

Research, Training, and Education

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

— *A 2008 survey question*⁶¹

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

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

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

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

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

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

Anti-Piracy and Poetic License

For a subject that elicits so much public attention, definitions of piracy in Brazilian law are surprisingly scarce. In fact there is only one, in the decree that established the CNCP in 2004.⁶⁴ Even here we don’t learn much: the CNCP decree simply states that piracy is understood as copyright infringement. For a definition of copyright infringement, the decree points back to Laws 9.609 and 9.610 of 1998—the Brazilian software protection and copyright acts, respectively. There is no definition of counterfeiting in the decree—an odd omission for an institution largely focused on counterfeiting, but a telling one given the CNCP’s persistent conflation of the two terms.⁶⁵

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

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

64 Decree 5.244/04.

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

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

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

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

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

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

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

To Repress and Educate

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

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

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

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

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

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

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

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

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

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

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

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

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

Mixed Signals

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

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

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

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

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

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

Research

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