

Brazil & The Internet: A Love/Hate Affair

Ronaldo Lemos (rlemos@fgv.br)

This short essay describes some of our work at the Center for Technology & Society (CTS) at the Fundação Getulio Vargas Law School in Rio de Janeiro. CTS has been in the past few years deeply involved with public policy debates regarding the regulation of the internet in Brazil, and also abroad.

We have selected a few key ongoing issues, plus a little bit of context, in order to make it easier to understand what is going on in Brazil. We believe the discussions taking place locally can be useful to other countries and groups currently working with similar problems.

Context

Brazil is at the forefront of a very important movement in the international sphere: pushing for the proper balance of Intellectual Property rights. The origin of this movement can be found both in the government and in civil society. Considering the government, three relevant aspects make evident the singularity of the present moment in Brazil:

1. The Brazilian Ministry of Culture is strongly supporting and leading the **reform of the Brazilian Copyright Act** in order to make it more balanced;
2. The ongoing **WIPO Development Agenda**, as proposed and led by Brazil and Argentina in order to bring transparency, balance and participation within WIPO and the intellectual property debate, plus the current discussions on the **WIPO Standing Committee on Copyright and Related Rights (SCCR)**, and
3. The current discussions in Brazil on a proposed **Cybercrime bill** which, if approved, would highly jeopardize freedom of expression on the Internet plus seriously affect several day-by-day uses of the Internet, including copyrighted materials. Having this in mind, CTS is leading a proposal and an open discussion for the creation of a **Regulatory Framework for the Internet in Brazil**, solving once and for all recurring issues that are currently being discussed over and over again whenever a new piece of legislation that has to do with the Internet is proposed.

Such discussions demonstrate that although Brazil is leading the movement for attaining a more balanced IP regime, internally, it suffers very much from the same pressures that take place, for instance, in the United States and other developing countries, aiming to irrationally increase IP protection. Brazil can only lead an international movement for the balancing IP if it solves this same problem internally, and provides a global example of how civil society mobilization can actually change the law for promoting development and access to knowledge.

Key issues

A) The reform of the Brazilian Copyright Act

After a long process (that included CTS' close participation), the Ministry of Culture is finally fulfilling its mandate to draft a new copyright law for Brazil. This new law will revoke the Brazilian copyright law of 1998. The 1998 law (Law 9.610/98) was passed under the influence of the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. In other words, in spite of the fact that Brazil is not a member of any of these treaties, the current copyright law was passed under the sign of an intense intellectual property maximalist trend.

Accordingly, after years of pressure on the part of civil society and other public interest groups, the Ministry of Culture initiated in 2006 a process to reform the copyright law. This process included a large number of seminars that took place in many Brazilian cities. All vested interest groups (record labels, collecting societies, artists groups, and others) were invited to participate in those debates.

Now the time has come for the new copyright bill to be introduced to the public. This new draft bill is expected to provide for a balanced copyright regime that will take into account not only the need for just remuneration on the part of creators, but also the principles of access to knowledge, innovation, and access to education. Among the expected changes, there is a chapter expanding the exceptions and limitations to copyright, including the right of private copying, which had been revoked by the 1998 copyright legislation.

At this very moment, the bill is under discussion with other Ministries and the executive government as a whole. The discussion is at its final stage, and the expectation is that when the bill is proposed to the Congress, it will be presented with the full support of the executive, including all Ministries and the personal support of President Lula and the Secretary of State Dilma Roussef. Nonetheless, despite the importance of this support, there will be significant resistance to the draft bill. Several pressure groups have been joining forces and organizing themselves against the Ministry of Culture initiative. Civil society is also mobilized and getting ready for a very intensive debate.

The process for discussing the law can take several months. It would not be a surprise if the process starts in the end of 2009 but is completed only after 2011, after the forthcoming presidential election of 2010. We believe that the copyright law, if approved, will become an extraordinary example for other countries currently considering copyright reform, and the example of how civil society got mobilized regarding this goal could also inspire other countries.

B) Cybercrime Bill

Another important policy-setting debate that is taking place in Brazil has to do with the adoption of criminal law to regulate the internet. Inasmuch as digital inclusion advances in Brazil, and social networks become widespread, the more conservative politicians of the country have figured out that they can attract a great deal of media attention by proposing draconic pieces of criminal legislation about the internet. These criminal draft bills disingenuously include in the majority of cases private interests embedded in the

text, under the disguise of the protection of online child safety, and other public interest issues.

The first significant case that emerged in this sense was the draft bill proposed by Senator Eduardo Azeredo, envisaging a broad criminalization of online activities (including file-sharing, DRM's, and other issues). The bill was "sold" a child protection bill. Curiously, the bill itself has only one article about child protection, out of more than forty broad and comprehensive articles which dealt with various new crimes (unlawful access of data, dissemination of malicious code etc).

A very strong reaction on the part of civil society took place when the project was approved by the Senate, and an online petition quickly attained more than 130,000 signatures. Because of the reaction, the project was stalled at the Congress. After that, Congress members have summoned a vast range of representatives from interest groups (from Free Software leaders to Federal Police investigators) to prepare an alternative text to the cybercrime bill. After 4 months of intense work, CTS-FGV was called to produce an alternative draft bill and a paper describing its advantages over the original draft of the cybercrime bill. This new draft has been well accepted, and has now become the basis for substituting the original bill. The draft prepared by CTS is currently under analysis at the Brazilian Congress, and it stands a very good chance of being passed into law, even if partially.

However, the process of "criminalizing" the internet in Brazil continues quickly, and other bills have emerged, such as a recent bill proposed by Senator Magno Malta. This bill, once again under the disguise of child protection, grants the police unlimited access to online communications, without the prior authorization of a court order. In other words, many forms of electronic wiretapping would no longer be scrutinized by the courts. This bill is currently being discussed at the Senate, and will be voted in the next few months.

C) Graduate Response or "three strikes out" in Brazil

Very recently, private groups have been approaching the Brazilian government demanding the implementation in Brazil of the "graduate response" system, as modeled in France. This system is currently being advocated in France and other countries as a response to file sharing. According to the Brazilian proposal, private groups such as the IFPI would monitor Brazilian users and determine what IP addresses are being used for file-sharing. Then, they would be able to contact ISP's, and deliver the IP addresses to them regarding all users suspicious of infringing copyright. The ISP's, on their turn, would be authorized to send a letter informing the user about the unlawful activity. If the user receives three letters, the user is disconnected.

This proposal raises numerous concerns from the legal perspective. First, it frontally clashes with the right of privacy granted by the Brazilian Constitution, which applies also to online communications. It also clashes with the principle of due process of law, in the sense the users are going to be indicted, investigated, processed and sentenced without the intervention of a court. And also, the penalty of disconnecting the user from the internet can be disproportionate.

D) A Civil-Rights-based Regulatory Framework for the Internet in Brazil

As a response to all the trends above, there has been on the part of civil society a growing desire to establish a civil rights based regulatory framework for the internet in Brazil. So far, all the proposals to regulate the internet have been reactive, concentrating primarily in criminal law bills, or other forms of liability and punishment.

Accordingly, civil society is now demanding the internet should be regulated from a positive perspective. A civil-rights based regulatory framework would include comprehensive norms about online privacy, freedom of expression, and limitations on the liability of internet users and internet providers.

It is important to point out that even after more than 14 years of commercial internet in Brazil, the country still has not implemented any form of safe-harbor for Internet Service Providers or Online Service Providers. This creates an enormous uncertainty, and the courts have been granting diverging decisions. This situation impairs innovation, because internet service providers simply cannot assess the limits of their liability, considering that the decisions can be completely different depending on each court deciding the case. Accordingly, in the past few months, an alliance of civil rights groups is being formed, including the free software community, the academic community, bloggers, Internet users' groups, and others.

All these efforts resonated at the Presidency level, and President Lula commissioned the Ministry of Justice to develop a working group for the drafting of a "civil rights regulatory framework" for the Brazilian internet. This working group includes members of the government, congress members, civil society representatives and the academia. The responsibility for coordinating the drafting process has been granted to CTS-FGV. We have proposed that a public Wiki is created, hosted by the Ministry of Justice, and anyone can participate in the draft.

The civil-rights based regulatory framework for the Brazilian internet, if approved, will be an important milestone for civil society and a response to the reactive criminal proposals that have been emerging in the past few years in the country.