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CHAPTER THREE

Exceptions and Limitations to Copyright in Brazil: A Call for Reform

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This chapter offers a critical analysis of Brazilian copyright law and legal scholarship, through the particular lens of exceptions and limitations. Copyright exceptions and limitations are those positive rights granted to users of cultural materials, to be exercised without prior authorization of copyright holders.¹ Exceptions and limitations are widely recognized as an essential part of the balance between public and private interests inherent in copyright law, deeply linked to the underlying rationales for copyright itself. This is an essential starting point; however, two additional perspectives also merit emphasis.

First, copyright exceptions and limitations are a particularly important strategy for addressing the challenges and opportunities posed by new information and communication technology. These include the challenges that the Internet and digital reproduction technologies pose to traditional copyright-based business models, as well as the opportunities these technologies offer to move from a society of information consumers to a society of information users – a transition that is already under way (Benkler

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1 We make no distinction between exceptions and limitations, but use the two terms interchangeably. A distinction can certainly be made, however, with limitations referring to works falling entirely outside the scope of copyright protection, and exceptions referring to permitted uses of works that are protected by copyright (Ricketson 2003).

2000, 2006, Lessig 2005). Exceptions and limitations are a critical means for dealing with these ongoing technological upheavals of copyright law, while at the same time allowing the development of the creative potential of these new technologies.

Second, copyright exceptions and limitations are an issue of particular importance to developing countries (Chang 2002, Drahos and Braithwaite 2003, Kanniah 2006, Paranaguá Moniz 2006). In Brazil, access to knowledge remains a privilege of the most affluent citizens, with negative effects on the quality of life and fundamental rights of the less affluent majority. This is also the case in many other parts of the world where a majority of the population does not have the resources to purchase knowledge goods priced to sell in higher-income markets. Seen in this light, exceptions and limitations to copyright must also be understood as a matter of national development policy – the challenges of international harmonization notwithstanding. With these perspectives in mind, this chapter follows a four-part structure:

Part one takes a historical view of the Brazilian system of exceptions and limitations to copyright, identifying particular challenges posed by this legal tradition. It is an effort to unearth problems that have remained buried for a long time in Brazilian copyright history, and are consequently avoided or glossed over by Brazilian legal scholars, judges, legislators and citizens. These include the unhealthy reliance of Brazilian copyright regulation on criminal law and the failure of both constitutional and statutory regulation to articulate the purposes of copyright protection and exceptions in a manner that could better guide legal interpretation and legislative reform.

Part two offers an account of the current state of Brazilian copyright exceptions and limitations. It is an effort to make sense of rules which, when individually considered, may have little meaning. A complete listing of the existing exceptions and limitations is provided, as well as a discussion and analysis of some of the more obvious gaps. As will be seen, the scope of exceptions and limitations in Brazil is extremely narrow, leaving little room for many traditional and emerging uses of cultural materials.

Part three offers an account of the widening gap between copyright legislation and prevailing social practices of mass copyright infringement. Two cases are analyzed: the recent crackdown on the traditional practice of photocopying academic texts, and the efforts of Brazilian law to come

to terms with the emerging practice of online file sharing. These accounts suggest that the stakes of exceptions and limitations policy in Brazil are rising, with a growing conflict between the demands of content industry actors for greater protection and the demands of the Brazilian public for greater access.

Part four takes issue with Brazilian legal literature and its interpretation of copyright law, which has neglected the necessity of balancing the interests of authors with those of the public. Offering a critique of the dominant approach to this subject, it concludes with a call for greater attention to the interplay between exceptions and limitations and constitutional values.

The historical development of copyright law

Before presenting the current system of copyright exceptions and limitations in Brazil, some historical context is helpful. The particular way in which copyright law developed in Brazil has greatly shaped the challenges faced today.

Looking back, three especially troublesome problems are rooted in the historical tradition of copyright law in Brazil. First, whereas the criminalization of noncommercial copyright infringement is a recent phenomenon in Europe and the United States, Brazilian copyright was born out of criminal law and still relies on it heavily. Second, while mention of copyright found its way into the Brazilian constitution as early as 1891, the constitution did not then and still does not articulate the values or purposes of copyright. Third, the exceptions and limitations to copyright found in Brazilian civil law – beginning with the 1898 Medeiros e Albuquerque Law – also omit a rationale.

All three of these factors complicate the attempts of legal scholars today to focus on the values and counter-values implicated by copyright law, and to suggest appropriate ways of balancing them.

Criminal beginnings

If the increasing reach of criminal law over copyright issues is cause for controversy in North America and Europe (Harvard Law Review 1999, Moohr 2003, Alexander 2007), Brazilian lawyers and citizens take it naturally. Article 261 of the Imperial Criminal Code of 1830 was the first Brazilian law to establish a proper reproduction right, imposing criminal sanctions when writings or drawings made by Brazilian citizens were reproduced without

prior authorization.² Once caught with illegal copies, offenders would lose all of the copies to the author or his or her heirs and pay a fine. The criminal offense was extant as long as the work was unlawfully reproduced during the author's life or within ten years after her or his death if heirs survived. Translators were given equal standing as authors of original works. If the works were corporately owned, protection would last for a term of ten years. Hence, both the reproduction right itself, as well as its term, were originally defined through the criminal law.

Articles 342–350 of the Penal Code of 1890 continued the Brazilian tradition of legislating copyright through criminal law. Compared to the Imperial Criminal Code, the 1890 Code enhanced copyright protection and introduced in Brazilian legal parlance the concepts of “literary,” “artistic,” “industrial” and “commercial” properties. Whereas the Imperial Criminal Code classified unlawful reproduction as a “crime against property,” the 1890 Code explicitly considered it a violation of “intellectual” property rights. The 1890 Code also granted a copyright on statutes, decrees, resolutions, reports and official documents of the Legislative and Executive branches to the state, coupled with a limitation that allowed reprinting on newspapers, compendia, treatises or any other scientific or literary works. The reselling of these works was explicitly permitted, along the lines of the first sale doctrine. A limitation was also established by Article 347, allowing partial citation of any written work with the aim of “criticism, polemics or teaching.” Thus, in the Brazilian legal tradition, copyright emerged from criminal law, as did exceptions and limitations.

Criminal law still plays a prominent role in copyright today. According to Article 184 of the Brazilian Penal Code, any act of copyright infringement – no matter how minor and regardless of commercial intent – is also

2 Texts on the history of copyright law in Brazil usually begin with an Imperial statute, *Lei de 11 de Agosto de 1827*, placing the origins of Brazilian copyright legislation almost sixty years before the Berne Convention of 1886 (see e.g. Costa Netto 1998, Bittar 2003, Ascensão 2007). It is questionable, however, if this is an appropriate starting point for the history of Brazilian copyright law. While the 1827 statute did create a privilege over literary property – analogous to the privileges that were granted in Europe before the first proper copyright laws emerged – its scope was very narrow. The primary purpose of the statute was to found Brazil's first two universities. Incidentally, it also granted a ten-year privilege covering professors' lecture notes. This privilege was only applicable after a bureaucratic process involving approval of the work's content by universities and the government, which would afterwards provide for printing and distribution of the material for internal use within each university. It was solely the final product of this process that was subject to the ten-year privilege. The 1827 statute is thus hardly comparable to either the printing privileges that were commonly granted across Europe since the fifteenth century, or the stationer's copyright developed in England in the sixteenth century, which would later serve as a model to the 1710 Statute of Anne (Patterson 1968).

automatically a criminal offense.³ Criminal law ends up not as a last resort measure for dealing with severe copyright infringement, but as a natural, organic part of copyright law. Since the Brazilian exceptions and limitations are so limited, mass copyright infringement inevitably follows – along with mass criminal infringement. While other countries debate whether it is appropriate for every single act of copyright infringement to be treated as a criminal offense – as some in the content industries advocate – in Brazil such debate does not occur, because this has been usual practice since 1830.

Constitutional copyright

While copyright was originally treated as a matter for criminal law, it became a constitutional issue with the adoption of Brazil's second constitution in 1891. The 1891 constitution was heavily influenced by American constitutional thought (da Silva 1999, Bonavides 2006), and the consideration of copyright as a subject of constitutional relevance was probably derived from the U.S. Constitution.

Unlike the U.S. Constitution's intellectual property clause, however, the Brazilian 1891 constitutional provision on copyright lacks a stated purpose for copyright. The U.S. Constitution gives Congress the power – but not the obligation – to establish patents and copyrights, for a specific stated purpose: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Article I, § 8(8)).

Brazil's 1891 constitution mandated a life-plus term for copyright, but did not provide a reasoning for the right. Article 72, paragraph 26 reads: "Authors are granted an exclusive right on the reproduction of their artistic and literary works through the printing press or other mechanical processes. The authors' heirs will be allowed the same right for a period of time established by law." Authors' reproduction rights are stated, and the public domain is asserted through reference to a copyright term established by law,

3 Article 184, as amended by Lei 10.695/03, has a main provision covering acts of infringement in a general manner, and three other provisions establishing increased penalties for more specific offenses. The main provision simply states that it is a crime to "violate author's rights and neighboring rights," with a penalty of three months to one year of imprisonment, or a fine to be judicially determined. Article 184, §§ 1 through 3 deal with copyright infringement in the context of commercial activity, requiring either direct or indirect profit. These offenses are punished with two to four years of imprisonment and a judicially determined fine. Software-related infringement is separately regulated by Lei 9609/98 and, curiously, punished with different penalties: six months to two years of imprisonment or a fine for general infringement (Article 12), and one to four years of imprisonment and a fine for commercial reproduction (Article 12, § 1) or the general commercial use of unlawfully reproduced material (Article 12, § 2).

but with no explanation of copyright's function in society. Since the textual formula of Brazilian constitutional copyright has remained fundamentally unchanged throughout Brazil's many constitutions, we are still left today without an explicit reference to copyright's goals.⁴

Civil copyright

The 1891 Constitution did not specify what exceptions and limitations should be placed on copyright. For this purpose, Brazil's first non-criminal copyright statute was adopted in 1898. Known as the Medeiros e Albuquerque Law after the congressman who proposed it, Lei 496/1898 was approved not long after the 1886 Berne Convention.⁵ Although there have been significant changes to Brazilian copyright law since 1898, the nineteenth-century law inaugurated a strategy for the regulation of limitations and exceptions that remains to this day.

Seven limitations were established under Article 22 of the Medeiros e Albuquerque Law. *Limitation 1* allowed partial or total reproduction of smaller works within the body of a larger work, as long as the latter had scientific purposes or was to be used for public learning. *Limitation 2* allowed newspapers the reproduction of news articles from other periodicals as long as credit was given, as well as the reproduction of any speeches given in public reunions. *Limitation 3* granted permission for the reproduction of official documents from all levels of the Brazilian Federation. *Limitation 4* allowed the reproduction of excerpts from any work in books or newspapers, for the purpose of criticism. *Limitation 5* authorized the reproduction of works of figurative art within written works, as long their main element was the text itself, and as long as credit was given. *Limitation 6* permitted the reproduction of any works of art kept in public spaces. *Limitation 7* allowed the reproduction of privately commissioned portraits or sculpted busts, when made by the owner of the physical objects. Although the statute did not specify the reasons backing the limitations, it appears that the unifying concerns were to facilitate free speech and education.

4 All of Brazil's constitutions, with the exception of the 1937 Constitution, which had no copyright provisions, kept the same structure of the 1891 copyright clause. Brazil's current constitution (1988) included new provisions on co-authorship, publishing rights and authors' right to supervise the revenues related to their works (Article 5, XXVIII, a and b), but preserved the original copyright provision under Article 5, XVII.

5 Brazil did not become a member of the Berne Convention until 1922.

Ever since the Medeiros e Albuquerque Law, every Brazilian copyright statute begins by establishing the scope and term of copyright protection, along with a few definitions, and then presents a list of limitations without specifying the principles that justify their existence. This was true of the Brazilian Civil Code of 1916 as well as the more recent copyright statutes of 1973 and 1998. Both kept the basic framework of the Medeiros e Albuquerque Law with some changes, particularly to the private copy exception.⁶ None of these versions, however, attempted to articulate a logic behind the shifting set of exceptions and limitations. Nor did they provide general principles that could be used to infer other appropriate, unforeseen uses of copyrighted material. This is a system that is considerably distant from American fair use; it is closer to the more rigid fair-dealing systems observed in Latin America and Continental Europe. The consequence is that not only legislation, but also legal literature and public opinion fail to adapt to the current technological challenges to copyright tradition.

Lessons from copyright history

Looking back, the Brazilian legal tradition creates three especially troublesome barriers to copyright reform and balanced legal interpretation.

First, there is the constitutional tradition of never stating a clear goal for copyright protection. This accounts for why Brazilian scholarship has neglected the question of copyright's purpose. Natural rights discourses dominate discussions concerning the rationales for copyright; other public or private interests are ignored.

Second, the statutory exceptions and limitations similarly fail to make explicit the reasons motivating their existence. Making sense of these lists as a coherent body of rules that serve specific purposes is not easy, particularly as the lists have been successively altered from 1898 to 1998, resulting in a somewhat jumbled text. The lack of clearly articulated reasons for the existence of exceptions and limitations greatly frustrates attempts to discuss the coherence and purposes of lists of exceptions and limitations, and

6 The Civil Code of 1916 extended the copyright term to life plus 60 years, and increased the scope of protection. Article 666 came with a list of ten limitations, mostly repeating the text of Medeiros e Albuquerque's Article 22, but with a few important modifications. Number VI authorized full copies of any work, as long as they were for noncommercial use and made by hand. The use of a typewriter for making a copy, for instance, would be considered copyright infringement, revealing that concerns about technologies that ease reproduction dates back to the early twentieth century. As of 1973, full private copies were allowed without any technological restrictions, with the condition that they were limited to a single copy and not-for-profit (Lei 5.988/73, Article 49, II). The private copy exception was restricted in 1998, however, and now allows for a private copy only of "small excerpts" rather than of the full work (Lei 9.610/98, Article 46, II).

makes them vulnerable to narrowing interpretations in the name of greater protection for authors' rights.

Third, by long tradition in Brazilian law, any act of copyright infringement – no matter how minor – is automatically a criminal offense. Since the limitations lists are so strict, mass criminal infringement inevitably follows. Furthermore, the lack of stated reasons for copyright and its exceptions and limitations helps reinforce content industry pressure for even stronger criminal protection.

Exceptions and limitations in the law

Brazilian copyright law is defined by the Penal Code of 1940 – recently altered in its copyright-related matter by Lei 10.695/03 – by the main copyright statute (Lei 9.610/98), and by Brazil's "Software Law" (Lei 9.609/98).⁷ Together, these laws form the current body of Brazilian copyright legislation. All provide for some copyright limitations, even the Penal Code of 1940. This part attempts to approach the current system in a systematic fashion and offer insight on a few interpretation issues that may arise when one attempts to understand the statutory text.⁸

The current body of Brazilian copyright exceptions and limitations may be divided into three groups, relating to: 1) partial or full reproduction; 2) derivative works; and 3) performing rights. The three tables in the following sections provide an exhaustive list of the limitations present in Brazilian copyright legislation.⁹ The dominant view in Brazilian literature is that exceptions and limitations lists are to be strictly construed, with no credence given to implied limitations. This is a primary tenet of Brazilian legal scholarship with respect to copyright; it is taken as dogma in academic writing and, as a result, often by courts as well.

Reproduction-related limitations

Table 3.1 shows that some of the reproduction-related limitations found in Brazilian law were directly inspired by the Berne Convention. The Berne

7 The 1998 legislation built upon the 1973 copyright statute, altering it to comply with the World Trade Organization's TRIPS Agreement. In fact, the Brazilian copyright reforms go far beyond the TRIPS requirements, offering even broader copyright protection and further restricting existing exceptions and limitations.

8 This may clash with current dominant interpretations of Brazilian copyright law, which are usually done article by article in the most restrictive way possible, without any serious attempt to discern order behind what may appear as randomness.

9 We have not offered literal translations, since the result, in many cases, would read very awkwardly. Great care has been taken, however, for the texts provided in Tables 3.1, 3.2 and 3.3 to be a faithful representation of the law.

Table 3.1 : Reproduction-related exceptions and limitations**News or information articles.** Lei 9.610/98, 46, I, a*Corresponding international law: Berne, 10bis (1)*

The reproduction of news or information articles in the daily press is permitted. Credit must be given to the article's author and the original publisher.

Public speeches. Lei 9.610/98, 46, I, b*Corresponding international law: Berne, 2bis (1) and (2)*

Public speeches may be reproduced in daily or periodical publications.

Portraits or visual works made for hire. Lei 9.610/98, 46, I, c*No corresponding international law*

The owner of portraits or other works of visual arts representing persons may reproduce the work, as long as the pictured person or their heirs make no opposition.

Reproduction of works for the visually impaired. Lei 9.610/98, 46, I, d*Corresponding international law: Berne, 9 (2)*

Literary, artistic and scientific works may be reproduced in the Braille system, or through any other methods devised for the use of the visually impaired, as long as the reproduction is not-for-profit.

Private copies (I). Lei 9.610/98, 46, II*Corresponding international law: Berne, 9 (2)*

The reproduction of small excerpts of a protected work is permitted, as long as it is for the private use of the person responsible for the reproduction. The reproduction must not be done for profit, and must be limited to a single copy.

Private copies (II). Penal Code, 184, § 4.*Corresponding international law: Berne, 9 (2)*

The reproduction of a single copy of "an intellectual work or phonogram" is allowed, for the private use of the person responsible for the reproduction, as long it is not directly or indirectly for-profit.

Quotations. Lei 9.610/98, 46, III*Corresponding international law: Berne, 10 (1)*

Quotations of a protected work in books, magazines or other publications are allowed for the means of study, criticism or polemics. The extent of the quotation should be within the reasonable measure required for the ends sought.

Students' lecture notes.* Lei 9.610/98, 46, IV*No corresponding international law.*

Students may take lecture notes, but are not allowed to publish either the complete lecture or excerpts of it, without the lecturer's prior authorization.

Judicial or administrative evidence.** Lei 9.610/98, 46, VII*No corresponding international law.*

The use of protected works is permitted for the purpose of producing judicial evidence.

Reproduction within the context of a larger work. Lei 9.610/98, 46, VIII*No corresponding international law.*

The reproduction of small excerpts of preexisting works of any nature, or of an entire work of visual art, is allowed within the context of a larger work. The reproduction itself must not be the main object of the larger work, and must not interfere with the normal exploitation of the work or cause unjustified harm to the legitimate interests of the author.

Private copies of computer programs. Lei 9.609/98, 6, I

No corresponding international law. Inspired by EU Council Directive 91/250/EEC of 14 May 1991.

A single full copy is allowed for backup or archival purposes, as long as an original copy was legitimately acquired.

Partial citation of computer programs. Lei 9.609/98, 6, II

No corresponding international law.

It is permitted to partially cite from a program's source code, for educational purposes. The program and its author must be identified.

Similarity of computer programs. Lei 9.609/98, 6, III

No corresponding international law.

If two computer programs are functionally alike, or if solutions to a given problem force programmers to adopt identical approaches to code writing, similarities in source code are not considered to be copyright infringement. If, likewise, the observance of technical standards forces code writers to write similar code, they are covered by the limitation.

* Also covers derivation.

** Also covers performance.

three-step test was not itself turned into law in Brazil,¹⁰ although traces of the Berne-three step test can be seen in the Article 46 VIII provision on reproduction within the context of a larger work. Overall, however, there is a distinct lack of underlying principles and clear criteria for interpreting the precise scope of exceptions and limitations. This is very much in accordance with the historical roots of Brazilian copyright.

Consider the private copy provision. A common motivation for establishing a private copy exception is to accommodate research and education purposes. Yet, the limitation established by Article 46, II does not specify this or any other purpose. As of 1998, moreover, the exception now permits a private copy of only "small excerpts," which often results in interpretations that do not allow for reasonable use within a research or classroom context. Other common uses for private copies have also been affected, such as time shifting of broadcast programs for later viewing.

10 Article 9(2) of the Berne Convention states: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." In some Latin American countries, the Berne 9(2) criteria of normal exploitation and unreasonable prejudice are explicitly written into national legislation as mandatory guides for the interpretation of limitations and exceptions. These criteria are not always helpful, but provide at least some logical orientation with regards to limitations. No such guidance exists in Brazilian law.

In this way, the statutory text's failure to state the intended function of an exception may lead to later changes that completely undermine its existence.

Coherence is also sometimes lacking. At least one of the "limitations" in this list is not a limitation at all. This is the case, for example, with the language at Article 46, I, c, which requires the authorization of the person pictured in a work of visual arts, if the owner of the work should wish to reproduce it. Put under critical evaluation, Article 46, IV also acts not as a limitation regarding student's lecture notes, but as a reinforcement of the lecturer's copyright. That the lawmakers felt that there was a need to state what should be obvious – that students may take notes at lectures – is egregious. The real purpose of Article 46, IV is to make clear the lecturer's right to control later uses of such notes.

In light of the technological changes introduced in the past fifteen years or so, moreover, the list of exceptions and limitations appears antiquated. The permission to write down and publish public speeches (Art. 46, I, b) and to reproduce daily press articles (Art. 46, I, a) may have provided an adequate degree of freedom of information and healthy flow of ideas in the nineteenth century. The era of digital technology, however, is much more complex and demands additional exceptions and limitations. The rise of the search engines – which rely on limitations and exceptions to function – and citizen journalism provide opportunities for political discourse to be enriched and broadened. Open content licensing strategies can only go so far in providing an environment for change; copyright reform is urgently needed to realize unprecedented positive opportunities for individual and social development (Benkler 2006).

An unintended limitation

When the copyright provisions of the Brazilian Penal Code were amended in 2003, an additional limitation was created. The amendment process – motivated by international pressure – established new infringement crimes with increased penalties. It was, however, so hastily drafted that it also established a new, unintended limitation to copyright. This occurred because the amendment was written with the 1973 version of copyright law in mind; proper care was not taken to verify the amendment's language against the newer statute, resulting in the enactment of a new limitation.

Article 184, § 4 of the Penal Code establishes that there is no crime when the act under consideration is covered by an exception or limitation

according to Lei 9.610/98, or yet, if it consists in a “copy of an intellectual work or phonogram, in a single copy, for the private use of the copyist, without intent of direct or indirect profit.” Thus, the 2003 amendment to the Penal Code appears to reinstate the 1973 private copy limitation, overriding the narrower private copy provision of the 1998 statute. Since all that is constitutionally required for copyright legislation to be valid is that it be enacted at federal level (Art. 22, I), the criterion of *lex posterior derogat priori* (Decreto Lei 4.707/42, art. 2, 1) indicates that the 2003 Penal Code amendment – being latter in time – should take precedence. There is no way to argue that *lex specialis derogat generali* – a specialized law overrules a general one – in this case, since both provisions are copyright-specific.

By our reading of the law, Brazil has reinstated the earlier, broader exception allowing a single full copy of any intellectual work for private, noncommercial use. Mainstream copyright scholarship, however, behaves as if the relevant private copy limitation is still the one of Article 46, II, of Lei 9.610/98, which permits private copies of only “small excerpts.” No attention is given to the Penal Code except when it comes to discussion of criminal infringement. Even then, no arguments can be seen that acknowledge and attempt to resolve the clear conflict between these two laws. It appears, rather, that scholars are reluctant to engage with this issue at all. This is unfortunate, as wider awareness and acceptance of the newer and broader private copy exception created by the 2003 reforms would go a long way toward establishing a better balance between copyright privileges and the promotion of access to knowledge.

Derivation-related limitations

Limitations concerning derived works in Brazilian law – listed in Table 3.2 are particularly inadequate for the digital environment, where the creative re-use of content is a given. With all that has been written about the remix culture, Web 2.0, video, music and Web mashups and peer production in general, the importance of derivation-related limitations is well established. Brazilian law provides little room for these new modalities of cultural production, however, even when they are entirely noncommercial.

In *droit d’auteur* countries, the idea of derivation-related limitations finds an even greater barrier than elsewhere due to the doctrines of moral rights and personality rights – especially the so-called “right of integrity.” There is

Table 3.2 : Derivation-related limitations

<p>Parodies and paraphrases. Lei 9.610/98, 47 <i>No corresponding international law.</i> Parodies and paraphrases are permitted, as long as they do not constitute actual reproduction of the original work or discredit it.</p> <p>Works in public spaces. Lei 9.610/98, 48 <i>No corresponding international law.</i> Works that permanently remain in public spaces may be freely represented by painting, drawings, photographs or audiovisual procedures.</p> <p>Software integration. Lei 9.609/98, 6, IV <i>No corresponding international law. Inspired by EU Council Directive 91/250/EEC of 14 May 1991.</i> To integrate any given computer program into others, be it at application or operating system level, is permitted if done for personal use and unavoidable considering the user's needs. Integration must be done for the exclusive use of the person who carries it out.</p>

widespread fear – at least from traditional scholarship – that any derivation or creative use of a work might be detrimental to the author’s personality and reputation. It is extremely hard to argue for creative derivation – even when the “standing on the shoulders of giants” effect of cumulative cultural creation is brought to attention – because strong natural rights-based rationales for copyright insist on the figure of an original author whose work is tantamount to – or at least a poor but worthy imitation of – divine creation. Therefore, many forms of content production which build upon previous works are viewed with distrust, as potential attacks on the author’s integrity or reputation.

This is evident in the parodies and paraphrases limitation (Lei 9.610/98, Article 47), which severely restricts the range of legal parody. Parodies are explicitly permitted, but with a key condition: the author of a parody cannot discredit the parodied work. Since the entire point of parody is often to discredit the original work to some extent, this limitation offers protection to very tame parodies. While supposedly granting the right to parody, this limitation leaves open the door to state-enforced private censorship.

Performing rights-related limitations

Limitations related to performing rights in Brazil are scant. What few exist are listed in Table 3.3. As is quickly apparent, there is little room for amateur public performance.

Table 3.3 : Performing rights-related limitations**Use of protected works for demonstration purposes.** Lei 9.610/98, 46, V*No corresponding international law.*

The use of literary, musical or audiovisual works, as well as radio broadcasts, is permitted for the purposes of demonstrating technical equipment in stores.

Theatrical and musical performances. Lei 9.610/98, 46, VI*No corresponding international law.*

Theatrical and musical performances may be carried out within private family environments or, for strictly educational purposes, in learning institutions. In both cases, performance must be nonprofit.

The Central Collection and Distribution Office – Escritório Central de Arrecadação e Distribuição (ECAD), the umbrella organization for Brazilian collecting societies, is an extremely litigious organization. The 1998 law granted even further permission for ECAD to pursue strategies of litigation by eliminating the previous requirement of indirect profit.¹¹ There is still controversy regarding what exactly qualifies as a “public performance” in an online environment. Judging from ECAD’s high rates of success in courts so far, however, it remains to be seen how far the ability to collect will be extended, in the absence of clear rules.

Exceptions and limitations in action

Thus far this chapter has offered a historical perspective on the unique challenges posed by the Brazilian legal tradition and examined the existing system of copyright exceptions and limitations. An accurate picture of the problems imposed by Brazilian copyright law on the use of protected content, however, can only be fully drawn when we observe how this system is worked into practice.

Since the exceptions and limitations lists of Brazilian copyright law are strictly construed, mass infringement inevitably follows. Consider three examples: a) the reproduction of protected content by libraries for

11 Article 73 of Lei 5.988/73 required that indirect profit be proved for royalties to be owed. The 1998 law imposes no such constraint, and ECAD has been achieving high rates of success in courts in charging royalties even when it comes to radios inside hospital rooms (see, for a representative judicial opinion on the matter: REsp 791630/RJ; STJ, 3^a T; Rel. Min. Nancy Andrighi, DJ 04.09.2006 p. 270). It must be mentioned that there is room for “indirect profit” to be construed as any personal advantage received by the infringer, regardless of commercial activity. Historically, however, “indirect profit” always referred to profit gained from the public performance of protected works as an incentive to the consumption of unrelated goods or services, such as the use of background music in restaurants in order to attract clientele. See, for example: REsp 58589/GO; STJ, 4^a T., Rel. Min. Barros Monteiro, DJ 22.05.1995 p. 14416.

preservation or managerial purposes; b) the showing of a single scene of a film in a classroom; and c) time or space shifting of music and film legitimately acquired by consumers. None of these acts is covered by Brazil's current regime of exceptions and limitations, which is blind to education, research and the preservation and archival of content. This compromises the development of new business models in a digital environment, as well as a good number of reasonable noncommercial uses for copyrighted content.

The following two case studies will provide concrete examples of how inflexible limitations create a state of mass criminality.

The first case presents an account of the conflict between the Brazilian Association for Reproductive Rights – Associação Brasileira de Direitos Reprográficos (ABDR) – and university students and faculty. Not content with the already strict limitations list, the ABDR has systematically misinterpreted copyright exceptions to discourage even legally permitted uses of copyrighted materials. The effect has been to significantly complicate access to scholarly knowledge in the Brazilian higher education system.

The second case examines file sharing in Brazil. This case study demonstrates how digital technologies and worldwide computer networks are amplifying traditional practices of noncommercial information exchange into a parallel version of copyright norms that has so far proved much more reasonable than the official list of exceptions and limitations. The current status of the content industry's world campaign against file sharing will be discussed in its Brazilian ramifications, along with reaction from file sharing communities, and the emergent scenario that points to rethinking copyright law.

Photocopying and access to scholarship

Higher-education institutions in Brazil usually do not provide clear policy guidance on course readers and textbook copying. In practice, the unlicensed reproduction of copyrighted material is essential to academic life. Course readers, copies of book chapters and even entire books can be found in files hosted by copy shops, ready for on-demand reproduction. Professors usually keep personal files as well, in which they include all of their courses' required and complementary reading material. Students are frequently seen carrying spiral-bound photocopied textbooks to class. This is all done without prior authorization from rightsholders.

This deeply rooted practice stems not only from the convenience provided by reprographic services, but also from demand factors specific to the

national context. The Brazilian book market features high prices, most academic library collections are inadequate, and out-of-print, foreign, or otherwise hard-to-find books are often required reading material.

The quest for knowledge in a book-scarce setting

A recent study carried out by Brazil's largest consumer group helps put things in perspective (IDEC 2008). The study calculated the average costs for the required reading material for law, business and economics majors in the first year of seven private and public institutions in São Paulo and Rio de Janeiro. According to the IDEC's numbers, the average costs for the required reading material for a freshman, totaled R\$2578.46 in public institutions and R\$3907.89 in private institutions. These values take into consideration only the books that could be readily found at bookstores; more than one-third of required books in both public and private institutions were out-of-print.

Considering that the minimum wage in Brazil as of March 2008 is R\$415.00 per month, it is simply not feasible for most students to buy all of the required reading materials. Books in Brazil may be cheaper than in many other countries in absolute terms, but when purchasing power is taken into account, they are much more expensive. Sá Earp and Kornis (2005) have developed an index for measuring the relative price of books in different countries, taking into account GDP per capita and the average price of a book. Their work suggests that the relative price of a book in Brazil is 270% higher than in Japan and 150% higher than in the United States. The scarcity of bookshops throughout Brazil is symptomatic of this reality.¹²

Libraries, unfortunately, are not a good alternative for students in Brazil. The IDEC research also evaluated library collections from all the institutions involved. The average collection numbered no more than six books per 100 students at public institutions; no higher than eight at their private counterparts.

Paying a fee for the authorized reproduction of printed works is also not an option for Brazilian students and professors. The Brazilian Association of Reprographic Rights – Associação Brasileira de Direitos Reprográficos

12 "[I]f one considers the existence of bookstores as a proxy for access to books, the market in Brazil is very small. The country as a whole has approximately 2000 bookstores, or an average of just one bookstore for every 84,400 Brazilians. The absolute majority of Brazilian cities do not have any bookstores. Entire states such as Roraima, Tocantins, and Amapá have only two bookstores each. In the overall Northern region of the country, the average is one bookstore for every 215,300 inhabitants" (Lemos 2007, 15).

(ABDR) – is the nation’s sole reprographic rights organization (RRO). It refuses to establish a licensing system for academic copying. Since 2004, indeed, ABDR has revoked what little licensing it had previously authorized. Instead, it has initiated an extremely aggressive legal and media campaign against “book piracy,” preaching that books should be bought or – in a worst-case scenario – borrowed from a library. ABDR has turned into a copyright enforcement association, pushing forward a business model that restricts itself to sales of hard-copy books backed by threats of criminal litigation.

Rewriting copyright law through misinformation and intimidation

Threat, in fact, is a crucial element of ABDR’s business model for the publishing industry. ABDR has unleashed the police on universities and copy shop owners, then taken them to court. Reaction has been shaped by student unions of a small number of universities into the “Copiar Livro é Direito” – “To Copy a Book is a Right” – movement (Magrani 2006), unfortunately without any sizeable impact. ABDR’s strategy has managed to intimidate copy shop owners and instill in them a paranoid approach to their daily activities. It has become somewhat difficult to make copies even of public domain and Creative Commons licensed materials. Yet copying is still a reality on Brazilian *campi*, and all it takes is to establish a few contacts or win the trust of copy shop employees to make legal or illegal reproductions.

In university copy shops around Brazil, the existing narrow exceptions and limitations are being further narrowed in practice. According to the ABDR’s publicity campaigns, even the reproduction of small excerpts of a protected work is prohibited.¹³ The proviso that copies should be made “*pelo próprio copista*” – that is, by the person responsible for the reproduction – is used to argue that such reproductions are legal only if the copy’s end-user is the one physically operating the reprographic machine. On top of that, there is the issue of determining what exactly amounts to a “small excerpt,” with legal scholars disagreeing on how to interpret the law or even sidestepping the question entirely (Cabral 2003, Abrão 2002, Bittar 2003). A couple of institutions, such as Universidade de São Paulo (USP) and Pontifícia Universidade Católica de São Paulo (PUC-SP), have been forced to draft

13 Most copyright notices in Brazilian books state that no full or partial copies of the work are permitted. Rather than quoting directly from the law, these notices make reference to Lei 9.610/98 by number only; few readers actually verify if the law backs the notices’ claims. The phenomenon of misleading copyright notices is by no means exclusively Brazilian (Patterson and Lindberg 1991, 7–11).

policy clearly adopting a 10% standard for “small excerpts,” attracting international industry criticism in the process (IIPA 2008).

New legislative proposals on an educational exception

There are three bills related to the reproduction of printed material currently under discussion at Congress. Bill 131/06, proposed by Senator Valdir Raupp, would alter Article 46, II of Lei 9.610/98 to allow a single copy of up to 2% of any work, for the private use of the person responsible for the act of reproduction. The rationale for the bill is that the actions of the ABDR against students and universities have been excessively aggressive, and that the new text would better meet public expectations of “access to information and knowledge.”

Bill 5046/05, introduced by Representative Antonio Carlos Mendes Thame, would go considerably further than Bill 131/06, creating a new limitation to allow university students to make a full single copy of any work for noncommercial uses. Representative Thame justifies the proposal with three arguments: 1) there are hundreds of works which are out-of-print, and thus out of reach for many students; copying these books would hardly provoke any serious economic harm to the publishers, but would provide students with easier access to knowledge; 2) university libraries often do not carry the necessary number of copies to fill the needs of every student; 3) lower-income students have no means to pay for increasingly expensive books, and to require of these students any action other than photocopying these books would be unfair, and violate their constitutional right to equality; 4) considering that every act of copyright infringement is automatically criminal in Brazil, to make use of criminal law to solve a social educational problem is not good public policy.

A third bill has been appended to Bill 5046/05, for joint consideration. Representative Bilac Pinto's Bill 1197/07 follows an entirely different line of reasoning: according to Bilac Pinto, universities blatantly violate the law by providing students with the means to illegally reproduce content. Since the law must be respected at all costs, the solution for this problem is to completely prohibit universities from even having reprographic machines or any other device capable of replicating literary works.

Little progress has been reached with Bill 131/06, which has been stalled in the Senate since June 2007. Bill 5046/05 and 1197/07 were considered, however by the House of Representative's Committee of Education and

Culture on June 2008. The Committee rejected the punitive Bill 1197/07 outright, but proposed heavy amendments to Bill 5046/05.

The sponsor of these amendments, Representative Rodrigo Rocha Loures, favored the creation of a new copyright exception for university students, but only as far as out-of-print works were concerned. His amendments would limit the educational exception to this circumstance. According to Representative Loures, to impose a new exception allowing the full copy of any work just because students have no means to pay for them, or because libraries do not carry enough copies of the work, is to burden the private sector with an issue that should be dealt with by the state.

Even in their original forms, both proposals to expand the educational exception are deeply flawed: Senator Raupp's for its questionable 25% limit, and Representative Thame's for its restriction to university students instead of the preferable "for educational ends" formula. Yet, they are a sign of progress, or at least a recognition that a problem exists. Reaction, predictably, has come in form of Representative Bilac Pinto's Bill 1197/07, which could still resurface in less obviously unconstitutional wording. International pressure is already mounting: the International Intellectual Property Alliance mentions in its Special 301 report that the bills "should be monitored, as any move to take them forward no doubt place Brazil in violation of international copyright mandates" (IIPA 2008).

Regardless of the outcome of these bills, exceptions attending to educational needs are sorely needed in Brazilian copyright. They should be clearly drafted, leaving little room for academic dispute regarding the extent and nature of the works to be reproduced, and respect Brazil's social context and development needs.

File sharing: a new challenge to copyright

File sharing is as rampant among Brazil's online population as elsewhere in the connected world. Estimating the population of file sharers in any country is a thorny issue, due to the technological profile of some of the systems employed for file sharing. It is safe to assume, however, that the population of file sharers is growing, despite organized industry attacks through both legal and technological means (Yu 2005). In Brazil, where the possibility of being sued over file sharing is still insignificant, file sharing is a popular and openly practiced Internet activity. A simple Google search with a few keywords – such as "emule," "torrents," "brasil," "br," "p2p" and "comunidade" (community) – will point the way to the many websites,

forums and blogs that form the infrastructure used by Brazilians for file sharing, gateways to vast global repositories of content spread throughout millions of computers.

Technology and community

Infrastructures for file sharing are easier to understand if we think of them as being composed by two types of layers: data transfer layers and community layers. Different systems are used for data transfer, for example, p2p networks.¹⁴ These are technical means of getting data from a given computer to another across the networks that comprise the Internet, using a variety of protocols and software as old as the FTP (file transfer protocol) and as recent as the BitTorrent protocol. On top of these data transfer systems, community layers organize the social and operational aspects of file sharing, providing space for one-to-one/many-to-many interaction and metadata management. Community layers make heavy use of social software such as forum and blog engines, content management systems and wikis. A good example of community layer software is the open source BitTorrent tracker software TBSource, which is used on many torrent communities for tracking and indexing torrent files and for managing a community website, in which users can browse through content for download/upload and interact.

Online file sharing has come a long way since Napster. The power of new technologies – such as BitTorrent – has greatly advanced the effectiveness of the data transfer layers. The greatest boost in sophistication, however, has occurred in the community layer, which now provides a rich source of regulation through both code and norms.¹⁵

To date, this extremely complex ecosystem has not been adequately appreciated by the content industry, policymakers and academic literature. Studies have focused on matters related to information policy, copyright reform and litigation strategies. File sharing has generally been used only as one of many examples of how law is challenged by technology. The phenomenon has yet to be studied in true analytical depth and breadth,

14 One cannot underestimate the importance of IRC-related protocols such as DCCP, newsgroups, and file storage sites such as www.megaupload.com for file sharing. A simple combination of a forum and storage sites can be used for file sharing, and in some cases be even more efficient than a p2p network. Users simply request or post what they have available in forum posts, and then provide links for the content, which point toward storage sites.

15 We follow Lessig's theory of four modalities of regulation (law, norms, architecture, and market) for the following analysis (Lessig 1998, 2006).

without a judgmental stance. There has been too much focus on the individual, sometimes with a very disapproving moral tone (e.g. Kovacs 2001). Less attention has been given to the complex realities of how file sharers interact and build communities that, in turn, are the source of intense normative production (Strahilevitz 2003).

The legal and technological campaign against file sharing has also fostered the creation of organized file sharing communities and the strengthening of sharing norms.¹⁶ File sharing communities are much more than platforms for the exchange of content. They are also platforms for the production of social norms, which amount to a strong parallel version of copyright law. Indeed, the parallel version of copyright advanced by file sharing communities appears to be much stronger than the official state-backed copyright law. New laws and self-help by means of TPMs and DRM systems and global police raids and arrests have hardly left a dent on file sharing. There is organized, collective action backing up the file sharing phenomenon, based on an ethos that is in direct contrast with key elements of copyright law – the exclusive nature of the rights of reproduction and distribution of content. If strong copyright is taken for granted by content industry actors, file sharers take the opposite stance: unlimited access to content for noncommercial ends is supposed to be the norm.

Norms versus law

Despite being a new phenomenon, the normative basis for file sharing culture has a long tradition in Brazil and elsewhere. Practices involving the sharing of cultural goods are far from novel. People everywhere are accustomed to sharing information, whether by lending a book, making someone a mixtape, or telling a campfire story. “Culture is public,” as Clifford Geertz puts it, “because meaning is” (Geertz 2000). Taking this basic fact of human culture into account, the use of new technologies allowing for easy reproduction of content for cultural transmission seems inevitable.

By attacking Napster and the services that immediately followed, the content industry only accelerated the growth and construction of file

16 No matter how open to criticism the term “sharing” is, and how different accounts for the motivation to “share” can be brought up, the “file sharing” label has stuck, and is not going anywhere. It does not matter if sharing is explained through a gift culture model (Giesler and Pohlmann 2002), or a “self-interest masked by the use of code” model (Strahilevitz 2003). File sharing communities’ self-image is one of sharing, and social norms tend to be conceptualized in those terms, even if motivations for participation and reasons for the high rates of success in the enforcement of norms vary.

sharing communities. What had been a single community became dozens as meeting spots multiplied and new technologies were tested. File sharing did not cease but intensified, evolved and became more sophisticated (Oram 2001, Maymounkov and Mazières 2002, Cohen 2003, Kulbak and Bickson 2005). Suing individual users was even less helpful. These served only as another catalyst for the shaping of the sharing ethos, further facilitating the construction of a body of norms in direct competition with established copyright law. Content industry actors are not unaware of this normative dynamics underlying file sharing; however, their moral arguments against the sharing ethos have so far not been effective (d'Astous et al. 2005, Lantagne 2004). Indeed, attempts to curb the growth of sharing norms through publicity or “educational” initiatives have in some cases backfired.¹⁷

As file sharing grows, the public becomes increasingly aware of the problems with current copyright law.¹⁸ Diversity of opinion on copyright legislation becomes unavoidable and paves the way for legal reform. Although public debates remain industry-dominated, a body of social norms continues to evolve in the opposite direction. The effects of technological development have clearly been stronger in aiding free reproduction and distribution than in restraining it. The practice of file sharing is still growing, and communities are increasingly more organized.¹⁹

Until recently, file sharing received little attention in Brazil from the domestic or international content industries. Although RIAA and MPAA's legal actions against file sharing in other countries do get coverage in Brazilian media, Brazilian nationals involved in file sharing faced no opposition. In 2006, however, the International Federation of the Phonographic Industry (IFPI) revealed that it would work with the Brazilian Association of Record Producers – Associação Brasileira dos Produtoras de Discos (ABPD) – to extend RIAA's litigation campaign into Brazil (Araújo 2006).

According to IFPI's press release, Brazil is now among “17 countries” where “a total of more than 13,000 legal actions” have taken place (IFPI

17 In 2006, the Canadian copyright licensing agency, Access Copyright, launched a copyright awareness campaign targeted at children, using the mascot Captain Copyright. The campaign was notably mocked by Canadian legal scholar and public interest advocate Michael Geist (2006). The Captain Copyright website is no longer functional.

18 As Drahos and Maher note, “the rise of international civil society has meant that regulators everywhere have to deal with much more interest group activity than in the past” (Drahos and Maher 2004, 5).

19 The darknet thesis (Biddle et al. 2002) has so far been correct: “There seem to be no technical impediments to darknet-based peer-to-peer file sharing technologies growing in convenience, aggregate bandwidth and efficiency. The legal future of darknet technologies is less certain, but we believe that, at least for some classes of user, and possibly for the population at large, efficient darknets will exist.”

2006). IFPI chairman and chief executive John Kennedy warns: “They all thought they were unlikely to be caught, but teachers, postal workers, IT managers, scientists and people in a host of other occupations, as well as parents, have ended up having to dig deeply into their pockets” (IFPI 2006). “[I]n Argentina,” he continues, “one mother made her son sell off his car to pay her back the settlement fee” (ibid.) This strategy has been accurately described as “the marketing of fear” (Falcão 2007). Even the president of Brazilian government’s National Anti-Piracy Council – Conselho Nacional de Combate à Pirataria – went on record against IFPI/ABDP’s actions (Rangel 2006).

Little is known so far of IFPI/ABDP’s litigation strategy for Brazil, because no one has come forward claiming to be at the receiving end of a lawsuit. From what IFPI/ABDP revealed to the press, only twenty uploaders are being targeted, each sharing a library of 3000 to 6000 songs. Despite the broad potential for criminal prosecution under Brazilian law, only civil damages will be sought (Folha Online 2006b). For now it seems, Brazilians sharing fewer than 3000 files will be safe from prosecution, and downloaders are not being targeted at all.

There are strong reasons to predict that prosecution of file sharers in Brazil will not have much impact. First, the probability of a lawsuit is still negligible. Furthermore, in the Brazilian legal system there is barely any pressure for reaching a settlement before a case is judged. What so far has been the dominant strategy in the U.S. context – scaring targeted users into settling without a trial (Channel 2004) – will not be applicable in Brazil. Whatever ABDP’s legal arguments are, they will certainly have to be put under the evaluation of a judge. Providing adequate evidence of infringement can be difficult, particularly if Brazilian courts require convincing proof tying a particular defendant to an implicated IP number. According to the 2008 IIPA Special 301 Report, “industry’s first attempt to take action against major individual uploaders met a negative ruling. The judge, considering the recording industry’s request to ISPs to identify the uploaders, decided that such an action would violate the individuals’ privacy rights; the case is under appeal” (IIPA 2008).

Community criticism of industry enforcement efforts

Even more interesting, however, is how file sharers have been reacting to the enforcement campaign. The ABDP’s insistence that anyone engaging

in file sharing of protected content is engaged in criminal activity does not seem to be acting as a deterrent. Indeed, it may serve as a further incentive for disobedience – civil or otherwise.²⁰ Since there has not been opposition to file sharing in Brazil up until October 2006, the parallel version of copyright that is fostered by file sharing communities has reigned peacefully (Mizukami 2007). Now that this understanding is finally being called into question, users revolt and start looking at copyright law – many for the first time in their lives – with a critical eye.

This is particularly true of Brazil's large communities dedicated to the sharing of American TV shows and foreign-language movies. There is a substantial lag between airdates in the U.S. and Brazil, so file sharing is the preferred alternative for those who cannot wait to see their favorite shows.²¹ All of the most popular American TV shows – and even some more obscure ones – have communities of fans dedicated to them in Brazil. The online social networks organized around fandom often overlap with video file sharing communities.²²

Looking at these communities, one finds large networks of users who simply download files, frequently organized around a core group of fans who are active in subtitling them.²³ The decentralized nature of subtitling – adding a layer of meaning generated by the file sharing community itself onto the pre-existing video file – creates unique opportunities for normative criticism within file sharing communities.

When the IFPI/ABDP legal actions were announced, another content industry association followed suit. The Association for the Defense of Intellectual Property – Associação de Defesa da Propriedade Intelectual (ADEPI) – began to send cease and desist notifications to subtitle providers,

20 Framing file sharing as a matter of civil disobedience is not simple, when one considers that civil disobedience requires actual knowledge that one is disobeying the law (Rawls 1999). Most Brazilian file sharers, however, appear to have no idea what the law says, as we shall see below.

21 Movies also suffer from very late release dates – sometimes DVDs are released into the film's original country before a release date is set for Brazilian theaters. In addition, many Brazilian cities lack theaters showing films except for recent American blockbusters. This too feeds the demand for file sharing as a way to access cultural materials not available in the mainstream marketplace.

22 A good example is www.9thwonders.net, the Brazilian community of fans of NBC's show *Heroes*. Even when fan communities are not as organized as 9th Wonders, they can be found at the most popular social networking sites, such as Orkut, which provides tools for easy fan community building. Since episodes and subtitles are available within the reach of a click, the file sharing option is simply too tempting for most fans to pass on.

23 See, for example, www.legendas.tv. Individuals who take on subtitling work assume important community roles in the Brazilian file sharing ecosystem, much along the lines of fansubbers of Japanese animation. For an example of a popular fansub community, visit www.animesuki.com. The Fansub Wiki, www.fansubbers.org, is also a good source of material on fansub culture.

which had up until then been left undisturbed.²⁴ The largest Brazilian community devoted to ABCs TV show *Lost*, Lost Brasil, had been a central provider of subtitles for *Lost* episodes, but ceased these activities as soon as ADEPI came into action. This had no effect, of course, on the unlicensed subtitling and distribution of *Lost* episodes: other members of the fan community quickly picked up the job and kept on translating the shows (Folha Online 2006b, Globo.com 2006a). The backlash to ADEPI's actions could be seen in forums, blogs, and even within the very subtitles that ADEPI was opposed to.²⁵

Messages of distaste directed toward ADEPI's actions began to appear in fan-made subtitles for a variety of shows (Lopes 2006). Examples include: "Subtitles made in honor of ADEPI" (*Lost*, episode 3.05); "For each site going down, 100 more will be created" (*Lost*, episode 3.05); "To celebrate author's rights is not to steal them" (*Lost*, episode 3.05); "Don't make bad use of this subtitle. Legendas.TV is against piracy" (*The O.C.*, episode 4.02); "Corruption is allowed. Culture isn't. Down with ADEPI" (*Prison Break*, episode 2.10); "The only necessary condition for the perpetuation of oppression is that people remain actionless" (*Dexter*, episode 1.06); "Thank you for every message of support" (*House*, episode 3.05) (Globo.com 2006b).

A few important points about the Brazilian file sharing communities can be inferred from these comments. First of all, users do not consider themselves to be in the wrong, and do not see themselves as pirates. Second, users do not think of what they are doing in terms of a violation of author's rights, but as a celebration of these same rights. To further complicate matters, users want to react against what they see as a violation of their rights but do not know how to put their feelings into legal terms, and moreover, do not know exactly what they are revolting against.

24 ADEPI has since been dissolved and fused with the Association for the Protection of Intellectual Phonographic Rights – Associação Protetora dos Direitos Intelectuais Fonográficos (APDIF) – into the Association Against Cinema and Music Piracy – Associação Antipirataria de Cinema e Música (APCM). For more information, visit www.apcm.org.br.

25 A video was also produced and posted to YouTube, entitled "E agora, ADEPI?" ("What now, ADEPI"). The video shows the use of fan-made *Lost* subtitles in Globo Television's news show *Fantástico*, when scenes of a yet-to-be aired in Brazil *Lost* episode were broadcast. Snippets of news reports on ADEPI's actions are also shown in the video, in an attempt to provide proof of the widespread acceptance of the subtitling and downloading of TV shows by Brazil's largest mass media conglomerate, and to depict ADEPI as hypocrites. The video may be viewed at: www.youtube.com/watch?v=4RkBKrgBVfc.

New opportunities for public debate on copyright

It is easy to revolt against ADEPI, since it was the source of the cease and desist notifications, but revolt against the law itself is more unusual. Many file sharers look at the law to find arguments to support their activities. Since the legal text is far from user-friendly, interpretation issues inevitably arise. Some people read the law and get the impression that what they are doing is perfectly legal, since there is no commercial intent.²⁶ Others mistakenly find support for the legality of fan-made subtitles in Article 8, V of Lei 9.610/98, which is in fact not applicable.²⁷

The Brazilian population in general knows that copyright law exists, but actual copyright rules are not well understood.²⁸ Since many times not to reproduce content makes absolutely no sense – such as taping a TV show for time shifting – Brazilians keep on breaking the law and shrug it off as being at worst an inconsequential offense and at best not an offense at all. In the end, the criterion popularly used to separate “copyright infringement” from an acceptable use is basically its noncommercial or private nature, despite the formal existence of a strict list of limitations which does not necessarily follow the same logic. This normative instinct underlies file sharing in Brazil. Copyright law is imagined as targeted toward pirates as illegal resellers of copyrighted material, and any private use is taken to be a right, even when the law says otherwise.

26 Google searching for three words – “*séries*” (TV shows), “*ilegal*” (illegal), “*legendas*” (subtitles) – reveals dozens of blog and forum posts trying to tackle the issue of the legal status of file sharing and fan-made subtitles, with a variety of views on the subjects. It is not rare for people to simply declare “I have no idea what the law says,” but a common misperception of Brazilian copyright law is that any noncommercial use of copyrighted works is permitted as a general principle. See, for example, the comments left at: <http://teleseries.com.br/blog/2006/11/01/lostbrasil-e-soseries-sao-pressionados-a-tirar-legendas-do-ar/>.

27 Lei 9.610/98 excludes from copyright protection “common use information, such as calendars, organizers, and subtitles” (Article 8, V). The term “subtitles,” however, does not refer to movie subtitles – context excludes this interpretation, even though what is exactly meant is not altogether clear. It is very common, though, for members of the file sharing community to read a permission to subtitle in the provision. In fact, however, the dialogue of a movie is part of it and hence under copyright protection; translations of dialogue can be considered to be derivative works, and thus prohibited unless authorized by the rightsholder. This often goes unnoticed by file sharers. See the following lengthy discussion in the boards of one of Brazil’s largest film news and reviews websites: http://www.cinemaemcena.com.br/forum/forum_posts.asp?TID=12648&PN=1.

28 The situation is not very different from Jessica Litman’s evaluation of public perception of copyright law in the U.S.: “people do seem to buy into copyright norms, but they don’t translate those norms into the rules that the copyright statute does; they find it very hard to believe that there’s really a law out there that says the stuff the copyright law says” (Litman 2001, 112).

The traditional practices of information sharing, amplified and organized through modern file sharing, reflect a public opinion environment that is extremely hostile to the content industry version of copyright law, which prohibits even noncommercial sharing. When copyright awareness was still absent from most people, industry discourse was taken as common sense, and yet ignored when actual information reproduction and sharing came into practice. Now that industry is adopting increasingly aggressive strategies in going after users, however, the situation is different. People are now being forced to think about copyright law, and to compare it to the parallel copyright norms that actually guide their behavior, as reflected most clearly in file sharing communities. Since so many Brazilians behave as if an exception existed for noncommercial reproduction and derivative works, the question must soon arise whether such an exception should be written into law.

Information policy considerations are only now being placed where they always belonged: at the center of public discourse, and within reach of the ordinary citizen. If questions such as “What is copyright for, anyway?” and “What should my rights as a user of copyrighted content be?” start to appear in everyday conversations, there is still hope for reform. The public’s embrace of a presumed “right” of noncommercial use and distribution, however, has yet to be conceptualized as a problem related to exceptions and limitations. Ordinary users are beginning to get in touch with copyright law and trying to use it to argue in the defense of the sharing ethos, but they lack the conceptual repertoire that is necessary for rational public discourse over information policy matters. As the next section discusses, this effort has so far found little support from legal scholarship.

The role of Brazilian legal scholarship

If a perspective of criticism and questioning is emerging among the Brazilian public, it has yet to find reflection in the legal profession. Scholarly debates over copyright exceptions and limitations in Brazil are almost non-existent. The idea that high copyright protection is essential to motivate cultural production and protect the dignity of authors, and that any exceptions and limitations that the law establishes are to be strictly construed, is the consensus scholarly position. The reasons for this unanimity – and the strategies adopted by scholars in order to sustain an academic barrier to policy debates – deserve to be examined more closely.

A failure of inquiry

Teleological reasoning is prevalent in Brazilian legal thought because of Continental European influences.²⁹ In this tradition, the question of “What are the functions exerted by exceptions and limitations?” should immediately come to mind, closely followed by the question of “What are the functions exerted by copyright itself?” Once these two questions are posed, vigorous discussions are unavoidable, providing a fertile breeding ground for scholarly debate.

Looking over the most widely read Brazilian texts on copyright law (e.g. Abrão 2002, Hammes 2002, Bittar 2003), however, one would be hard-pressed to find any depth of discussion on these matters. Reasons for copyright protection are briefly, but forcefully, stated. Then the authors proceed to dry efforts of textual exegesis which remain oblivious to these controversial issues.³⁰ A rationale for copyright protection is clearly assumed by Brazilian scholars, but often stated as an unquestionable fact which is not open to debate and never to be examined beyond a paragraph or two.

Brazilian copyright scholarship is also regrettably limited in scope. There is a paucity of copyright-specific literature in Brazil. Copyright scholarship consists of an isolated corpus of texts – written by only a handful of scholars – dealing primarily with the strict exegesis of Lei 9.610/98 and occasionally branching out to Lei 9.609/98, the Penal Code and international treaties.³¹ Copyright is studied as a self-sufficient, closed body of rules rather than as part of a broader legal system. The wealth of interactions between copyright

- 29 This influence is particularly due to the works of German legal philosopher Friedrich Carl von Savigny. Savigny’s much discussed four elements of interpretation – grammatical, logical, historical and systematic – although taken out of the context of his broader system of legal methodology, have had a marked impact on Brazilian legal thought. The idea that an adequate interpretation of legal texts involves the correct handling of the four aforementioned “methods” is ubiquitous among Brazilian lawyers and law professors. Teleological reasoning is often mentioned as a fifth element, or simply derived from what corresponds to the logical element in Savigny’s theory. For the standard text on legal hermeneutics in Brazil, see *Hermenêutica e Aplicação do Direito* (Maximiliano 2001).
- 30 For example, all that notable copyright scholar Bruno Hammes has to say about the rationale for copyright protection, in a reasonably lengthy book, is the following: “Authors create culture. Literature and art are fruits of human intellectual activity. By protecting authors, the country promotes and increases the cultural patrimony” (Hammes 2002, 34); “Culture is a factor of progress. A learned people progresses on all points of view. Economic progress is directly dependant on culture. Author’s rights are a source of economical riches. There are important economical sectors that depend on author’s rights” (ibid., 36).
- 31 Courses on copyright are not part of the curricula of the overwhelming majority of Brazilian law schools. Copyright is studied only as part of elective course offerings, which are seldom available. This fact is sometimes noted by conventional copyright scholars, as part of discourses that blame the “social acceptance” of piracy in Brazil on the absence of proper education (see, e.g., Kretschmann 2006). The most serious consequence of this deficiency, however, is that copyright scholarship remains largely unexamined by the academic community.

legislation and other civil law norms³² remains largely unexplored, to say nothing of the constitutional law.

The insularity of copyright scholarship is one of the major barriers to a more rational discussion of exceptions and limitations in Brazil. Lack of numbers has led, in the Brazilian case, to homogeneity of discourse. In addition, most of Brazil's copyright scholars are also copyright lawyers working for the content industry. This alignment may be responsible for legal scholarship's decidedly industry-oriented stance on copyright matters.³³ As a result, the content industry not only writes copyright law in Brazil but also, effectively, interprets it.

Exaltation of the Romantic author

In order to understand how this works, it is necessary to see how strong natural rights-based justifications for copyright are woven into legal doctrine by Brazilian scholars in order to push the theory that the public is well served by the status quo.

Studies on the foundational arguments for intellectual property protection usually mention two strands of justification, grounded on either utilitarian or natural rights-based theories (Menell 2000). Regardless of a particular country's copyright tradition – Anglo-American copyright or Continental European *droit d'auteur* – both strands can be found and are actively used (Ginsburg 1990, Goldstein 2001). Yet countries such as Brazil that have been exposed for a longer time to Berne-style rhetoric and Continental European *droit d'auteur* are inclined to make much heavier use of natural rights arguments.

The traditional utilitarian justification considers the legal monopoly established by copyright a necessary evil, justified by its ability – over the long run – to facilitate public access to works that authors otherwise would not have had the incentives to create. Brazilian scholars offer a narrower version of this utilitarian argument: authors need incentives so that they can create, and that is the end of the story. Culture is not seen as a matter of necessity,

32 A good example is the interaction between copyright licenses and consumer law. Any license demanding that rights be unilaterally waived by consumers is unauthorized by Brazilian consumer law (Lei 8.078/90, Article 51, I). That would make any licensing arrangement making use of DRM technology in order to impose barriers to exceptions and limitations to copyright automatically against the law.

33 Textbook author Plínio Cabral, for instance, adopts ABDR rhetoric when criticizing the reprography of excerpts of protected works for educational purposes: "On universities, so-called 'professors' folders' can be found in which, without any order, indication of title or authors' names, copies of excerpts of protected works pile up in haphazard fashion. This is true pedagogical junk, an attack on culture and an offense to the education of our youth, besides a gross violation of author's rights" (Cabral 2003, 72).

of human needs related to communication and the very development of a society, but as part of a hierarchical worldview in which authors are valued above non-authors.³⁴

Instead of being the result of a bargain between public and private interests, then, copyright is seen as a means of protecting authors from the public. The neo-utilitarian justification of providing a living to creators comes along with further appeals to protection of the author's personality and dignity. In this view, the entire universe of copyright law is based on the figure of the mythical Romantic creator who – despite the theoretically non-transferrable and non-waivable nature of moral rights – can be and usually is replaced by a corporate agent through contractual means. In other words, authors deserve protection as an incentive for creation, but more importantly, just because they are authors. Discussion of the direct and collateral damage commonly associated with intellectual property protection is completely avoided.

Strict interpretation of exceptions and limitations

The logical consequence of the Romantic-inspired *interpretatio in favorem auctoris* in Brazilian copyright literature is the idea that lists of exceptions and limitations are to be strictly construed, with absolutely no room for judges to decide on broader principles (Abrão 2002, 146).³⁵ Whatever is written under Article 46 of Lei 9.610/98 or Article 6 of Lei 9.609/98 is to be interpreted in the strictest and most restrictive way possible, and any controversy in interpretation must be decided in favor of the author. The strict interpretation dogma has acquired the status of common sense. It is never questioned.³⁶

Two lines of reasoning are commonly used to defend strict interpretation. The first argues that Article 4 of Lei 9.610/98 expressly mandates this approach (Bittar 2003, 71, Cabral 2003, 15–16). Article 4, however, clearly refers to the

34 Authors, in this case, also means industry, but this is rarely explicitly mentioned. The fact that we have “author’s rights” legislation instead of “copyright” immensely helps the protection of industry through the proxy of authorship, by centering the entire universe of copyright law on the figure of the mythical, Romantic author/creator.

35 The only notable author who seems to partly disagree with this is Eduardo Vieira Manso. Writing about the 1973 statute, Manso analyzes strict interpretation of exceptions and limitations in a purely commercial context, and states that any use of protected content with noncommercial intent should be considered a free use (Manso 1980, 132–133 and 152).

36 As Norman Fairclough writes, when ideologically charged discourses such as the entire rhetorical apparatus required for the defense of the strict interpretation dogma acquire enough power to be taken as common sense, they also assume a semblance of neutrality which turns them into an “official” version of the truth, and consequently become very difficult to be challenged (Fairclough 1990).

interpretation of copyright *contracts*, and not interpretation of the statute itself. Unlike copyright legislation in the Dominican Republic,³⁷ for example, Brazilian law does not explicitly call for strict interpretation of exceptions and limitations. The second line of argument maintains that strict interpretation is logically required, since exceptions and limitations deal – by definition – with exceptions to the general rule (Abrão 2002, 146). Viewed from another angle, however, copyright itself is an exception to the rule of public access to content and public domain. Thus an argument from logic might equally conclude that exceptions and limitations for public use should be interpreted from the broadest perspective possible. Despite the flaws of both arguments, the conviction that exceptions and limitations are to be interpreted as narrowly as possible dominates traditional copyright scholarship in Brazil.

The birth of dissent

This is Brazilian legal scholarship on copyright so far. But signs of a more nuanced future are on the horizon. Digital reproduction is here to stay and so is content distribution through the Internet. Collaborative authorship, commons-based peer production, free software and open content licensing are on the rise despite technological and legal threats. Scholarship cannot remain oblivious to these facts.

For the first time in Brazil's history, a schism can be seen in copyright scholarship. This is a result of challenge from outside the community of established authorities.³⁸ Instead of operating on strictly doctrinal grounds, this new body of literature takes a critical approach to the conceptualization of copyright law in general and the interpretation of exceptions and limitations in Brazilian law in particular. It remains to be seen if these re-interpretations will gain traction. Support for them is strong, however, when copyright law is viewed in light of Brazilian constitutional law.

Copyright and the constitution

The maximalist approach to copyright protection that currently dominates Brazilian statutory law and legal scholarship emphasizes the rights of copyright-holders while minimizing the rights of users seeking access to

37 Ley 65-00 (Ley sobre Derecho de Autor), article 30.

38 This has been due in significant part to the influence of recent American scholarship, particularly the works of Lawrence Lessig and Yochai Benkler. Domestic scholarship by authors with broader interests in intellectual property and international law, however, is also playing an important role. See, for instance, Barbosa 2003 and Lemos 2007.

knowledge. It is questionable, however, whether this approach is acceptable when viewed in light of the broader constitutional framework.

While the Brazilian constitution requires protection of authors' rights, it also contains provisions requiring protection of other public interests that may be affected by copyright law. These include guarantees related to free speech, education rights, access to culture, antitrust law and consumer law. The constitution specifically mentions goals such as the "production, promotion and diffusion of cultural goods" (Article 215, II), the construction of a society that is "free, fair and grounded on solidarity" (Article 3, I), the "eradication of poverty and marginalization and the reduction of social and regional inequalities" (Article 3, III). It charges government to promote "full employment" (Article 170, VIII), to "provide the means of access to culture, education and science" (Article 23, V), to "promote scientific development, research and technological capacitation" (Article 218) and to secure the "full exercise of cultural rights" (Article 215). Fulfillment of these rights calls for greater use of exceptions and limitations to strike an appropriate balance in copyright law.

One possible path to an alternative approach to copyright exceptions and limitations begins with the constitutional clause on the "social function of property."³⁹ While there has been resistance in the past to the idea of applying the clause to intellectual property (Bastos 1998, 210), recent literature is more receptive to the idea (Ascensão 2006, Carboni 2006, Guerrero 2006, Souza 2006, Branco 2007, Mizukami 2007). Although the exact meaning and extent of this clause is open to debate, current Brazilian constitutional scholarship provides a welcoming environment for the analysis of competing property interests, individual rights and state goals. This can serve as an intellectual basis for considering a more systematic framework of exceptions and limitations to copyright.

Brazilian scholarship on constitutional law has been very open in the past years to recent German legal theory.⁴⁰ This framework makes it quite easy to defend the use of the social function of property clause as a source for exceptions and limitations to copyright. Reasoning based on the

39 Brazilian Constitution, Article 5, XXIII: "Property shall fulfill its social function." The social function of property is also mentioned as one of the principles that guide economic activity under Article 170, III, alongside private property (Article 170, II), consumers' rights (Article 170, III), competition (Article 170, IV), and the reduction of social and regional inequality (Article 170, VII).

40 The works of Robert Alexy and Friedrich Müller – which despite being deeply incompatible are usually seen as component parts of a single unitary approach – have been particularly influential. This is mostly due to the great influence of Portuguese author José Joaquim Gomes Canotilho's constitutional law textbook, *Direito Constitucional e Teoria da Constituição* (Canotilho 2002).

Dworkin-inspired rules/principles distinction proposed by Robert Alexy (2000, 2002, 2003) makes a particularly productive strategy for arguing for a more extensive and permissive system of exceptions and limitations. The Brazilian constitution is also structured in such a way that it is possible to easily defend the existence of the horizontal effect of constitutional rights.⁴¹ There is thus broad opportunity to argue for the direct enforcement of constitutionally derived exceptions and limitations, either alongside the ones that have been statutorily established or in place of those limitations.

Conclusion

As the preceding account of exceptions and limitations reveals, Brazil is a nation of criminals when it comes to copyright infringement. Moreover, this situation is not going to change in the foreseeable future. In opposition to the dominant cries for stronger copyright protection and enforcement, this chapter argues that instead of scandal directed at Brazilian citizens, scandal should be directed at the inadequate state of the law and of legal scholarship. What is needed now is a critical re-evaluation of the essential role of exceptions and limitations in balancing the interests of copyright holders and the larger public, particularly in light of Brazil's constitutional guarantees.

Exceptions and limitations in Brazilian copyright law are inadequate on many accounts. They are excessively restrictive and anachronistic – in some cases incoherent – and offer no opportunity for balance through interpretation. To make things worse, they are often misinterpreted by the content industry to pose even greater limitations on users. As a framework for public rights of use and access to culture and information, the current lists of exceptions and limitations are unacceptably limited.

Although the scenario we have described is bleak, there is also hope on the horizon. The Internet and digital technologies have turned culture and information policy into the focus of popular attention. The new efforts of the Ministry of Culture to create a genuine public discussion of copyright policy are a sign of these times. Prior to leaving his post as Minister of Culture in July 2008, Gilberto Gil initiated a series of public debates on copyright

41 Brazilian constitutional law does not present a “state action” requirement to find a violation of constitutional rights – actions of other citizens or of corporations can also be found to violate constitutional rights. Indeed, the text of the Constitution is so open to the concept of horizontal effects that the controversy surrounding them is limited to how exactly effects should be considered (Steinmetz 2004, da Silva 2005, Sarmiento 2006).

legislation through the Fórum Nacional de Direito Autoral. This series of multistakeholder conferences aimed at a long overdue overhaul of copyright law. So far two conferences have been staged, with debates broadcast over the Internet to encourage broad public participation. This is unheard of in the history of Brazilian copyright lawmaking, and all things considered, a positive development. Although public participation has been negligible so far, the fact that there is an open forum for copyright reform at all is welcome change.

At the same time, old habits die hard. Under the pretense of protecting Brazilians against identity fraud and child pornography, a bill currently under congressional discussion would create even more criminal offenses related to the reproduction, distribution and modification of copyrighted content online (Doctorow 2008). Under Senator Eduardo Azeredo's proposed "cybercrime" legislation, even accessing a website while disregarding its terms of use could be punished with one to four years of imprisonment. A new system of private surveillance – charging Internet service providers with notifying the police of potential criminal activity and providing identity records of users – is also a part of the package.

Together, these two recent initiatives illustrate well the crossroads at which Brazilian copyright law currently stands. While the outcome of these battles is not easy to predict, at least copyright law is now on its way to being properly debated in Brazil.

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