibrium is at risk as new demands come from all sides. As a CNCP councilor from the public sector explained, “Generally, in the field of intellectual property, the government acts as one. Everyone holds the same position. Except when it comes to enforcement, which is concentrated at the CNCP.”

## Research

The delegitimation of industry research that we have seen in other countries and documented in chapter 1 of this report is readily visible among enforcement experts in Brazil. “I don't think they're reliable at all,” a law enforcement official told us when asked about industry numbers. Such views were widespread among the public-sector representatives on the CNCP. A representative holding one of the ministry seats elaborated:

[What we] defend at the CNCP is the development of independent rates of piracy and counterfeiting. We defend that because we feel this is too serious an issue for the government not to [use its] technical capacity to produce an official picture of the problem of piracy and counterfeiting in Brazil. And if we work with the private sector, [we need] to say ‘OK, you got to this number. What was the methodology?’ Let’s sit together and go over the methodology. If we feel, in our analysis, that the methodology is adequate, we’ll have no problem in supporting the numbers. I just think that the government needs, before supporting the numbers, to know how they were produced. They might be true; I’m not necessarily saying that the methodology is not good. But for the government to stand by these numbers, they need to go through some kind of check.

Lack of transparency was a constant refrain of the public-sector skeptics. Among the major domestically produced studies, only a couple make serious efforts to explain their methods, data sources, or underlying assumptions. None, in our view, provided enough information to independently evaluate the research. In several cases, statistics and reports are cited that have no sources—or erroneous sources—as we document in the following pages. In our view, transparency at this level is a minimum condition for credibility, both for the industry and for the government officials responsible for policymaking and law enforcement.

Nevertheless, these critiques have had no discernable impact on how numbers are used or how studies are produced in Brazil. Government officials—including at the CNCP—have not been held accountable for or otherwise dissuaded from repeating ungrounded claims. Not all the bad data comes from industry. One ministerial informant described how Federal Revenue Service numbers that combine different categories of seized goods (pirated, counterfeit, and contraband) are used by the CNCP to show that Brazil’s efforts are having an effect on piracy in particular: “The CNCP has tables on seizures that we always divulge internationally. In every international meeting we show [them], always saying, ‘Look, the statistics have certain issues, but notice the evolution.’” Again and again, the narrative drives the data. Consistently, the media has played along, turning headline numbers into boilerplate stories that often repeat industry press releases verbatim.

## THE MAGIC NUMBERS

Investigation of three of the most frequently used numbers in the Brazilian enforcement context reveals the contours of the problem. Claims that the global value of the pirate market is \$516–600 billion, that two million jobs have been lost to piracy in Brazil, and that R\$ 30 billion (\$17.6 billion) in tax revenues is lost annually have become touchstones of the Brazilian enforcement debate.<sup>68</sup>

68 This problem is in no way unique to Brazil, and our work here contributes to a wider body of efforts to trace the origin of piracy’s many “magical numbers,” including recent studies by the US Government Accountability Office and *Ars Technica* (GAO 2010; Sanchez 2008). The GAO, for its part, could find

Sourcing these numbers quickly becomes a challenge. The most common citations attribute the global estimate to Interpol, the jobs estimate to research originating at the Brazilian university Unicamp (Universidade de Campinas), and the tax-loss estimate to the Brazilian union Unafisco (Union of the Fiscal Auditors of the Brazilian Federal Revenue Service). The CNCP is such a frequent user that many news reports simply source the numbers to the Ministry of Justice, the CNCP's parent. In a typical example:

According to [then executive secretary of the Ministry of Justice and CNCP president] Luiz Paulo Barreto, the globalization of the economy has also brought the internationalization of piracy, which earns around US\$560 billion annually worldwide—even larger than the drug trade, whose operations are estimated at US\$360 billion. Based on these numbers, Interpol has come to consider piracy the crime of the century. “The power is too great, and no one can fight that alone. We need partnerships. This is the idea behind the new National Plan for Combating Piracy, which has three axes: repression, education, and economics,” he stressed. (Agência Brasil 2009)

Association with the Ministry of Justice effectively launders the numbers and allows them to circulate through other government channels, including judicial decisions. In March 2010, a single São Paulo judge quoted these figures in three separate decisions, drawing from documents provided by the prosecution that in turn quote material pulled from the CNCP's website. With Barreto conferring legitimacy on the numbers, both prosecutor and judge have turned them into boilerplate text for use in cases of criminal copyright infringement:

The statement made by the President of the “National Council on Combating Piracy,” Luiz Paulo Barreto, also Executive Secretary of the Ministry of Justice, added to the books through the counter-arguments provided by the prosecution, bears transcription here: “. . . piracy provokes a reduction of two million jobs in the formal market. Brazil, according to the secretary, loses R\$ 30 billion yearly in tax revenue. Globally, Interpol (the international police) considers piracy the crime of the century, amounting to US\$522 billion/year, much more than the drug traffic, US\$360 billion/year” (information obtained through informative pieces published by the organization's website).<sup>69</sup>

Our investigation was unable to substantiate any of these estimates. With regard to the

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no credible basis for widely circulating estimates of losses to US business (\$200–250 billion), lost jobs (750,000), or lost automotive-parts sales (\$3 billion).

69 The text is reproduced in three decisions: Vote 20.252, AC 990 09 217763-0 - Bauru, TJSP/1 Câmara Criminal; Vote 20.253, AC 990.09.236431-6 - Olímpia, TJSP/1 Câmara Criminal; and Vote 20.254, AC 990.09.229941-7 - Mirandópolis, TJSP/1 Câmara Criminal.

Unafisco estimate on tax losses, an informant from the public sector categorically claimed that the number “does not exist” at all. Another indicated that it is at best a guess since it would be extremely difficult to provide a reliable estimate of fiscal losses potentially generated by piracy and counterfeiting. Arguably more conclusive is the fact that Unafisco conducts no research. We consider the number purely fictional.

A search for the basis of the Interpol numbers also leads to a dead end. According to the CNCP, the numbers were first disclosed during the Second Global Congress on Combating Counterfeiting and Piracy (Ministério da Justiça 2005b:7), but no mention could be found in the documents hosted on the congress’s website. The First Global Congress (2004) factsheet on the impact of piracy and counterfeiting mentions that “in 2000, trade in counterfeit goods reached an estimated US\$450 billion—larger than the GDP [gross domestic product] of all but 11 countries and about the same size as the total GDP of Australia.” It also makes reference to an FBI (US Federal Bureau of Investigation) estimate of the economic impact of counterfeiting in the United States that has been debunked by the US Government Accounting Office (GAO 2010).

The estimate of the two million jobs lost to piracy presents a similar puzzle. Most of the time, the number is attributed to Unicamp, a public university located in the city of Campinas, without further detail. In only one instance did we find a more specific credit: to Unicamp economist Marcio Pochmann (Indriunas 2006).<sup>70</sup> When we contacted Pochmann, however, he directed us to a study on informal vendors commissioned by the City of Campinas and stressed that the two million estimate was related to how many jobs could be generated through the formalization of the street trade overall in Brazil. This study was unavailable through public channels, and we only obtained it after one of the members of the research team was kind enough to digitize his printed copy (CESIT/SETEC 2001). No mention of the two million estimate could be found in the report.

## SECTOR-SPECIFIC RESEARCH

There is little recent sector-specific research on piracy in Brazil, and most of the main industry groups have dropped their annual updates. The last film piracy study by the MPAA was in 2005. The last ESA numbers come from 2006, and the last publishing industry figures from 2007. By 2010, only the BSA and the RIAA were reporting numbers. Of these two, only the BSA publicly releases its reports. This decline in reporting is not unique to Brazil. All the industry groups (except the BSA) have had to reconsider how they measure piracy as the pirate economy shifts from physical to digital distribution. And all have been under sustained criticism for their research assumptions and lack of transparency.

Discussions of film piracy in Brazil still look back to a 2005 study commissioned by the MPAA, in which Brazil was one of twenty-two countries surveyed. Despite constant MPAA

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70 We also found a reference crediting the number to the McKinsey Global Institute, without further specification (Gazeta Mercantil 2004).

criticism of Brazil on this front, the study placed Brazil near the bottom of the list for rates of piracy, at 22% (compared, for example, to 29% in India, 62% in Mexico, and 81% in Russia). IIPA reports continue to relay MPAA complaints about “growing” rates of DVD and Internet piracy. If there is any empirical evidence of this growth, the MPAA has not shared it. Requests by members of this project for detailed data from the 2005 study were refused, as were requests made by the US GAO and a team of OECD (Organisation for Economic Co-operation and Development) researchers commissioned by the International Chamber of Commerce to study global counterfeiting and piracy. A Brazilian film industry representative interviewed in 2009 reported that a new and supposedly broader and more rigorous study was underway,<sup>71</sup> but no new study has been released. Other sources indicate that cost-cutting at the MPAA has put a hold on new large-scale research.

In the publishing sector, in 2004, the ABDR replaced the CBL as the main industry source for loss estimates in Brazil—an event followed by the ABDR’s removal from the CNCP and the intensification of the organization’s conflict with universities. In piracy research circles, the transition was marked mostly by the unexplained rise of US-publisher loss estimates from \$14 million, where they had been stuck since 2001, to \$18 million, where they remained until 2008.

A publishing industry informant indicated that, in fact, no new research has been conducted since 2002, when the ABDR (with financing from the Spanish reproduction-rights organization CEDRO) commissioned a study by the marketing research firm A. Franceschini Market Analyses, also known as the Franceschini Institute. This study was never published, but its conclusions were widely circulated in industry literature. Notably, it estimated that university students in Brazil had illegally copied some 1.935 billion pages from books and articles (how it reached this estimate is unclear). Based on this number, it derived an estimate of R\$ 60 million (\$35 million) in industry losses—though here too the method was unclear (ABDR n.d.b:1).<sup>72</sup>

Other numbers also circulate in this space without citation. In a primer on piracy and

71 As the representative described the new study (in terms that make it sound very much like the old study): “We get samples in the target countries, then we do interviews with people, involving knowledge about pirated products, consumer habits, how many times you don’t buy an original product if you buy a pirated one, [and] if you buy a pirate product, what is the effect the pirate product—in our case a pirate DVD—if you buy a pirate DVD, is it going to substitute the purchase of an original DVD [or] is it being just used to sample the product? You buy the pirate DVD because it’s there, then you take a look, see if you like it or if you’re not sure, and then of course you buy the original DVD to have the extras, inlays, all the nice stuff. So [both substitution and sampling] are considered in the total volume of losses for the industry. Price levels, situations, the types of products you usually buy from pirates or not—usually the big titles, the most expected ones. We have some definition, let’s say, of a target audience that tends to be slightly more male [than female], so there’s also a profiling element to this research.”

72 The Franceschini Institute was also responsible for the first phase of the *Retratos da Leitura no Brasil* (Portraits of reading in Brazil) research, commissioned by the CBL, the SNEL, and ABRELIVROS in 2000. It is possible that there is overlap between the piracy study mentioned by the ABDR and the first phase of the *Retratos da Leitura no Brasil* study, regarding methodology or data collected. The report encompasses an earlier presentation on the initial phase of work (Amorim 2008). The presentation itself is available for download on the ABRELIVROS website: [http://www.abrelivros.org.br/abrelivros/01/images/stories/arquivos/dados\\_retratos\\_2001.ppt](http://www.abrelivros.org.br/abrelivros/01/images/stories/arquivos/dados_retratos_2001.ppt).

authors' rights, the ABDR cites a figure of R\$ 350 million (\$206 million) in annual losses due to book piracy. It describes this number as "estimated from data on book sales over 8 years, with a comparison between the current number of book sales and the number of new teaching institutions and new students enrolled yearly" (ABDR n.d.a:4). In other contexts, R\$ 400 million is used, representing "over 50%" of the market for academic and technical books (Cafardo 2007). When asked about these figures, a member of one of the most important book-trade associations in Brazil claimed not to know of any particular studies of the subject but pointed to the ABDR as the source. In our view, there does not appear to be any current research here worthy of discussion—or even much pretension to it. The published data is inadequate to understanding the scope and significance of book copying in Brazil and should not be credited in discussions of either enforcement or the publishing industry's numerous business-model problems in Brazil.

With regard to the recording industry, local record producers association the ABPD has commissioned consumer surveys in the past through the consultant group Ipsos Insight. These furnish one of the first links in the great chain of piracy research, passed on to international recording industry group the IFPI for inclusion in its periodic market and piracy reports, across to the US-based group the RIAA, which massages the findings into industry loss estimates, and from there into IIPA reports, where they form the basis of claims that piracy "has decimated the local legitimate music industry" (IIPA 2010:143).<sup>73</sup> How this happens is something of a mystery. Neither the IFPI nor the RIAA would disclose how they aggregate national data into larger international models or how, in the RIAA's case, they transform those findings into loss estimates (the IFPI, it is worth noting, does not estimate "losses" and in the past has only offered estimates of the "street value" of pirated goods).

Moreover, we could not determine how—or even whether—these models are updated. The most recent data on the ABPD's website is from 2006, when Ipsos apparently surveyed 1,200 Brazilians about their music-consumption habits. This study provides the basis of the ABPD's claims of over R\$ 2 billion (\$1.17 billion) in losses due to illegal music downloads, representing "over three times the revenue in the official market . . . for genuine CDs and DVDs, which at the time was R\$ 615 million [\$370 million]."<sup>74</sup> There is no account of how ABPD arrived at this estimate.

An analysis by the University of São Paulo's Research Group on Public Policies for

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73 According to the IFPI (2009a), recorded music sales are off roughly 40% since the peak year of 2004. Whether this is decimation is a matter of perspective. The legal market was always miniscule, with per capita music consumption in Brazil, at its peak, of around one-tenth the value of the US market. Furthermore, there are a number of vibrant, lucrative, mostly performance-based local music scenes that do not figure into recording industry sales statistics (Lemos and Castro 2008; Mizukami and Lemos 2010).

74 ABPD, "Pesquisa de Mercado," Música na Internet, [http://www.abpd.org.br/musicaInternet\\_pesquisa.asp](http://www.abpd.org.br/musicaInternet_pesquisa.asp). Recording industry numbers can be confusing because the IFPI measures market size at wholesale, while many local industry groups report only retail sales—often resulting in significant differences in reported size. The ABPD number is the wholesale number reported by the IFPI.

Information Access (GPOPAI) details several likely flaws in publishing and recording industry numbers, with the caveat that the inquiry was limited by the refusal of both the ABPD and the ABDR to provide details on their studies (GPOPAI 2010).

Research coming out of the business software sector is in its own league. Compared to the other industry associations, the Business Software Alliance is a veritable engine of piracy and economic-impact studies. The BSA, via its consultant the IDC (the International Data Corporation), produces and disseminates new Brazil data for at least two annual reports—its global software piracy report, focusing on rates of piracy and estimated losses, and a set of secondary reports on the impact of piracy on jobs, tax revenues, and the information technology sector. These reports use the good-news/bad-news format that virtually defines advocacy research in this field. The good news is that the business software piracy rate has been in slow decline in Brazil, falling from 64% in 2005 to 56% in 2009. The bad news is that because of rapid growth in the Brazilian informatics market, the total value of pirated software has grown from \$766 million in 2005 to \$1.6 billion in 2007 to \$2.2 billion in 2009 (BSA/IDC 2010).

Responding to nearly a decade of criticism of its assumption that a pirated copy equals a lost retail sale, the BSA no longer categorizes these numbers as losses to business but rather as the notional “commercial value” of unlicensed software. Although the BSA has a relatively robust model for estimating rates of piracy, it shares the wider industry aversion to releasing the data it uses, which in our view should disqualify that model from serious consideration in policy contexts. Few other readers have been so demanding, however, and the BSA and its local representative the ABES are arguably the most skilled among the industry groups at managing media attention to research releases. Every new BSA report is greeted with articles in major newspapers, as well as in many local news sources. These articles almost always reproduce the good-news/bad-news format. Criticism, doubts about methodology, and dissenting views are completely absent from the media coverage analyzed for this report.

The BSA/IDC reports have a major impact on public conversations because they are integrated into a very comprehensive communication campaign. S2Publicom (formerly S2 Comunicações), the company that provides press assistance for the ABES, times the release of BSA numbers to coincide with the ABES Road Show, a traveling law enforcement training program co-sponsored by the ABES, the BSA, the ESA, and the APCM. As the Road Show moves from state to state, the ABES releases localized estimates of the jobs, industry profits, and tax revenues that would be generated if the piracy rate were reduced (see table 5.4 for examples of the releases associated with the *Sixth Annual BSA/IDC Global Software Piracy Study*, published in 2009).<sup>75</sup> These ensure a more or less continuous stream of news stories that report the numbers and rehearse the larger claims about business software piracy. The press schedule

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75 ABES press releases can be reviewed on the S2Publicom website: [http://www.s2publicom.com.br/imprensa/ClienteReleasesS2Publicom.aspx?Cliente\\_id=345](http://www.s2publicom.com.br/imprensa/ClienteReleasesS2Publicom.aspx?Cliente_id=345).

for the *Fifth Annual BSA/IDC Global Software Piracy Study*, released in 2008, was particularly intense, with more than twenty press releases in different states. The numbers for São Paulo alone were published five times, but with different values between the initial and subsequent press releases. The BSA attributes these differences to its practice of revising its numbers as more data becomes available—punctiliousness we applaud. But the revisions also include dramatic differences in the numbers of jobs allegedly created in response to a 10% decrease in the piracy rate.

**Table 5.4** ABES Press Releases for the Localization of the Sixth Global Software Piracy Study

Date	Region	Losses	Gains (if piracy reduced by 8%)
April 28, 2010	Federal District	R\$ 121 million	2,100 local jobs (direct + indirect) R\$ 180 million profits for local industry R\$ 29 million in local taxes
April 14, 2010	Santa Catarina	R\$ 126 million	2,300 local jobs (direct + indirect) R\$ 187 million profits for local industry R\$ 30 million in local taxes
March 24, 2010	Ceará	R\$ 63 million	1,100 local jobs (direct + indirect) R\$ 93 million profits for local industry R\$ 15 million in local taxes
March 9, 2010	São Paulo	R\$ 1.1 billion	19,500 local jobs (direct + indirect) R\$ 1.6 billion profits for local industry R\$ 261.4 million in local taxes
November 26, 2009	Rio Grande do Sul	R\$ 213 million	3,800 local jobs (direct + indirect) R\$ 315 million profits for local industry R\$ 51 million in local taxes
November 12, 2009	Paraíba	R\$ 27 million	500 local jobs (direct + indirect) R\$ 40 million profits for local industry R\$ 6.5 million in local taxes
October 7, 2009	Mato Grosso do Sul	R\$ 33 million	600 local jobs (direct + indirect) R\$ 49 million profits for local industry R\$ 8 million in local taxes
September 24, 2009	Amazonas	R\$ 54 million	965 local jobs (direct + indirect) R\$ 80 million profits for local industry R\$ 13 million in local taxes
August 18, 2009	São Paulo	R\$ 1.1 billion	19,500 local jobs (direct + indirect) R\$ 1.6 billion profits for local industry R\$ 261.4 million in local taxes

The first press release for the state of São Paulo put this number at 3,700;<sup>76</sup> subsequent releases put it at 19,500.<sup>77</sup> The basis for this shift is unclear since the IDC does not show its work and the ABES does not disclose the procedure used for the localization of the BSA/IDC study. But such swings appear to be relatively common, and we have documented them in both China and India. In our view, they point to the real function of the studies in supplying numbers to conjure with—magical numbers—rather than robust estimates of economic impact. The problematic reasoning behind these estimates, explored in detail in chapter 1, begins with the basic misreporting of the primary costs and benefits of software piracy. Losses to US software providers are, in a first instance, gains to Brazilian businesses and consumers. Piracy is not merely a loss to legitimate markets but also a vast subsidy for other kinds of economic activity dependent on software infrastructure. An adequate account of the economic impact of software piracy would have to take account of both sides of the equation. The IDC has never done so.

### CROSS-SECTORAL RESEARCH

Although the big international industry groups have pared back their research agendas in Brazil and elsewhere, the attention generated by the CNCP and the National Plan since 2004 has produced its own small boom in domestic research. A wide range of research consultants now populate this space, hiring out their services to private-sector clients. The FIEMG (Federação das Indústrias do Estado de Minas Gerais—Federation of Industries for the State of Minas Gerais), the FIRJAN (Federação das Indústrias do Estado do Rio de Janeiro—Federation of Industries for the State of Rio de Janeiro), the newspaper *Jornal de Londrina*, and the marketing firm Instituto Análise have all sponsored studies, as has the Instituto Akatu, a consumer-rights non-governmental organization, with funding from Microsoft.<sup>78</sup>

76 ABES, “Pirataria de Software Causa Prejuízo de R\$ 737 Milhões para Economia de São Paulo, press release, March 28, 2008, [http://www.s2publicom.com.br/imprensa/ReleaseTextoS2Publicom.aspx?press\\_release\\_id=21116](http://www.s2publicom.com.br/imprensa/ReleaseTextoS2Publicom.aspx?press_release_id=21116).

77 For example, ABES, “Pirataria de Software Causa Prejuízo de R\$ 898 Milhões para Economia de São Paulo,” press release, September 25, 2008, [http://www.s2publicom.com.br/imprensa/ReleaseTextoS2Publicom.aspx?press\\_release\\_id=21931](http://www.s2publicom.com.br/imprensa/ReleaseTextoS2Publicom.aspx?press_release_id=21931).

78 The Akatu study, done through the consulting firm Fátima Belo-Consultia and Estratégia, is interesting insofar as it encapsulates a contradiction inherent in much of the consulting work of private firms. Many of these studies are commissioned as strategy pieces for the production of more effective advocacy campaigns but end up simply as minor contributions to those campaigns—launched in the media to rehearse familiar anti-piracy claims. Methodologically, the Akatu study is a typical example of this subgenre. It employs a mix of desk research and unspecified qualitative research. Data from US Chamber of Commerce/IBOPE and Fecomércio-RJ/Ipsos reports are used to substantiate statements such as: “[Consumers] are aware that piracy is associated with organized crime” (Instituto Akatu 2007a). Digging deeper, Akatu activity reports for 2007 and 2008 reference seven focus groups

The most important of these are two recently launched longitudinal surveys of consumer behavior in relation to pirated and counterfeit goods. One, begun in 2006 by Ipsos, was commissioned by the Fecomércio-RJ (the Rio de Janeiro Federation of Commerce). The other, begun in 2005 by the research firm IBOPE, is funded primarily by the US Chamber of Commerce. The resulting reports offer very similar perspectives and share, in particular, an unmistakably accusatory tone toward consumers, who insist on buying pirated products despite their awareness of the numerous harms. Attacks on informality are another undercurrent of these studies, particularly in those sponsored by ETCO, which represents manufacturers. ETCO is an idiosyncratic entity in the anti-piracy network because it is the only one that regularly engages with academic research.

The annual Fecomércio-RJ/Ipsos national consumer survey looks primarily at consumption and consumer motivations in relation to pirated goods. Full reports were published in 2006, 2008, and 2010; partial results were released in 2007 and 2009<sup>79</sup>. The 2010 survey was published in conjunction with a public awareness campaign called “Brasil sem Pirataria” (Brazil without Piracy), built around the menacing slogan: “Those who buy pirated products pay with their lives.”

**Table 5.5** Percentage of Brazilian Population that Has Purchased Pirated or Counterfeited Goods Within the Previous Year

2006	2007	2008	2009	2010
42%	42%	47%	46%	48%

*Source: Authors based on Fecomércio-RJ/Ipsos (2010) survey data.*

The reports document a slight rise in the percentage of Brazilians who have consumed pirated and counterfeit goods within a year, just outside the margin of error of 3%, over the five-year period (table 5.5). Although we have a hard time drawing any conclusions from this apparent trend, the report paints a bleak future for commerce in Brazil, claiming that “piracy seduces an increasing portion of average citizens” (Fecomércio-RJ/Ipsos 2008:4).

Some of the survey questions can be extracted from the published results. Questions asked in 2009 include:

Do you believe that the use of these products can bring you any negative consequences?

Do you believe that piracy causes unemployment?

Do you believe that piracy “funds” organized crime?

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conducted for the report, but this is as far as we could go in determining their methodology (Instituto Akatu 2007b:12; 2008:11–12). Contacting Akatu did not prove helpful.

79 The Fecomércio-RJ/Ipsos report for 2010 includes all previously released results.

Do you believe that piracy harms commerce's profits?  
 Do you believe that piracy harms manufacturers or artists?  
 Do you believe that piracy "feeds" tax evasion?  
 Many pirate products cause serious harms to health. Are you aware of this information?"

Although the survey describes itself as a study of piracy, only three categories (out of the fifteen to nineteen used in different years) refer to copyrighted goods—DVDs, CDs, and computer programs. The rest deal with hard-goods counterfeiting.

On a topic loaded with potential for survey bias, the Fecomércio-RJ does not hide its objectives. Everything leads in the direction of confirming harms. The responses to the question "Do you believe that piracy 'funds' organized crime?" (some 60% answered yes in the 2009 survey, down from 69% in 2008) are usually reported to the media as confirmations of the claim and as indictments of the population's moral shortcomings. The study is rather clear on the motivations for piracy, with 94% of consumers buying pirated and counterfeited products because they are cheaper. Price is followed by access, with 12% responding that pirate goods are "easier to find" and 6% that they are "available before the original product." Based on these results, the Fecomércio-RJ draws the two obvious policy recommendations: (1) more investment in awareness campaigns and (2) lower business taxes. Increased penalties for intellectual property crimes also appear among the recommendations, but with much less apparent urgency.

The other major longitudinal survey is an annual US Chamber of Commerce/ IBOPE study conducted in partnership with several organizations, including the Brazil-US Business Council and the ANGARDI. Together with the BSA reporting, these studies arguably have the most mind share with the press, industry groups, and policymakers.<sup>80</sup>

The stated goals are much the same as those of the Fecomércio-RJ/Ipsos survey. They include measuring the consumption of pirated and counterfeited goods, surveying consumer attitudes, and estimating quantities of illegal traffic in major Brazilian cities, including São Paulo, Rio de Janeiro, and Belo Horizonte. The most recent results, published in 2008, examined the consumption of ten product categories, from fake toys to fake motorcycle parts. Once again, only one of these categories (computer/electronic games) related to copyrighted goods. Again, the study described its topic as piracy.

By the standards of its peers, the US Chamber/IBOPE reports are a model of transparency. They explain in detail how the survey is conducted and how losses to piracy are calculated. But in other respects, they repeat many of the mistakes common to the genre. This is true in the details, as when they reach to establish the role of organized crime in counterfeit street vending

80 We did not have access to the US Chamber's report for the 2006 edition of the survey research. A presentation produced by IBOPE that contains tables for 2006 can be downloaded from the IBOPE website: [http://www.ibope.com.br/opiniao\\_publica/downloads/opp\\_pirataria\\_dez06.pdf](http://www.ibope.com.br/opiniao_publica/downloads/opp_pirataria_dez06.pdf).

through similarities in the prices of goods in Rio and São Paulo.<sup>81</sup> And it is true of the larger model of losses that anchors the study. Its fourth-edition report claims that piracy leads to losses amounting to R\$ 18.6 billion (\$10.9 billion) in taxes across seven sectors of the economy, with a total market value of R\$ 46.5 billion (\$27.3 billion) (US Chamber of Commerce/IBOPE 2008).

The report calculates the size of the pirate/counterfeit market by assuming a one-to-one correspondence between pirate/counterfeit copies and lost retail sales of genuine products. This assumption ignores the obvious impact of price on the propensity to purchase—an impact that may be fairly low in the context of essential goods but very high in the context of luxuries or discretionary purchases like CDs and DVDs. Industry groups have been slow to integrate these “substitution effects” into their models because they are very hard to measure and invariably undercut claims of losses. But at this point, all the major international groups, including the BSA, the RIAA, the IFPI, the ESA, and the MPAA have moved away from the one-to-one loss model. Neither the ESA, the BSA, nor the IFPI characterize their findings as loss estimates but only cite the street or commercial value of the pirated goods. In the case of software, the BSA’s chief researcher at the IDC is on record as describing the actual substitution rate as “perhaps one in ten in developing countries” (Lohr 2004). Estimates of substitution rates for CDs in high-income countries generally range from 10% to 30%—and are certain to be lower in countries where price-to-income disparities are greater.

A further problem with the US Chamber/IPOBE survey is that there is no way of telling how much of lost sales, even if properly calculated, would actually represent lost tax revenue. Here the study assumes, like all other industry studies, that money spent on counterfeited or pirated goods simply disappears from the national economy. This is manifestly untrue. The revenues from informal trade circulate through the economy—including into the regulated economy in ways that are subject to taxation. The savings to consumers from purchasing cheaper counterfeit or pirated goods do not vanish but enable other purchases, which may be taxed. For our part, we find it entirely plausible that the government suffers a net loss in tax revenue due to the high percentage of informal economic activity in Brazil, and we think that the formalization of the economy and the suppression of dangerous counterfeit products are important development goals.<sup>82</sup> The current industry studies, however, are not designed to measure tax losses but rather to produce maximalist accounts of harms and sell the government on more expensive measures to combat them. As the IBOPE study argued:

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81 “The similarity of results obtained in Rio de Janeiro and São Paulo in terms of pricing is an indicator for the structured nature and organization of the crime that exists behind this market” (US Chamber of Commerce/IBOPE 2007). This is possible but by no means established here. Street vendors operate in larger, highly interconnected markets that share price information.

82 It is a separate and much less clear question, in our view, whether the substitution of cheap goods for expensive ones in the media sector negatively impacts overall social welfare. As is discussed in chapter 1, the primary effect is likely to be strongly positive.

“It was verified that the piracy of products in only three sectors—clothing, tennis shoes and toys—deprives the country of at least R\$ 12 billion (US\$7 billion) a year in taxes. This value would be sufficient, for example, to cover 26% of the social security deficit” (US Chamber of Commerce/IBOPE 2005).

## Training, Awareness, and Education

Combating piracy is more than a necessity; it’s an ideology—[the belief] that we can take this country to another level. I’m a firm believer in Brazil; I’m a firm believer in the potential of the Brazilian economy, of Brazilians as citizens, as human beings. I believe in the difference we can make in the world. Now, we’ll only be able to take this country to another level when we respect intellectual property and, more than that, invest in education. Education is, in my point of view, the driving force for the development of a nation, and Brazil has [the potential] to be a big, beautiful country.

—*Software industry representative*

The view that strong intellectual property protection is a requirement of development and economic growth is widespread among industry and opinion leaders in Brazil, reinforced by three decades of global-trade orthodoxy and the association of IP enforcement with law enforcement in general. With additional repressive and economic measures blocked by disagreements at the CNCP, the wider indifference of Brazilians to this perspective has become a predictable focus of attention. Since the middle of the last decade, industry groups have invested heavily in training, education, and awareness-building programs directed at a wide range of Brazilian audiences, including law enforcement, consumers, and children. These programs are presented as part of the long-term battle to establish a stronger “intellectual property culture” in Brazil (INPI 2010).<sup>83</sup>

Training sessions, seminars, and courses for law enforcement professionals occur throughout the year in Brazil. The most frequent training programs are part of the ABES Road Show, the traveling outreach program organized by the business and entertainment software industries, with the collaboration of the film and music industries. In one session of the Road Show we

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83 In the public sector, the national patent office (the INPI) is the most visible advocate of this perspective and recently cooperated with the FIESP in publishing a series of IP primers targeted at journalists, teachers, and entrepreneurs. The INPI’s place in a larger Brazilian strategy of global competitiveness is described by Peter Drahos: “The strategy then appears to be to invest in a patent office that opens the grant gates, let it play a major role in spreading patent culture through a multitude of training courses, and with the assistance of the US build a court system that really understands intellectual property and hope that a sufficient number of Brazilian firms are able to capture economically significant monopolies” (Drahos 2010:255).

observed in São José dos Campos, São Paulo, the main topic was how to identify pirated games and circumvention devices. Other activities included presentations on intellectual property enforcement made by the APCM and the CNCP. Seminars are usually reserved for judges and public prosecutors, who are less likely to accept being “trained” but will certainly participate in events with a more scholarly flavor.

How much judges and prosecutors learn from these events is hard to gauge. Law enforcement officials at this level have considerable leeway to develop their own understanding of the matters they act upon. What they actually do with that understanding, in contrast, is more easily measured. Rates of prosecution, conviction, and incarceration for copyright infringement remain extremely low in Brazil, and complaints about prosecutorial and judicial follow-through remain a regular feature of IIPA reports.

Studying anti-piracy public awareness campaigns in Brazil is a dismal exercise. Demagoguery and scare tactics are the norm, often to a degree that reads as comedy rather than instruction. All are localizations of templates developed at the international level, and all hit the same simple messages: “you wouldn’t steal a car”; “kidnapping, guns, drugs . . . the money that circulates in piracy is the same money that circulates in the world of crime”; “tomorrow I will sell drugs in my school because of that DVD”; and “thank you ma’am, for helping us to buy weapons!” are typical. (Three of the four quotes come from recent spots produced by the UBV, the organization of Brazilian film distributors, which has developed a particular specialization in the genre. The spots run on TV, in theaters, and in DVD preview materials.) With a few exceptions, these campaigns are produced by the private sector with private money.<sup>84</sup> Two of the larger campaigns—“Pirata: Tô Fora!,” maintained by the SINDIRECEITA, and the educational initiative “Projecto Escola Legal,” supported by AmCham—are endorsed by the CNCP.

By all appearances, educational initiatives are a bottomless pit for public and industry resources—capable of demonstrating the cooperativeness of the state but not actual impact on attitudes or practices. To the best of our knowledge, none of them has ever been evaluated.<sup>85</sup> And this is, in our view, the problem with much of the enforcement agenda.

As Alexandre Cruz was stepping down as president of the National Forum against Piracy and Illegality, he explained one of his regrets: “We didn’t make good use of the space we have on TV. Unfortunately, we didn’t have enough resources to make a campaign that would have an impact, to change behavior” (FNCP 2009). At about the same time, the FNCP announced a partnership with Zazen Produções, producers of the hit films *Tropa de Elite* (2007) and *Tropa*

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84 The few public-sector efforts that we could find include an anti-piracy manual published by the Legislative Assembly of the State of Rio de Janeiro and an issue of *Revista Plenarinho*, a comic book published by the Chamber of Deputies, with support from the ESAF, part of the Ministry of the Treasury (Braga 2010; Câmara dos Deputados 2009a).

85 StrategyOne examined two hundred campaigns for the International Chamber of Commerce without identifying a single evaluation component (BASCAP/StrategyOne 2009).

*de Elite 2* (2010), to make a theatrical feature film about piracy that stressed its links with organized crime.

This is a considerably more ambitious and canny outreach strategy. José Padilha, director of *Tropa de Elite*, has found a fertile niche in making films that take on “Brazilian problems” as their premise (Pennafort 2008). *Tropa de Elite*’s controversial but highly engaging narrative about police action against Rio’s gangs is often interpreted as condoning police brutality in the service of a zero-tolerance approach to crime. This depiction clearly resonated with Brazilian audiences—and with Brazilian pirates. An estimated 11.5 million people saw pirated versions of the film after an employee at Drei Marc, the company subtitled the film, put it on the Internet prior to its theatrical release (Martins, Ventura, and Kleinpaul 2007). When Gilberto Gil, then Minister of Culture, admitted to owning a pirated copy, Padilha began a public crusade against piracy, speaking out and demanding stronger action. Due to Padilha’s influence, *Tropa de Elite 2* enjoyed a preemptive anti-piracy campaign by police, which guarded working prints of the film so that it would not leak—a first in Brazil for this form of private capture of enforcement (Araújo 2010).<sup>86</sup>

Public-sector participation in enforcement is most visible in and around educational initiatives. Some simply involves opening the doors of schools and universities to anti-piracy and anti-counterfeiting organizations. Representatives of the ABES regularly speak to university students, for example, and students are invited to attend parts of the ABES Road Show. In other contexts, such as the “Projeto Escola Legal,” public-sector participation is much more direct.

### THE “PROJETO ESCOLA LEGAL”

To reject pirate products is, therefore, a small personal investment that each Brazilian can make in the development of our country.

—“*Projeto Escola Legal*” teachers’ manual<sup>87</sup>

From our perspective, the American Chamber of Commerce’s “Projeto Escola Legal” (PEL—Legal School Project) campaign exemplifies most of the issues raised by this report, from the blurring of private and public power, to the misuse of terms and numbers, to thinly disguised advocacy masquerading as education. As the flagship educational initiative endorsed by the CNCP, it is also one of the main outcomes of the stalemate between repressive and economic measures in enforcement policymaking.

86 The outreach to Padilha remains unique. The only other case we found involved ABES sponsorship of a 2006 storyline in a Globo soap opera called *Páginas da Vida* that involved drastic consequences for a network of computers after the use of a pirated program. See the synopsis on Globo.com’s website: <http://paginasdavid.globo.com/Novela/Paginasdavid/0,,AA1367031-5742,00.html>.

87 AmCham-Brasil (2010:14).

PEL is described as an ethics and civics program for students aged 7 to 14. Coordinated by AmCham, the project has involved a wide array of partnerships with public authorities and industry sponsors. The primary government support comes from the CNCP, which counts PEL as one of its strategic projects in the National Plan, under the umbrella of a broader “Piracy out of Schools or Education against Piracy” initiative.<sup>88</sup> Other public-sector support comes from the INPI, the offices of education of the states of São Paulo and Goiás, the Public Prosecution Service of Goiás, and the Federal Regional Court of the Fourth Region (which covers the states of Rio Grande do Sul, Santa Catarina, and Paraná). The primary public subsidy is, of course, at the local level, where hundreds of teachers and administrators contribute their time to implementing the PEL agenda.

Industry sponsors vary from year to year. The current list includes the ABES, the BSA, ETCO, Interfarma (Associação da Indústria Farmacêutica de Pesquisa—Association of Pharmaceutical Industry Research), Merck Sharpe & Dohme, Microsoft, the MPA, and Nokia. Local store-owner associations often participate, as does the Bar Association of São Paulo and the ABPI, an association of IP lawyers. We were unable to obtain an overall budget or a breakdown of the public and private costs of the initiative, but it has grown dramatically since it was piloted in 2007.

PEL was launched in 2007 at five São Paulo city schools (four public, one private). In its first year, it involved 93 teachers and 1,433 students. By 2009, AmCham claimed that PEL was present in 117 schools (94 public, 23 private) in four cities, involving 953 schoolteachers and 22,000 students. Two additional cities were slated to be added in 2010 (AmCham-Brasil 2010:5). The PEL campaign engages entire school communities, including parents, but the main focus is the training of teachers. Through PEL, teachers are taught how to integrate themes and activities related to piracy and counterfeiting into the regular curriculum, across the different subjects they teach. Students are seen as replicators of the core content of the program, extending anti-piracy messaging to their friends and families. Media coverage of school activities is part of the program and adds a further dimension to its outreach.

PEL is implemented through a yearly cycle of events and workshops, inaugurated by a one-day seminar for schoolteachers in each of the participating cities. This Educator Awareness on Combating Piracy Forum (Fórum de Conscientização de Educadores no Combate à Pirataria) is followed by workshops at individual schools, usually with direct industry participation. Schoolteachers receive a manual, *ABC do PEL* (PEL’s ABCs), containing the core themes, ideas, and arguments of the project, as well as complementary material on piracy offered by AmCham and the campaign’s industry sponsors. Teachers are encouraged to work anti-piracy exercises into the curriculum under the general themes of civics and ethics. Ethics is one of the “transversal themes” of Brazil’s National Curriculum Parameters, which are meant to guide

88 In December 2010, as this report was going to press, CNCP officers indicated to the authors that CNCP support for PEL had recently been withdrawn. If so, this development has not yet been announced.

and connect the content and activities for all basic education subjects. PEL updates its lessons on its website and connects them to local news about piracy and counterfeiting. Months later, schools host anti-piracy assemblies, where students showcase PEL-inspired works created in the classroom.

As elsewhere, “piracy” in PEL literature is used all-inclusively to describe not only copyright infringement but also counterfeiting and contraband. Among the list of fourteen products used to illustrate intellectual property crime, only three can be pirated in the proper sense—CDs, DVDs, and software. Although the *ABC do PEL* glossary includes entries on patents and trademarks, it does not have one on copyright.<sup>89</sup> These definitions, and a few passages on the importance of intellectual property for innovation and development, comprise the entire discussion of intellectual property in the manual. No mention is made of exceptions and limitations, nor of balancing users’ rights with the rights of content owners.

A parody of hard-line positions on intellectual property and piracy might look very much like the PEL teachers’ manual. The manual presents a radical version of “intellectual property culture” in which the legal and the moral perfectly coincide, with no gray areas. It associates a general notion of civic duty with blind respect for laws. As a counterpoint, the text provides a broad sketch of a lawless society where “guns and bribery” are the norm (AmCham-Brasil 2010:6).

The materials can appear bizarre. “Survival and the physical and moral integrity of individuals are ensured by the existence of laws,” the PEL manual tells us, which are created to protect society from harm (AmCham-Brasil 2010:6). Because piracy is illegal, it is harmful to society, and more specifically “harms health,” “generates unemployment,” “provokes tax evasion,” “infringes intellectual property,” “harms the economy,” “damages equipment,” “produces clandestine waste,” “practices unfair competition,” and “finances organized crime” (AmCham-Brasil 2010:11). Each of these consequences is described in detail and connected to consumer behavior: “It is not an exaggeration,” the manual says, “to affirm that by buying a pirated product, an individual is worsening his own chances of getting a job, or even provoking the unemployment of one of his relatives or friends” (AmCham-Brasil 2010:10).

A section of the manual entitled “Dealing with Complicated Questions” contains responses to questions or rationalizations about piracy that students or colleagues may raise. These questions touch on the high price of media goods, the role of piracy in access to culture, and the hypothetical effects on employment if informal workers stopped selling pirated goods. In response to a 7- to 14-year-old who, concerned with business taxes, volunteers, “I buy pirated products because the taxes on the genuine goods are too high!” the teacher should have a ready answer: “First of all, by saying that, you are affirming that you would rather give your money to

89 A post on the PEL website titled “What are author’s rights and the public domain?” goes as far as failing to differentiate copyrights from patents: “The rights of authorship for creations last for a determined time. For example: a pharmaceutical company researched and developed a new medicine. It will require a patent for this creation and will have a copyright for 20 years, which is the period of validity of a patent in Brazil” (Projeto Escola Legal 2010).

bandits than the government. You would rather see your money being transformed into guns and drugs for organized crime, instead of more schools, hospitals, and security for the people. This is the choice you make when you consume pirated goods” (AmCham-Brasil 2010:15). To the student who suggests that piracy provides the only affordable access to cultural goods, the model teacher brings logic to bear: “The production of movies, music, books, etc., is vast, and therefore, if we cannot buy a ticket to watch a movie, we can’t say that we do not have access to culture, but only to that specific movie, in that specific place, and that specific moment.” The manual then offers a list of alternatives to piracy, including the suggestion that students pitch in for a DVD rental to watch at home (AmCham-Brasil 2010:16).

PEL’s other problems can probably be inferred by the reader at this point. Most of the well-known “magical numbers” are in play here, without citation. And the teachers’ manual adds some of its own: the R\$ 30-billion (US\$17-billion) figure, supposedly representing tax losses due to piracy, is presented as US\$30 billion—boosting the value by about 70%. The manual suggests that Brazil’s GDP could be 40% higher each year without piracy, which may or may not be a reference to estimates of the size of the informal economy. Predictably, this chicanery is transformed into a lesson plan for “solving mathematical problems with data from research on piracy and pirated products, with statistics and calculations of the losses that piracy causes to the country’s economy” (AmCham-Brasil 2010:19).

There has been no attempt to measure the impact of PEL on schoolteachers, students, and families—though the project is reaching a scale and level of ambition where such evaluation seems necessary. Given the absurdity of much of the discourse, we will guess that the impact is very low. But impact on rates of piracy is not the only goal of the PEL program—and possibly not even its primary goal. PEL is, above all, a marketing campaign—for intellectual property protection in general, of course, but also for the principle of state commitment to anti-piracy and for the specific brands that figure in the PEL curriculum.<sup>90</sup> While investments in the first of these may be a matter of ideological commitment on the part of private-sector supporters, regardless of demonstrable results, the latter two deliver more concrete benefits to both the state and the private sector. Our concern is that such irresponsible interventions in public education will continue to grow, not because of their effectiveness, but because they represent the path of least resistance in an otherwise stalemated enforcement debate. If we take seriously the idea that “education is the driving force for the development of a nation,” as our software industry informant put it in his defense of the “ideology” of intellectual property, we should begin by canceling the “Projeto Escola Legal.”

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90 AmCham seems to be aware of the tension between such brand-driven marketing and the demand that consumers essentially refrain from buying. The “Facing the Problem” section of the PEL teachers’ manual tries to argue that marketing-driven consumerism must be tempered by the desire to be “honest and conscious citizens”—especially when consumers can’t afford the genuine articles (AmCham-Brasil 2010:18).

## Conclusion

“I’m not going to speak about enforcement because it’s a waste of time.”

—*Private-sector consultant*

We are, in many respects, at the end of the piracy decade, in which cheap digital technologies fueled an explosion of unauthorized access to media goods. We are also, in a narrower sense, at the end of the enforcement decade, marked by the growth and spread of multinational enforcement industries in the developing world and by the internalization of their agendas by public authorities. Brazil provides a very clear example of both arcs, with the latter running from copyright industry pressure at the beginning of the millennium, to the creation of the CNCP a few years later, to the wider adoption of the enforcement agenda by public authorities at all levels. As the industry groups repeatedly note, Brazilian government cooperation is itself a major success of the enforcement agenda. The once largely private functions of IP enforcement have been assumed by the public sector. But our work also suggests that such cooperation is relevant only at the margins of the larger digital media economy: its impact on the overall availability of pirated goods has been minimal. This is not a Brazilian problem; it is a global one—a direct consequence of the massive, increasingly democratic digital revolution.

Arguably, this has also been a decade of Brazilian resistance to maximalist IP agendas, marked by Brazil’s advocacy of the Development Agenda at WIPO, refusal to support the WIPO Internet Treaties, and opposition to ACTA. Although such independence gives the appearance of tension within Brazilian IP politics, there is also a complementary dynamic at work. Domestic compliance enables Brazil’s progressive international role. Brazil can stand up in favor of the Development Agenda, in part, because it has appeased industry demands at home. Domestically, this international agenda is almost invisible: the message for consumers is almost always about government and industry cooperation in the war against piracy.

The confluence of interests between public and private sectors in Brazil has two primary features: a strong collective interest in combating the illicit trade in hard goods and a general consensus around the need to educate consumers. But as disc piracy gives way to online piracy, this consensus shows signs of fraying. The conflation of piracy and counterfeiting, so useful when it comes to physical piracy, has not made an easy transition to the online copyright debate. The CNCP’s only project in this area, the ISP working group, is not likely to succeed in implementing graduated response in the face of strong public opposition to such measures. The CNCP is still very much a forum for cooperation against counterfeiting and street piracy, with little power to do much against digital, non-commercial piracy. Industry, accordingly, has taken this debate elsewhere, recasting the enforcement agenda as part of a broader set of measures for online security, child protection, and the fight against cybercrime. As the controversy surrounding the Azeredo Bill illustrates, this conflation makes for volatile politics in Brazil.

As every chapter of this report documents, piracy is first and foremost a response to sharp constraints on media access. The failure to address pricing and distribution issues, our work suggests, ultimately makes the investment in enforcement and awareness campaigns moot. Although pirates are increasingly understood as “underserved customers” in some sectors of the copyright industry,<sup>91</sup> this concept has not penetrated very far into Brazilian IP debates. Although the CNCP mandate includes cooperation on “economic measures,” this side of the dialogue has been completely blocked—caught between its framing as a business-model issue by the public sector and as a tax-relief issue by the private sector.<sup>92</sup> This, in our view, is the elephant in the room at the CNCP.

The first test of the adequacy of business models under local conditions is simply the presence or absence of goods in the market.<sup>93</sup> By this standard, Brazil fares poorly. For physical goods such as music CDs and DVDs, high-cost licensing creates a high-priced and culturally impoverished market of the kind documented throughout this report. With regard to digital platforms, Brazil is far down the list when it comes to industry internationalization strategies. As of late 2010, Brazilians had no access to iTunes, Spotify, Hulu, or the PlayStation Network and were only recently granted access to a (functionally restricted) version of Xbox Live. Some of these issues are clearly amenable to public-private cooperation but remain at the margins of a discourse that emphasizes the moral failings of consumers, questionable links between piracy and organized crime, and inflated loss numbers. The CNCP’s recent endorsement of the Fecomércio-RJ campaign message that “those who buy pirated products pay with their lives” is a good example of this pattern of avoidance of serious debate on these issues. Brazil’s upcoming hosting of the World Cup in 2014 and the Olympics in 2016 is, unfortunately, likely to strengthen this trend as multinational corporate sponsors bear down and as Brazilian officials seek paths of least resistance through the many challenges associated with these high-profile events.

Still buried beneath the enforcement agenda is the question of access to data and research. The domination of policy debates by opaque industry research not only violates the basic principle that public policy should be made with publicly available data but also represents a tremendous lost opportunity for a collective, cooperative exploration of business models that could expand both the production of new media and access to it for Brazilian consumers. In the absence of a real dialogue on those matters, it is all too likely that the next decade will look much like the last one—not an end to the piracy era but its beginning; not an end to the enforcement ramp up but further costly escalation.

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91 As game publisher Valve’s Jason Holtman suggested (Masnick 2009).

92 Or in the form of hopeless token efforts like the ABDR’s “Pasta do Professor”—a licensing scheme for educational materials that combines sharply limited content with serious privacy issues and “non-transferable” physical copies.

93 As the IIPA stated in its 2002 Brazil report, “Piracy of products for Sony PlayStation is 100% because Sony is not in the market.”

## About the Study

This chapter is based on research conducted between 2008 and 2010, coordinated by the Overmundo Institute and conducted by researchers at the Center for Technology and Society and FGV Opinion—both at the Getulio Vargas Foundation in Rio de Janeiro. The overall project was supported by a grant from the International Development Research Centre (IDRC). Much of the work was qualitative, grounded in interviews with some twenty-five actors from IP enforcement networks, as well as in informal talks with many more individuals. Data was also gathered from participant observation of industry seminars and training sessions and from visits to known pirate markets and the main police unit specialized in intellectual property crimes, the DRCPIM, in Rio de Janeiro. Finally, the report relies on a wide range of documents produced by industry and government, both textual and audiovisual. Legal analysis was a factor at all stages of the research, with standard texts in Brazilian legal literature taken as yardsticks for the interpretation of law.

Interview subjects are anonymous in this work. For reference, informants were grouped according to their general institutional affiliation, and care has been taken to strip statements of any identifying information.

Pedro N. Mizukami (CTS-FGV), Oona Castro (Overmundo Institute), Luiz Moncau (CTS-FGV), and Ronaldo Lemos (CTS-FGV) were the lead researchers and the authors of the report that became the present chapter.

Olívia Bandeira (Overmundo Institute) was responsible for the analysis of news articles and contributed many insights. Thiago Camelo, based at the time at the Overmundo Institute, interviewed street vendors from the Uruguaiana market in Rio de Janeiro, and Eduardo Magrani (CTS-FGV) provided supplementary research.

Elizete Ignácio dos Santos, Marcelo Simas, and Pedro Souza, from FGV Opinion, offered assistance with interviews and analysis of industry research. Susana Abrantes and Sabrina Pato, independent researchers working with FGV Opinion, carried out most of the interviews, with guidance from both the Overmundo Institute and the CTS-FGV. Alex Dent contributed a report based on ethnographic work with the APCM and the FNCP and with market workers at the Camelódromo de Campinas in São Paulo. Joe Karaganis was a constant help with all stages of the research and write-up.

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