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Collective Licensing at the ISP Level

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Brazil: Background and the Development of Piracy Locally



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Brazil is the largest country in South America, with a population of more than 190 million people, with well-known social and cultural distortions, which also are reflected in the music business. In this sense, recent polls reveal that 73% of music consumers are located in just 10 cities, while music stores are found only in 34% of the cities.



The continuous decrease in the number of physical music stores and the volume of CD sales is a result of the increasing amount of CD piracy, with much of the product found among the street vendors of Brazil, but also because of digital music downloads, both legal and illegal. Digital music sales represented, in 2008, 12% of the music market, while in 2006 and 2007 it only represented 2% and 8%, respectively. According to the Brazilian Association of Phonogram Producers (ABDP), 78% of digital music revenues were originated by sales through mobile telephones.

The great development of local e-commerce, which is estimated to have been growing by 35% per year since 2003, also reshaped piracy in the Brazilian musical market. Vinyl records were once the main medium for music distribution, and music piracy was limited to cassette tapes of poor quality, which were not attractive to consumers. In the early 1990s, music piracy evolved on to CDs. Since the technology to make those copies was expensive and not accessible to the general public, these products were imported to Brazil, and the high prices of counterfeit CDs and packages kept CD piracy rates at a low level.

A drastic change occurred with CD recorders becoming less expensive and, thus, available to non-professional computer users. At that moment, counterfeit CDs began to be domestically manufactured and counterfeiters were no longer concerned with the appearance of the CD package—consumers were consciously acquiring illegal copies instead of original ones, due to the enormous price difference and sense of general tolerance of such infringement. As a result, CD piracy had resulted in a low-risk and high-profit business by the mid 1990s in Brazil.

The recent spread of personal computers, internet users, broadband connections and third-generation mobile telephones indisputably gave a boost to digital music piracy. (According to IBGE, the number of Brazilian residences containing a personal computer increased from 26% of the total in 2007 to 31% in 2008; an estimated 27% of Brazilians also had internet access.) It is estimated that, nowadays, digital piracy is much stronger than piracy in physical media. According to the National Council to Combat Piracy (formed in 2004), the revenues of the Brazilian recorded music industry fell dramatically from approximately US \$500 million in 1998 to \$173 million in 2008, while digital piracy became a major concern for the Brazilian authorities—it is estimated that over 1.8 billion songs are illegally downloaded per year.

As a result of this uncontrollable growth in music piracy, governmental and non-governmental anti-piracy associations have been created, and several actions have been adopted in order to convict counterfeiters of piracy-related crimes, to seize of counterfeit products and to promote educational campaigns.

>>Legislation

As a matter of law, Brazil is well supported. Brazil is a member of several international treaties that regulate copyrights, such as the Berne Convention, the Rome Convention and the TRIPS Agreement, but it is not a member of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which expressly deal with copyright in the digital environment. Nevertheless, the Brazilian Copyright Law and Criminal Code manage to keep track of the developing technologies and are applied to online

and mobile distribution of downloads and streams of music. There has been an up-to-now successful attempt to construe, under Brazilian law, that new forms of digital music distribution are encompassed by old, established concepts of copy, distribution, communication to the public and even public performance.

Unauthorised digital music downloads, for example, may be characterised as illegal music distribution by the server application and illegal copying by the end user, since a permanent copy of the audio file is stored in the end user's computer or device. Music streaming, on its turn, may be understood as the transfer of a digital medium containing a musical work by a server application to the end user's computer and, by means of making a transitory and incidental copy, allows the end user to listen simultaneously to the streamed music, provided that he/she remains connected to the server. Lastly, simulcasting may be considered the non-interactive digital transfer where the same content is simultaneously transferred to several users connected to the server application.

>>The Case Law

Despite the undeniable technological advances involved in digital music distribution, the underlying format may be reduced to the general acts of copy, distribution, communication to the public and public performance, which are exclusive rights traditionally held by copyright owners and fully protected under Brazilian law.

This understanding was upheld by the Court of Appeals for the State of Paraná in 2009, upon deciding that the offer of software that allowed users to share and download music files through P2P networks, without the copyright owners' authorisation, should be considered copyright infringement, as provided by the Copyright Law and the Criminal Code. The court also noted that the judiciary had an obligation to provide the plaintiff with a practical and effective measure to prevent further infringements until a final decision was rendered.

Notwithstanding the importance of such a decision, the current hot topic in digital music distribution is definitely related to the powers granted by the national Copyright

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Law to our Central Office of Collection and Distribution (ECAD). ECAD is a privately owned, civil not-for-profit society and is responsible for the collective licensing of public performance rights. ECAD is composed of 10 music associations, which are formed by the copyright owners (phonograms producers and publishing companies). ECAD is entitled neither to license musical compositions for synchronisation purposes, nor to grant rights for the creation of derivative works, among other uses. ECAD deals only with public performance rights.

A recent decision issued by the Brazilian Superior Court of Justice clarified that, although ECAD was the legitimate party to collect copyright royalties accruing from public performance of musical works, the individual rights holder was entitled to explore his/her work at his/her convenience, without having to obtain ECAD's consent thereon. The calculation of royalties due should now be based on the number of songs publicly performed by the licensee whose copyright owners are associated with ECAD.

Another interesting case involving the interpretation of the powers legally granted to ECAD is exposed in a lawsuit recently filed by ECAD against a local ISP in July 2009, whereby ECAD claims that the on-demand music streaming service offered by the ISP to its clients constituted a public performance of the copyrighted musical work and, consequently, ECAD's prior authorisation and collection of the respective copyright royalties were required. As would be expected, the ISP presented its defence by arguing that: (i) the offered streaming did not result in a public performance of the musical work, but, instead, was a mere digital music distribution for private performance; (ii) since it was not a public performance, ECAD was not legitimate in filing the lawsuit; (iii) the offered streaming services could be considered to be included in an exemption provided by the Copyright Law (as the ISP also offered for sale the download of the audio file, its streaming conduct could be construed as demonstration for sale); and (iv) the ISP was licensed to offer such service by the respective copyright owners, although the agreements were solely related to digital music distribution and had no provision for public performance rights. Although no final decision on the merits was rendered in this case, the lower court and the Court of Appeals for the State of Rio de Janeiro had the opportunity to examine ECAD's pleas, and rejected its preliminary injunction request.

"The biggest challenge is to bring back music buyers to the market"

>>What's Next?

The Brazilian Copyright Law is under revision. It is expected that an amendment will update and clarify how copyright applies to new technologies and the digital environment. Establishing a modern legal framework that guides the protection and use of copyrighted works while maintaining the balance between protection, access and use by the general public is a clear target for the Government to promote so-called cultural integration. We believe that the law will develop in a way to provide for additional limitations on copyright and to enhance free uses, like private copies and private musical performance, especially in the digital environment.

Today, a matter of great concern for the Brazilian music industry players is the difficulty in obtaining licences for making music available for commercial purposes. This difficulty originated in the fact that copyright owners (both record labels and authors) are represented by different organisations and it can be very burdensome to negotiate and obtain licences with each one of them. The creation of a collective licensing society for uses and purposes other than the collection of public performance rights (a matter under ECAD's authority) would boost the market and help in the fight against piracy.

From a business perspective, Marcos Jucá, vice-president of the Brazilian Association of United Publishers (ABER), believes that the creation of a collective licensing association for both music downloads and streaming services has become a necessity and has been carefully analysed by the market players. He described the creation of the 'clearinghouse' as a priority for 2010.

Although the creation of a collective licensing association would probably bring positive results to the digital music market, it is important to bear in mind that, as recently decided by the Superior Court of Justice in relation to ECAD, the extension of the powers occasionally granted to this new association would be limited. This is so because music distributors would not be prevented from negotiating an alternate licence directly with copyright owners, the submission of copyright owners to this association would not be mandatory and the royalties charged would have to be reasonably set.

In any event, we believe that the future of the musical market stands with these new forms of music distribution, especially through mobile phones and dual delivery with the internet, preferably under subscription fee services, which would allow users to download unlimited music and keep the tracks for private use. Mobile phone manufacturers and carriers also share this opinion and have been successfully launching products embedded with musical and video content. Felipe Llerena, executive director for iMusica in Brazil, reasons this success stems from the affordability of mobile digital distribution for the poorer sections of society, who can then afford to pay for extra services. According to Llerena, music piracy has limited action in digital distribution because of the effectiveness of the DRM in this line of business. He also pointed out other possibilities for the future of digital music distribution in Brazil:

'Although internet sales have not yet picked up at the same pace as mobile sales, there is one line of business in internet digital music that is bringing about interesting revenues: branded content. It has been adopted more and more by the corporate world in order to increase its consumer base and loyalty... Last but not the least, we believe that unlimited subscription service is the next leap in the digital music distribution, and iMusica wants to lead this process very closely and aggressively, as we believe that we have to bring back the music buyer to the scene... The new consumer is willing to adopt this service, since, if he pays once a month or a week to have unlimited access to music, he can discover new music and recommend them to his friends.'

We agree with Llerena that the biggest challenge is to bring back music buyers to the market. In our opinion, the creation of a collective licensing society would help in achieving this result, as having a broad, legitimate catalogue available is a necessary step in fighting the illegal one.