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**From Legal Commons to Social Commons: Brazil and  
the cultural industry in the 21<sup>st</sup> century**

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## **From Legal Commons to Social Commons: Brazil and the Cultural Industry in the 21<sup>st</sup> Century**

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### **Abstract**

This article describes some of the current transformations regarding the processes by which information and culture are generated, from the point of view of developing countries. In this brief analysis, the article discusses the role of projects such as Creative Commons for developing countries. It also discusses the idea of *legal commons* and *social commons*.

While the idea of *legal commons* can be understood as the voluntary use of licenses such as Creative Commons in order to create a “commons”, the idea of *social commons* has to do with the tensions between legality and illegality in developing countries. These tensions appear prominently in the so-called global “peripheries”, and often make the legal structure of intellectual property irrelevant, unfamiliar, or unenforceable for various reasons.

With the emergence of digital technology and the Internet, in many places and regions in developing countries (especially in the “peripheries”), technology ended up arriving earlier than the idea of intellectual property. Such a *de facto* situation propitiated the emergence of cultural industries that were not driven by intellectual property incentives. In these cultural businesses, the idea of “sharing” and of free dissemination of the content is intrinsic to the social circumstances taking place in these peripheries. Also, the appropriation of technology on the part of the “peripheries” ends up promoting autonomous forms of bridging the digital divide, such as the “LAN house” phenomenon discussed below. This paper proposes that many lessons can be learned from the business models emerging from social commons practices in developing countries.

The tension between legality and illegality in “peripheral” areas in developing countries is not new. The work of Boaventura de Sousa Santos<sup>1</sup> and others in the 1970s was paradigmatic for the discussion of legal pluralism regarding the occupation of land in Brazil. This paper aims to follow in that same pioneer tradition of studies about legal pluralism, and to apply those principles to the discussion of “intellectual property” rather than the ownership of land.

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<sup>1</sup> See Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, available at <http://www.jstor.org/view/00239216/sp020014/02x0165i/0>.

## **Resumo**

O presente paper descreve algumas transformações relativas ao processo pelo qual cultura e conhecimento são gerados, a partir da perspectiva de países em desenvolvimento. Em uma breve análise, o trabalho discute o papel de projetos como o “Creative Commons” para países em desenvolvimento, em especial para o Brasil. Também são apresentadas as idéias de “commons legal” e “commons social”.

A idéia de “commons legal” pode ser entendida como o uso voluntário de licenças, tais como aquelas do projeto “Creative Commons” para criar um universo de bens compartilhados (commons). Ao mesmo tempo, a idéia de “commons social” relaciona-se com as tensões entre legalidade e ilegalidade nos países em desenvolvimento. Estas tensões aparecem de modo proeminente nas chamadas “periferias” globais e em muitos casos tornam a idéia de propriedade intelectual irrelevante, desconhecida ou não-implementável, por diversas razões.

Com a emergência da tecnologia digital e da internet, em várias partes de países em desenvolvimento (como as “periferias”) a tecnologia tem chegado antes da idéia de propriedade intelectual. Essa situação de fato propicia o surgimento de novas modalidades de indústria cultura, que não são motivadas pelos tradicionais incentivos da propriedade intelectual. Nesses novos modelos de negócio culturais, a idéia de “compartilhamento” e de livre disseminação do conteúdo é intrínseca às circunstâncias sociais ocorrendo nas periferias. Ao mesmo tempo, a apropriação da tecnologia por parte das periferias acaba promovendo formas autônomas de reduzir a exclusão digital, tal como o fenômeno das “LAN houses” discutido no trabalho. Um dos pontos discutidos aqui é que várias lições podem ser aprendidas a partir dos modelos de negócio surgindo a partir dos “commons sociais” nos países em desenvolvimento.

A discussão entre legalidade e ilegalidade nas áreas periféricas não é nova. O trabalho do professor Boaventura de Sousa Santos e outros no final da década de 70 foi paradigmático na discussão da idéia de “pluralismo jurídico” com relação à ocupação

da terra no Brasil. O presente trabalho deseja seguir os mesmos passos dessa tradição jurídica acerca do pluralismo jurídico. No entanto, ele está focado na idéia de propriedade intelectual e não na questão da propriedade da terra.

## **From Legal Commons to Social Commons: Brazil and the Cultural Industry in the 21<sup>st</sup> Century**

This article describes some of the current transformations regarding the processes by which information and culture are generated. In this brief analysis, the paper discusses the role of projects such as Creative Commons licensing in developing countries. It also discusses the idea of *legal commons* and *social commons*.

While the idea of *legal commons* can be understood as the voluntary use of licenses such as Creative Commons in order to create a “commons”, the idea of *social commons* has to do with the tensions between legality and illegality in developing countries. In many cases, these tensions taking place in the global “peripheries” make intellectual property irrelevant, unfamiliar, or unenforceable, for various reasons.

With the emergence of digital technologies and the Internet, in many places and regions in developing countries (especially in the “peripheries”) technology ended up arriving before the idea of intellectual property. Such a *de facto* situation propitiated the emergence of cultural industries that were not driven by the intellectual property incentives. In these cultural businesses, the idea of “sharing” and of free dissemination of the content is intrinsic to the social circumstances taking place in these peripheries. Also, the appropriation of technology on the part of the “peripheries” ends up promoting autonomous forms of bridging the digital divide, such as the “LAN house” phenomenon discussed below. This paper proposes that many lessons can be learned from the business models emerging from social commons practices in developing countries.

The tension between legality and illegality in “peripheral” areas in developing is not new. The work of professor Boaventura de Sousa Santos<sup>2</sup> and others in the 1970s was paradigmatic for the discussion of legal pluralism regarding the occupation of land in Brazil. This paper aims to follow that same pioneer tradition of studies about legal

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pluralism, while applying those principles to the discussion of “intellectual property” rather than the ownership of land.

## **1. Traditional Media and Technology in Developing Countries: The Case of Brazil**

Traditional media such as the music industry, the press, the publishing industry, and (for different reasons) the movie industry, have been facing important challenges in the past few years. The following sections give an overview of the challenges faced by traditional forms of media in Brazil, and it is safe to say that this situation is most likely similar in many other developing countries, as well as in some developed countries. In his book “The Long Tail<sup>3</sup>”, Chris Anderson accounts for the decline of Hollywood’s box-office revenues, TV audience, and music industry sales indicating that the same crisis affecting developing countries is correlated to the challenges faced by traditional media in developed countries.

However, in developing countries, the reasons for the crisis are more complex. They certainly have to do with the emergence of the Internet and digital technology, as well as with the difficulty of adapting business models to a changing technological environment. But in developing countries, economic factors are the most crucial piece of the puzzle: there is a contradiction between inflexible business models, in many cases established based on the economic reality of developed countries and “exported” to developing countries, and the local economic circumstances. The example below about the competing sales of “illegal” and “legal” computers can provide some useful lessons about this situation.

### **1.1 Computer Sales in Brazil: the “Legal” v. “Illegal” Tension**

The story about “legal” computers and “illegal” computers was summarized by Joaquim Falcão<sup>4</sup>. The term “illegal” computers refers to computers that are sold on the black market, assembled generally with smuggled parts, pirate software, and without the

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<sup>3</sup> ANDERSON, Chris, *The Long Tail*, Hyperion, 2006.

<sup>4</sup> FALCÃO, Joaquim, Cf. *Folha de São Paulo*, 30/07/2006, *apud* in [http://www.culturalivre.org.br/index.php?option=com\\_content&task=view&id=76&Itemid=47](http://www.culturalivre.org.br/index.php?option=com_content&task=view&id=76&Itemid=47)

payment of taxes due. The emergence of this black market dates to the 1980s, when Brazil adopted very protectionist legislation, preventing the importation of computers and computer parts as a means to promote the development of the national computer industry. From that time on, the number of “illegal” computers sold in Brazil was larger than the number of legal ones. Even after the legislation was revoked in 1992, the black market remained in place and the sales of “illegal” computers continued to thrive, especially because these computers were generally sold at a lower price to consumers. In 2004, black market computers represented 74% of all computers sold in the country. According to some projections, the 2006 will be the first year in which the number of legal computers sold will be larger than the number of illegal ones.

In the article cited above, Falcão discusses what the turning point was for Brazil in moving away from illegality. Was it a change in criminal law? Was it the result of a more efficient judiciary branch, with more effective judicial decisions? Was it stricter enforcement? Or was it public consciousness that changed because of anti-piracy campaigns? According to the author, all these elements were marginal in the decrease of sales of black market computers. The problem of illegality in such a situation, even if paradoxical, is not a legal matter, as many would like to believe. The problem is primarily economic, and the decrease of illegality was due to economic reasons.

As Falcão notes:

In the past few years, the technology industry has been able to sell legal computers for far less than in the past. On average, a legal computer costs R\$1,999 (roughly US\$910) while an illegal unit sells for R\$1,719 (roughly US\$780) – just a 14% difference. In addition, the drop in the interest rates charged for the financing of a legal computer (1.9% per month), the reduction of taxes, as well as warranty guarantees and repair support, are all reasons for the increase in legal computer trade.

In other words: illegality was a result of the inability of companies to produce affordable computers for the majority of consumers given existing tax and financial policies. It was not the result of inefficiencies in enforcement or tax



collection operations, or incapable judges, or even unethical behavior on the part of Brazilians. This is a problem that cannot be resolved by the federal police or court system; only the introduction of substantial changes to economic policy and an increase in the efficiency of entrepreneurship will solve the issue of illegality<sup>5</sup>.

A few lessons can be learned from the situation above. The first of them is the fact that the majority of developing countries have to face the reality of the tensions between legality versus illegality. Like it or not, this situation ought to be taken into account when any policy-making decisions are made regarding developing countries, or they seriously risk inefficacy. The second lesson is that the economy plays a very important role in the emergence of these tensions between legality and illegality. In this sense, in order to cope with the problem, it is necessary to understand that in many cases, as Falcão points out, illegality is not a law enforcement problem. It is predominantly an economic one. One can invest unlimited resources in enforcement, and even change the legal system substantially, and yet if a deep contradiction between business models and economic models persists, the problem remains.

This insight is very important for understanding the situation of the traditional media markets in developing countries, and especially in Brazil. The example of the music industry, described below, can provide further support for Falcão's claim.

## **1.2. The Music Industry in Brazil**

Brazil is a country with approximately 180 million inhabitants. Brazilians are inherently musical, as symbolized by the fact that from 2003 to 2006, the country's Minister of Culture was Gilberto Gil, probably one of the three most important and famous musicians in the country and a well-known musician worldwide.

In spite of the inherently musical nature of the Brazilian people, however, multinational labels are facing a very deep crisis regarding their business models in the country. The

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<sup>5</sup> *Idem.*

best way to grasp the situation is to look at the example of the Brazilian branch of the international media conglomerate Sony-BMG, which after its merger surpassed former leader Universal to become the largest record company in the country.

In spite of its leading position, Sony-BMG is facing a serious crisis in Brazil. In various interviews with major Brazilian newspapers, the president of Sony-BMG Brazil mentioned that the companies had only 56 artists in their cast in 2005<sup>6</sup>. The company planned to reduce this number by 40% by the end of 2006.

Not only is the number of artists dropping, but the number of releases is also small and decreasing. In 2005, Sony-BMG Brazil released 35 music CDs of new Brazilian artists. In 2006, the president of the company declared that the number of new CDs of Brazilian artists to be released during the whole year would be approximately 14<sup>7</sup>.

What might be the reasons for such dramatic numbers? The emergence of independent labels in Brazil, and the migration of established artists to these smaller companies is one of the reasons. The version given by the major record companies is that piracy is the primary factor negatively affecting their business model.

Another possible explanation parallels the example of the black market computers mentioned above: the incompatibility between the business models of the record labels with the economic reality of the country. In this particular case, this incompatibility is primarily due to the fact that the overall business model is based on the economic reality of a developed country. The price structures for CDs and DVDs are in many cases the same as the ones adopted in developed countries, in spite of the significant local income differences.

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<sup>6</sup> Cf. Folha de São Paulo, 25/03/2005, "Presidente da Sony BMG aponta fusão como resultado da crise na produção musical"

<http://www1.folha.uol.com.br/folha/ilustrada/ult90u50022.shtml>

<sup>7</sup> Cf. Jornal do Brasil, 05/04/2006, "Sem Medo da Crise",

<http://jbonline.terra.com.br/jb/papel/cadernob/2006/04/04/jorcab20060404001.html>

As Falcão puts it in the same article<sup>8</sup>:

Take, for example, the market for music today in Brazil. The major record companies want an “economic miracle.” In the name of legality, they compel consumers to buy CDs for an average price comparable to that of the American market – US\$10 to US\$15 (about R\$22 to R\$33).

This amount is not compatible with the average salary of Brazilians. They also wish to combat the development of alternative production systems that allow for the sale of CDs at far lower prices (R\$5, a price more in line with the purchasing power of Brazilians). From a capitalist standpoint, this is a very simple issue: record companies are not efficient and innovative enough to organize their production in a manner that is compatible with the demand that exists in the Brazil’s domestic market.

As one can see, it is not a regulation issue. Even with efficient repression or restrictions, consumers still cannot afford CDs at that price. It is a matter of inadequate supply for the existing demand. Rather than correct the economic dilemma on the supply side, the industry instead represses the demand in the local market.

For Brazilians to even consider purchasing a CD at the average price found in the U.S. (US\$15 to US\$20), his or her monthly income would need to be comparable to that of an American (US\$2.000), and not the current reality in Brazil (R\$350, or about US\$140). Thus, major record companies limit access to their music in Brazil to the small educated elite that can pay for it. They do not produce for Brazil.

[The record labels] produce for Brazil’s elite. What these companies are doing is manufacturing social exclusion. Meanwhile, they try to stop new business models that function well and offer sustainable production for Brazil’s popular market by

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<sup>8</sup> FALCÃO, Joaquim, *ibidem*.

making concerted efforts to impose outdated, normative legislation, applying it to informal production and trade systems.

These record companies – which pay virtually nothing for copyright protection – want even more: they want Brazil’s government to allocate public resources to police and tax internal revenue operations, as well as for court actions, thereby saving them expenses. The result is a true transfer of costs from the private to the public sector: the government is strongly pressed to make use of public resources to protect production within the private music industry, an industry which has contributed mightily to the deepening of social exclusion and greater inequality in Brazil.

It is interesting to note that sales of the music industry in Brazil are plummeting. From 2000 to 2005, there was almost a 50% decline in the total amount of physical units sold in Brazil, as shown in the table below<sup>9</sup>:

**Figure 1: CD Sales in Brazil**

<b>YEAR</b>	<b>TOTAL CD SALES (in units)</b>
2000	94 million
2001	72 million
2002	75 million
2003	56 million
2004	66 million
2005	52,9 million

At the same time, from the music production side, initiatives such as Trama Virtual<sup>10</sup>, a website where Brazilian bands can upload their entire albums, are thriving. Trama Virtual alone has more than 15,000 contemporary artists, offering more than 35,000<sup>11</sup> songs online for free. Among the artists who started their career uploading their songs

<sup>9</sup> Source: ABPD (Associação Brasileira dos Produtores de Discos – Brazilian Association of Disc Producers 2005 report)

<sup>10</sup> [www.tramavirtual.com.br](http://www.tramavirtual.com.br)

<sup>11</sup> Cf. O Estado de São Paulo, 13/06/2005, “Cansei de Ser Sexy sai do virtual para o mundo real”, [http://www.link.estadao.com.br/index.cfm?id\\_conteudo=3978](http://www.link.estadao.com.br/index.cfm?id_conteudo=3978)

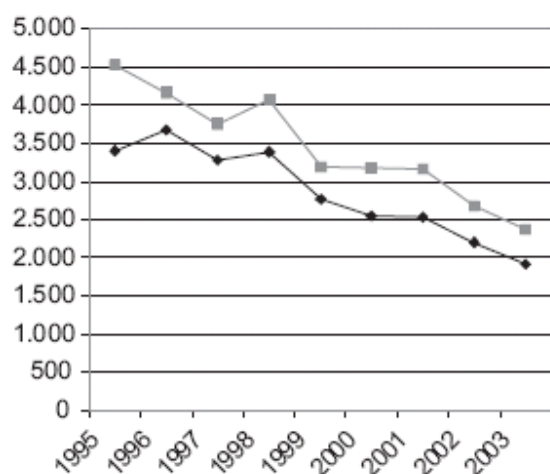
for free at the Trama Virtual website is the now-internationally known band CSS (Cansei de Ser Sexy), hired by the American music label Sub Pop. The success of sites such as Trama Virtual indicates that the most substantial part of creativity in the Brazilian music market is taking place outside the traditional multinational labels.

Below is a description of another situation: the emergence of cultural markets at the Brazilian “peripheries”, which account today for the music to which the majority of the Brazilian population actually listens. These markets are emerging in marginalized areas of the country, as a result of the appropriation of technology on the part of poor populations. Section 3 gives a more comprehensive description of this phenomenon.

### **1.3 The Book Industry in Brazil**

The book industry follows the same trends of the computer and music industries mentioned above. Figure 2, below, depicts the decrease in revenues from 1995 to 2003 in the publishing market, both in direct sales to the government and in regular commercial market sales.

**Figure 2: Publishing Revenues According to Type of Sales, 1995/2003<sup>12</sup> (in millions of reais – R\$)**

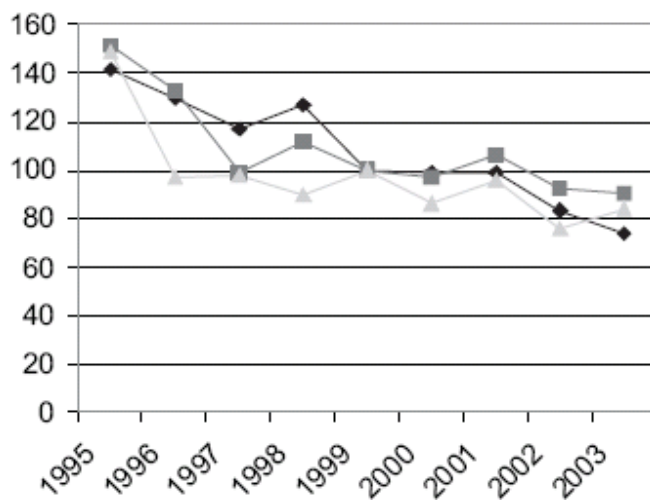


<sup>12</sup> The source is the study the Brazilian National Development Bank (BNDES), organized by Gilson Schwartz, and published in 2006. Cf. EARP, Fábio Sá et. al, A Economia da Cadeia Produtiva do Livro, Rio de Janeiro, 2005, BNDES, page 31.

- Revenue from sales to the government
- ◆ Revenue from sales to the commercial market

The graph below depicts the overall decline in total revenues in the book market in Brazil.

**Figure 3: Evolution of Revenues in the Publishing Market (in millions of reais – R\$)<sup>13</sup>**



- ◆ Total Revenues
- Revenues per title
- ▲ Revenues per single issue

<sup>13</sup> *idem*, page 31.

Further, if 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<sup>14</sup>.

Prices are considered high, especially for educational textbooks. A recent investigation made by business students in São Paulo indicated that to purchase the mandatory textbooks for the first six months of a business university, a student would have to spend approximately US\$1,000. Additionally, of the 66 required textbooks, 30 were out of print and not available on the market.<sup>15</sup>

That raises the issue of another recent and important development in the Brazilian publishing market over the last few years: the conflict between the reprographic rights association and universities, students and even professors. Students in the country complain that access to books at the university level is expensive and difficult, for the reasons above. At the same time, the 1998 amendments to the Brazilian copyright law (Statute 9.610/98) removed all the limitations and exceptions in place from 1973 to 1998 that were applicable to the right to copy books for educational purposes. As a result, the right of private copy was suppressed in Brazil, and no alternative compensation system was introduced in order to replace it. Contrary to the laws in many other countries, in which a levy is collected for allowing copy of limited portions of copyrighted materials, the Brazilian law adopted a very restrictive and imprecise provision.

This provision, in article 46 of the Brazilian Copyright Law, states that:

Art. 46 – It does not constitute a copyright violation:

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<sup>14</sup> ASSUMÇÃO, Jefferson, *Oficina de Leitura*, in *Revista Agulha* 34 (May, 2003).

<sup>15</sup> Cf. MAGRANI, Bruno, “Copiar livro é direito”, in [http://www.culturalivre.org.br/index.php?option=com\\_content&task=view&id=53&Itemid=48](http://www.culturalivre.org.br/index.php?option=com_content&task=view&id=53&Itemid=48)

II – the copy, in one single issue, of small excerpts, for private use of the copying party, provided that the copy is made by the copying party, and without the intent of profit

The provision created unresolved issues regarding the definition of “small excerpts” and even regarding the requirement that the copy be made “by the copying party”. Students claim that copying 10% of a book is considered a “small excerpt”. The reprographic rights association claims that a “small excerpt” consists of a page or two of a book. Also, there is an ongoing dispute about the meaning of copy “made by the copying party”. The reprographic rights representatives claim that a copy made by a photocopy shop is not included in the definition.

So far, the courts have not settled the issue. The practical consequence is the fact the dispute escalated when, in 2004, the reprographic rights association (ABDR – Associação Brasileira de Direitos Reprográficos) started to go to the courts in order to enforce its interpretation of the law. As a result, major educational institutions such as the University of Sao Paulo (USP), the Pontifical Catholic University of Sao Paulo (PUC-SP), and the University of the State of Rio de Janeiro (UERJ) were sued under the allegation that they were facilitating the copy of excerpts. Professors were also threatened with lawsuits, and even student government offices, such as the entity representing the business students at the Fundação Getulio Vargas Business School in São Paulo, were sued.<sup>16</sup>

In response to the lawsuits, student leaders decided to create a national movement to react against the litigation of the reprographic rights association. This movement, named “Copiar Livro é Direito – *Copying Books is a Right*” demanded that the Brazilian law be interpreted to allow the copying of at least 10% of the content of a book. The movement was supported by student government offices around the country<sup>17</sup>.

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<sup>16</sup> *Idem*.

<sup>17</sup> Cf. Folha de São Paulo, “Estudantes Lançam Frente Pró-Xerox”, 22/02/2006 <http://www1.folha.uol.com.br/folha/educacao/ult305u18396.shtml>



An interesting element of the case is the fact that the reprographic rights association posted a “settlement agreement” on its website, available for downloading by any entity or individual being sued. According to an early version of the settlement agreement, by accepting its terms and agreeing to banish photocopy machines and refrain from copying books as a whole, the lawsuit would be dropped and a discount over the cover price of the books would be provided to the signatory<sup>18</sup>. This strategy led some to claim that the lawsuits were simply a commercial strategy on the part of the reprographic rights association. A few months later, on June 1<sup>st</sup> of 2006, an NGO based in Sao Paulo, IDCID (Instituto de Direito do Comércio Internacional e Desenvolvimento), decided to sue the reprographic rights association (ABDR), claiming the entity was overstepping its rights and engaging in a misinformation campaign among universities, students and professors.<sup>19</sup>

The above examples illustrate different elements that affect the publishing market in Brazil, especially with regard to textbooks for university education. In the first place, books are expensive (which can be attributed to the fact that it is hard to obtain economies of scale via large print runs). Secondly, students depend on photocopies of textbooks in order to have access to educational materials. Considering the average income in Brazil, it is very hard for the average student to be able to pay the retail price for each textbook that is required at the university education level. At the same time, the absence of alternative models impoverishes the debate and the possibility of providing compromise solutions that would meet the needs of both publishers and students. The reprographic rights association tried in the past to experiment with collecting levies from photocopy shops, but these experiments were soon abandoned. The only model that the reprographic rights association claims possible is the purchase of the full book, at its cover price, on the part either of the student or the university libraries.

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<sup>18</sup> Cf. Associação Brasileira de Direitos Reprográficos (ABDR), <http://www.abdr.org.br/Termo%20Compromisso%20ABDR-Universidade.doc>

<sup>19</sup> Cf. Agência de Notícias da Propriedade Intelectual, <http://www.agenciapi.com.br/modules/news/article.php?storyid=88>

At the same time, experiments with open publishing have begun to grow in the country. The most well-known is the Domínio Público (Public Domain) website created by the Ministry of Education<sup>20</sup> in Brazil, which purports to publish books in the public domain and Creative Commons-licensed materials. Another important initiative is the SciELO Project (Scientific Electronic Library), which compiles a significant number of academic journals in many disciplines, both Brazilian and from other countries, from Venezuela to Spain<sup>21</sup>.

These initiatives, while still at an early online stage, demonstrate that there is an yet unexplored possibility of using technology to innovate in the publishing market, and to develop new business models that might include open access to the content.

#### **1.4 The Film Industry in Brazil**

In 2006, The Center for Technology & Society<sup>22</sup> at FGV Law School commissioned a study on competition in the film industry. The study was carried out by Luis Fernando Schuartz and Jorge Fagundes. Schuartz is a member of the Administrative Council for Economic Defense, which corresponds in Brazil to the role played by the Federal Trade Commission in the United States. Most of the findings below are a result of this investigation<sup>23</sup>.

Reflecting the global marketshare, Hollywood controls approximately 85% of the Brazilian film market in terms of coverage of Brazilian film screens. In 2005, some 90 million film tickets were sold, representing a growth of only 5,5% in relation to 1995 and half of the tickets sold on average during the 1970s (209 million tickets per year). Most of the public for films is concentrated in the capitals of the Brazilian states. The majority of cities in the country simply do not have a movie theater and even in the big cities, film screens tend to be concentrated in a few neighborhoods. To give an idea of the

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<sup>20</sup> [www.dominiopublico.gov.br](http://www.dominiopublico.gov.br)

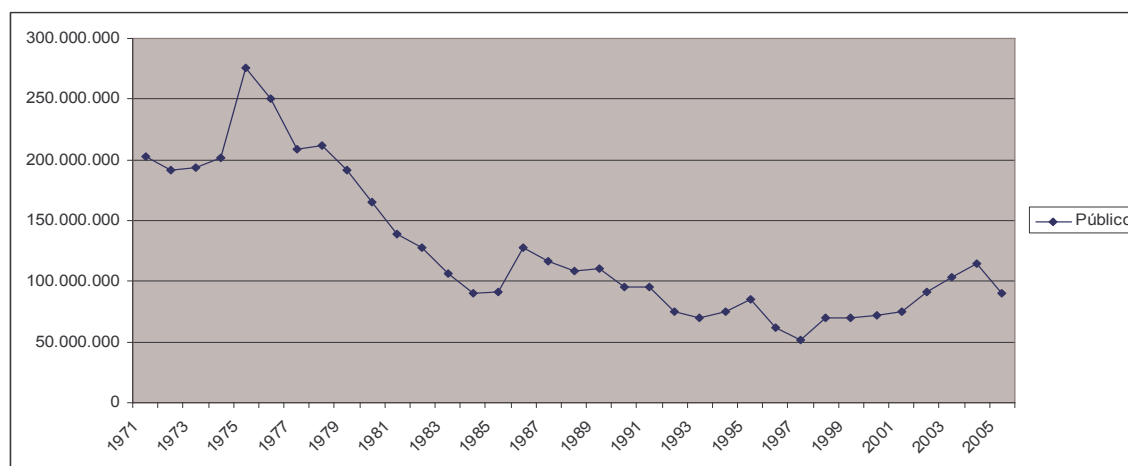
<sup>21</sup> <http://www.scielo.br/>

<sup>22</sup> [www.diretorio.fgv.br/cts](http://www.diretorio.fgv.br/cts)

<sup>23</sup> SCHUARTZ, Luis Fernando et. al., *Defesa da Concorrência e a Indústria de Cinema no Brasil*, 2006, published at [www.culturalivre.org.br](http://www.culturalivre.org.br).

distribution of the public, the cities of São Paulo and Rio de Janeiro account for 25% of movie tickets sold in the country in 2005. The overall revenues in 2005 were approximately R\$644 million (approximately US\$285 million). As Schuartz puts it, “In spite of a 2.2% growth in tickets sold in comparison with the past decade, there is no doubt that we are witnessing a structural decline in the industry in terms of audience.”<sup>24</sup> Figure 4 below demonstrates the fluctuations of public over the past decades,<sup>25</sup> while Figure 5 shows the changes in the number of movie theaters in Brazil.<sup>26</sup>

**Figure 4: Evolution of Movie Theater Audiences in Brazil (1971-2005)**

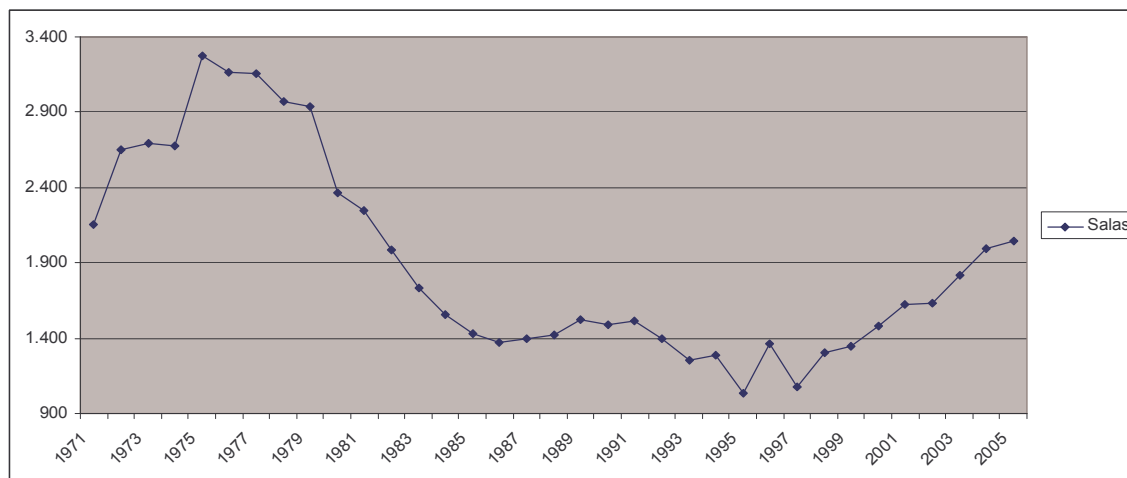


**Figure 5: Evolution of the Number of Movie Theaters (1971-2005)**

<sup>24</sup> *Idem*, p. 29.

<sup>25</sup> The source of the the data is the Filme B ([www.filmeb.com.br](http://www.filmeb.com.br)), and the graphic was prepared by Schuatz, *ibidem*.

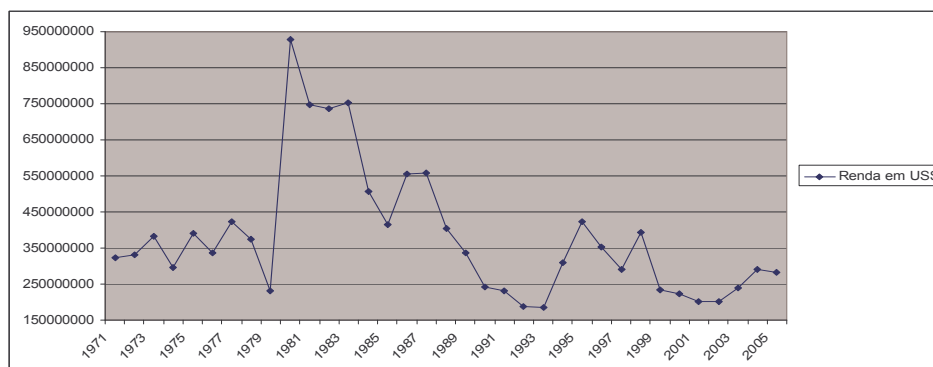
<sup>26</sup> *Ibidem*.



In parallel with the rise in the number of movie theaters from the lows in the mid-1990s, the late 1990s and early 2000s showed a modest growth in movie audiences. In 2005, the number of movie theaters in Brazil was 2045. However, this number is similar to the number to theaters in the beginning of the 1980s. These theaters are concentrated in only 8% of the Brazilian cities (just 454 cities), and 10 cities jointly contain 71% of movie theaters (São Paulo, Rio de Janeiro, Brasília, Belo Horizonte, Curitiba, Porto Alegre, Campinas, Salvador, Recife and Goiânia).

The revenues generated at the box office are also in decline. During the 1980s, there was a brief peak, which was never repeated. In the past 15 years, average annual box office revenue has been steady around US\$285 million, while in the 1970s the average revenue was US\$343 million, as demonstrated in Figure 6:

**Figure 6: Evolution of Box Office Revenues in US\$ (1971-2005)**



An important element is the entry of the multiplex cinemas in the Brazilian market in the middle of the 1990s. As a result, the 50 major multiplexes represent 471 theaters (or approximately 23% of the total number of theaters). The total public of the multiplexes is 39.5 million people (43% of the total movie public in Brazil), and the revenue generated is R\$332.8 million (approximately 50% of the total revenues for movies in Brazil in 2005). As Schuartz points out, "There is a clear substantive concentration of revenue and public in only 23% of the Brazilian movie theaters, all multiplexes."<sup>27</sup>

The distribution market is also quite concentrated, as can be seen in the following chart:

**Figure 7: Market Share of Distributors in Terms of Public (1999-2004)**

<b>Distributor</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>
WARNER	29.3	22.62	20.5	25.1	19.8	22.2
UIP	20.3	25.63	23.2	11.0	13.3	15.3
FOX*	-	-	11.3	13.2	15.5	18.8
SONY/COLUMBIA/BUENA VISTA	36.67	40.03	24.3	34.4	39.1	32.7
<b>Sub-Total</b>	<b>86.27</b>	<b>88.28</b>	<b>79.3</b>	<b>83.7</b>	<b>87.7</b>	<b>89.0</b>
PLAYARTE	-	-	4.4	4.3	3.1	2.1
EUROPA/MAM	1.7	-	8.1	5.5	3.0	3.2
PANDORA	-	-	-	-	-	-
EBA/LUMIÈRE	7.7	8.31	7.8	6.0	5.6	5.3
RIOFILME	1.0	0.36	0.3	0.2	0.3	0.4
Outros	0.3	0.02	0.1	0.3	0.3	0.0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

\* = jointly with Warner until 2000

Source: Luis Fernando Schuartz, from the data provided by Filme B.

The four major distributors are able to obtain an average of more than 500,000 spectators for every title released (basically, Hollywood movies). The other distributors, responsible for releasing 42% of the films in Brazil in 2005, only obtained an average of 24,500 thousand spectators per film.

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<sup>27</sup> *Idem*, p. 37.

Finally, in terms of local film production, approximately 50 films are released in Brazil per year. In the year of 2004, out of 58 films released, 42 had less than 100,000 spectators, a very low box office rate. Ten films had between 100,000 and 1 million spectators, and only five films had more than 1 million spectators. In that same year, 26 Hollywood films had more than 1 million spectators in Brazil.

Accordingly, the film industry in Brazil faces two different challenges. The first is the overall decline since the 1970s in audience, revenues and number of movie theaters. The second is the fact that a self-sustainable national cinematography struggles to emerge in the country, and to compete with Hollywood. The situation is the same at the global level. Only a few countries like South Korea, India and China succeed in competing with Hollywood in terms of a local cinematography. In the majority of cases, the global audiovisual market follows a single business model, which is the one shaped by Hollywood. This model depends on tactics such as “distribution windows”, where the same film needs to be sold to different media at different times (movie theaters, airlines, video on demand, cable television, DVDs etc.).

The question is whether other strategies can emerge that could represent alternative and self-sustainable business models for the production of audiovisual content. Section 3 will investigate new possibilities of organizing audiovisual production by studying examples such as the Nigerian movie-industry, which has developed business practices completely different from those adopted by Hollywood. Considering that Brazil, and most other countries, have been for many years emulating the Hollywood model without economic success, it is important to consider these emerging possibilities. Searching for alternatives becomes especially important for countries like Brazil, where film production depends almost entirely on governmental funding.

## **2. The Legal Commons: Creative Commons and Other Experiments with Institutional Alternatives in Brazil**

At the same time that traditional media face a transformation of their business models, Brazilians are experimenting with new forms of organizing media, access to culture and knowledge, as well as new information-driven business models. One of the most important characteristics of these initiatives is that they put in practice an exercise of “institutional imagination”, as Roberto Mangabeira Unger puts it.<sup>28</sup>

## **2.1 Background of the Creative Commons Project in Brazil**

The Creative Commons organization was founded in the United States in 2001 with the goal of providing a practical means to help restore balance to what its founders saw as an increasingly restrictive copyright system that in many cases stifled rather than promoted creativity. In 2002, the organization released a set of licenses that artists and authors could use to maintain their copyright in their works while at the same time signaling that the Creative Commons-licensed works could be freely licensed and used for certain purposes and under certain conditions. This “some rights reserved” approach quickly won a wide following, and in 2002 Creative Commons began to work with international partner organizations to “port” the licenses to non-US jurisdictions.

Creative Commons in Brazil is a project of the Fundação Getúlio Vargas Law School in Rio de Janeiro, coordinated by the Center for Technology & Society. For more than 60 years, FGV had been playing a leading role in Brazil in the fields of economics and business administration. Nevertheless, in order to fully accomplish its institutional mission, i.e. to strategically position Brazilian institutions for the long term, FGV realized it should concentrate all its legal education activities through the creation of a new and innovative law school.

The FGV law school in Rio de Janeiro was then created with the mission to focus on fields of study that would be strategically important to the development of the country. These fields include the reform of the judiciary system and the relation between technology and society, including intellectual property. As a result, the law school created the Center for Technology & Society (CTS), a multi-disciplinary center that

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<sup>28</sup> UNGER, Roberto Mangabeira, *What Should Legal Analysis Become*, Verso, 1996

focused on the legal system while also on collaborating with economists, anthropologists, computer scientists, and others.<sup>29</sup>

The first initiative undertaken by the CTS, then in formation, was to organize for the first time in Latin America the I-Law Conference, which usually took place at Harvard Law School. In March 2003, professors Lawrence Lessig, Yochai Benkler and William Fisher, among others, came to Brazil for an intensive one-week conference that was attended by several government officers, NGOs, and important market players. Thanks to the help of Hermano Vianna, one of the most important intellectuals in Brazil, the then-recently nominated Minister of Culture of Brazil, Gilberto Gil, participated in one of the panels, sharing the microphone with the Electronic Frontier Foundation's John Perry Barlow in a seminal debate about creativity and intellectual property in Brazil.

From that moment on, the scenario was set for several other initiatives. Brazil was the third country to join the Creative Commons, after Japan and Finland. The translation of the licenses into Portuguese and their adaptation to the Brazilian system took more than a year, with participants from institutions ranging from law firms to the Copyright Commission of the Brazilian Intellectual Property Association.

The licenses were officially launched in June of 2004 at the International Free Software Forum in Porto Alegre. Before an audience of almost two thousand people, Brazilian Minister of Culture Gil joined Lessig and Fisher, as well as Vianna, John "Maddog" Hall, Luis Nassif, Marcelo Tas, André Midani, Claudio Prado, Sérgio Amadeu, and Marcelo Branco—a group representing organizations as diverse as the major broadcasting companies, national newspapers, the Brazilian government, and the free software movement—in introducing the licenses.

Since its launch, the Creative Commons movement has expanded significantly. Besides the Ministry of Culture, other governmental bodies such as the National Institute of

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<sup>29</sup> For more information about the CTS, cf. NEW, William, *Centre Highlights Brazil's Leadership in IP, Free/Open Source Issues*, at IP-Watch, published at [http://www.ip-watch.org/weblog/index.php?p=309&res=1024\\_ff&print=0](http://www.ip-watch.org/weblog/index.php?p=309&res=1024_ff&print=0)



Technology, the FINEP (the incubator agency of the Ministry of Science and Technology, roughly corresponding to the National Science Foundation in the US), the Ministry of Foreign Affairs, and the Brazilian National Patents Office have been working with concepts promoted by the Creative Commons project.

Creative Commons licenses were also well-received by Brazilian civil society. Countless cultural artifacts, ranging from music, film, pictures, texts, websites, and books, have adopted the licenses. And the number is growing. Collectives of artists have appeared throughout Brazil and begun to adopt the CC ideas. In short, the Creative Commons came to meet a repressed demand for alternatives about how to disseminate creativity and culture made in Brazil.

## **2.2 Legal Commons: Institutional Alternatives and Collaborative Media in Brazil**

In addition to the Creative Commons licensing project, the institutional imagination to which Unger refers has produced many other projects in Brazil. A brief list follows below.

### Open Publishing Initiatives:

*DominioPublico.gov.br (PublicDomain.gov)*. The *DominioPublico.gov.br* website is an initiative of the Ministry of Education in Brazil. The project aims at making available at the website books whose copyright protection have already expired. The website brings works of important writers in Brazil, such as Machado de Assis, Aluísio de Azevedo, Gregório de Matos and others. Besides publishing public domain works, the website also allows the publication of works licensed under a Creative Commons project. Even though the project was originally designed for books, it now proposes to host any sort of content, such as films, pictures, music and other cultural artifacts. The number of users is also noteworthy. Right from the launch, the website had an average of 312,000 pageviews per day<sup>30</sup>.

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*Biblioteca Digital de Teses e Dissertações* (Digital Library of Thesis and Dissertations). [www.teses.usp.br](http://www.teses.usp.br). This initiative was created by the University of São Paulo, the largest university in Brazil. It aims at the online publication of doctorate theses and masters' dissertations developed at defended at the University of São Paulo.

*Biblioteca Virtual do Estudante Brasileiro* (Virtual Library of the Brazilian Student) <http://www.bibvirt.futuro.usp.br>. This is a project conducted by the Escola do Futuro at the University of São Paulo in partnership with the AT&T foundation. The library publishes online textbooks in Portuguese, as well as images, sounds and other activities connected with elementary, primary and technical schools in Brazil.

*Portal do Conhecimento* (Knowledge Portal). [www.bibliotecamultimedia.org.br](http://www.bibliotecamultimedia.org.br). This is an initiative by Instituto Embratel 21, in partnership with the National Library of Brazil, funded by Embratel and Star One. The portal publishes content generated by the Ministry of Culture and the Ministry of Education (such as television educational programs). It also digitizes academic conferences.

*SciELO* (Scientific Electronic Library). [www.scielo.br](http://www.scielo.br). The Scientific Electronic Library Online - SciELO is an electronic library covering a selected collection of Brazilian scientific journals. The library is a project by FAPESP (Fundação de Amparo à Pesquisa do Estado de São Paulo), in partnership with BIREME (the Latin American and Caribbean Center on Health Sciences Information). Since 2002, the Project is also supported by CNPq (Conselho Nacional de Desenvolvimento Científico e Tecnológico). The Project envisages the development of a common methodology for the preparation, storage, dissemination and evaluation of scientific literature in electronic format.

*Amazone* ([amazone.wikia.com](http://amazone.wikia.com)). The *Amazone* project is one of the most interesting and challenging initiatives taking place in “open publishing” and academic experimentation in Brazil. The project was created by Eduardo Viveiros de Castro, one of the most important anthropologists in Brazil and possibly in the world<sup>31</sup>. Instead of

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<sup>31</sup> See for instance <http://www.press.uchicago.edu/cgi-bin/hfs.cgi/00/190391.ctl>

publishing his book new book *Amazona (A Onça e a Diferença)* in a traditional way, Eduardo decided to open up the content of the book on a wiki website, allowing contributors from everywhere to add contributions and change the content of the book. By doing this, he sought to challenge the ideas of authorship, property, copyright, and other institutions.

### Music

*TramaVirtual* ([www.tramavirtual.com.br](http://www.tramavirtual.com.br)). TramaVirtual is a project by the record label Trama ([www.trama.com.br](http://www.trama.com.br)). In short, Trama Virtual is an open platform where any musician can upload content for free download online. The project has existed since 2004, and has become an important reference for contemporary Brazilian music. At the same time the largest Brazilian label (Sony-BMG) is releasing an average of only twelve or thirteen new CDs of Brazilian music per year, Trama Virtual has more than 15,000 artists, many of which are uploading entire albums to the website.

*Overmundo* ([www.overmundo.com.br](http://www.overmundo.com.br)). Overmundo is a collaborative website, where anyone can upload articles that are then submitted to a voting process on the part of the users. The website also has a Banco de Cultura (Culture Database) where songs can be uploaded and further discussed throughout the website<sup>32</sup>.

*Blogs, MySpace, Orkut and other tools.* Many bands in Brazil, just like in many other countries, are moving their careers online, using tools such as weblogs, YouTube, MySpace, Orkut and others. Even the most well-known artists in Brazil are using these tools to promote their content.

### Film

In Brazil, most of the nationally produced films are financed with public funds. One of the reasons that legitimate this form of financing is the perception that is politically important for the country to create and maintain a national film production industry.

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<sup>32</sup> Full disclosure: the author of the article was one of the creators of the website Overmundo.

Increasing access to this cinematic production is an important argument to help justify the maintenance of the public system for financing films.

*Porta-Curtas Petrobras* ([www.portacurtas.com.br](http://www.portacurtas.com.br)). If Trama Virtual is the largest aggregator of music in Brazil nowadays, the same is true for Porta-Curtas with regard to short films. The project was financed by Petrobras, and its objective is to catalog, and if possible make available online, short films produced in Brazil. The project catalogs more than 4,000 films, of which approximately 450 are available on its website. Most of the shorts were shot on film stock, and were available before only at movie festivals and through other limited forms of distribution.

*Overmundo* ([www.overmundo.com.br](http://www.overmundo.com.br)). Through its Culture Database (Banco de Cultura) Overmundo is allowing different forms of film distribution in Brazil. Overmundo hosts films distributed in BitTorrent format and others. One of the most recent initiatives was the release of the film *Cafuné*, a feature film directed by the award-winning director Bruno Vianna, simultaneously in movie theaters and online. The director managed to obtain the support of his distributor, the Grupo Estação in Rio de Janeiro, to distribute his movie in this innovative manner; it was the first time that a feature film was released simultaneously in theaters and online in Brazil, and possibly one of the first to do the same worldwide.<sup>33</sup>

### Citizen Journalism and Web 2.0

Initiatives of collaborative journalism are spreading fast in terms of adoption Brazil. In short, the idea that “every citizen is a reporter”, as propagated by the Korean collaborative newspaper OhMyNews<sup>34</sup>, has become an important guideline both for media portals online and for new collaborative websites that try to capture the potential of socially produced content. The first sign that citizen journalism is becoming an important force in the Brazilian market is the fact the all the content portals in Brazil are restructuring their websites in order to foster user participation. One of the portals, IG,

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<sup>33</sup> Cf. Brazilian Film – Cafuné – Released Simultaneously in Movie Theaters and Online.  
<http://creativecommons.org/weblog/entry/6048>

<sup>34</sup> <http://English.ohmynews.org>.

(www.ig.com.br) has actually changed its entire marketing campaign to claim that it will be the first collaborative portal in Brazil, empowering its users to create content through the site.

*Eu Curti, Estudio Livre, Conversê, and others.* Other initiatives that incorporate concepts of citizen journalism and web 2.0 include websites like Eu Curti (www.eucurti.com.br, a clone of the popular website Digg), Overmundo, Estúdio Livre (www.estudiolivre.org), and Conversê (www.converse.org.br). The latter two are part of the Digital Culture initiative of the Ministry Culture in Brazil, promoted by Gil during his tenure as Minister of Culture

### **3. Innovation Arising from the Global Peripheries**

While web 2.0 projects such as online collaborative platforms and web-based communities are present and growing in Brazil, it should be noted that these new forms of creation and communication affect only a small percentage of the Brazilian population. But even though the digital divide is still considerable and access to computers is in many cases restricted, technology has nevertheless been appropriated by different segments of the Brazilian society, including at the “peripheries”. This appropriation of technology by the poorest and most marginalized segments of the population is producing new types of entrepreneurial enterprises. One of the most important is the emergence of the so-called “LAN houses”, which have succeeded in bringing computers connected to the internet to some of the poorest regions in Brazil.

#### **3.1 LAN Houses as the New Tool for Digital Inclusion**

There is a new center of digital convergence for youth in low-income Brazilian neighborhoods (and perhaps global ones). This point of convergence is represented by

LAN houses<sup>35</sup>, small businesses such as street stores or kiosks filled with computers where members of the community go to access the Internet and to play multiplayer games on a network. LAN houses are extremely popular among young people from all social backgrounds. Due to this popularity, the number of LAN houses has increased rapidly in Brazil in recent years. Today, the majority of poor neighborhoods in Brazil, even in smaller towns or in the *favelas* (shantytowns), now have at least one LAN house.

General initiatives for bridging the digital divide in developing countries always face at least two challenges: social efficacy and economic sustainability. The social efficacy problem arises in most cases in connection because of difficulties in the assimilation of the initiative on the part of the community. The possibility of burglary and robbery increases when, for instance, the digital inclusion initiative is regarded as an extraneous element to the community, a sort of external intervention in community life. This creates the perspective of “otherness” and prevents the integration of the project in the community, which in turn prevents a feeling of community responsibility for its maintenance. In addition, it is worth pointing out that many digital inclusion initiatives implemented in Brazil prohibit the use of electronic games in their computers. This policy neglects to consider the fact that many children, from all social classes, develop an interest in computers specifically because of videogames. As a result, a significant percentage of youth are drawn away from publicly funded telecenters, including some of those young people who would most benefit from familiarity with computers and the internet.

Economic sustainability problems are a significant challenge when funding for digital inclusion initiatives is available only for a limited period of time. After the exhaustion of the funds, many projects are left to their own fate to find ways to sustain themselves. In the short term, economic problems lead to technological obsolescence. In the mid-term,

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<sup>35</sup> The term LAN stands for “Local Area Network”, meaning that all the computers in a LAN house are connected to each other, forming a network. This network allows the users to play games and interact with each other. Most of the LAN houses also have a connection between the entire network and the internet.

these problems often lead to the dismantling of the projects. The positive impact of the digital inclusion policies, accordingly, may unfortunately be small and limited in time.

The rise of LAN houses in poor areas, however, shows that digital inclusion can be achieved not only by public or semi-public efforts, but also through the private sector. The problems of social efficacy and economic sustainability that tend to plague large, publicly funded initiatives can be significantly mitigated within the LAN house model. The LAN houses are generally small enterprises, created with private funds and owned in most cases by a member of the community in which they are located. These community entrepreneurs have direct, local knowledge about the daily practices of the community that allows them to evaluate the best place to set up the store and the computers. Further, the owner of the LAN house is working for profit, and therefore attempts to maximize the number of customers that the store receives, usually by enabling the multiplayer games either on the local network or through the Internet. That has an impact on the economic sustainability: games tend to be extremely appealing for young people, and the relatively low prices (in general, approximately US\$0.50 per hour) ensure that even lower-income citizens will have access to the internet and other LAN house facilities. If the enterprise is successful, the business owner can increase the number of computers or even open new stores.

A recent study by Ibope/Netratings<sup>36</sup> found that more than 6 million people in Brazil (approximately one third of the online population) access the internet from a public place. Of those people, only 1.6 million access the internet from points of access provided by the government, such as telecenters and other digital inclusion initiatives. The absolute majority, 4.4 million people, access the internet through LAN houses and other paid access points located, in many cases, in the poorest areas of the Brazilian cities. These numbers demonstrate the current importance of LAN houses in the country, and hint at their unexplored potential.

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<sup>36</sup> [http://idgnow.uol.com.br/internet/2006/10/02/idgnoticia.2006-10-02.6756378514/IDGNoticia\\_view](http://idgnow.uol.com.br/internet/2006/10/02/idgnoticia.2006-10-02.6756378514/IDGNoticia_view)

LAN houses represent a self-sustaining entrepreneurial initiative that is helping to bridge the digital divide, bringing technology and internet connectivity to those who need it the most. As with any other business, the revenues that LAN houses produce provide for their own sustainability and expansion. These entrepreneurial efforts can be a supplementary model to the digital inclusion initiatives that focus on government-funded telecenters, which can be vulnerable and difficult to sustain because of issues such as their dependence on continuous public funding.

Finally, it is important to consider the fact that LAN houses produce significant positive externalities for the community, especially because of the Internet connection they provide, and indications are that these positive effects can be developed even more fully with the right programs. In interviews conducted by the Center for Technology & Society in the communities of Rocinha<sup>37</sup> and Cidade de Deus<sup>38</sup> in Rio de Janeiro, it became clear from the statements made by the owners of the local LAN houses that the population frequently asks whether they also provide “courses” and other cultural and educational activities. Members of the community ask the owners, for instance, whether they provide courses for teaching people how to use computers. The owners themselves claim in the interviews that they have interest in providing these courses, but that they do not have the skills to do so. Owners also claim that these courses would be good for the business, especially in the morning period, when the LAN houses generally have a low attendance rate. In other words, there is an unexplored interest on the part of the small-scale entrepreneurs in implementing citizenship and cultural activities within the realm of activities of the LAN houses, making the model a feasible and promising one<sup>39</sup> for bridging the digital divide in developing countries.

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<sup>37</sup> Rocinha is the largest favela in Rio de Janeiro. It is located in the city of Rio de Janeiro, between the neighborhoods of São Conrado and Leblon. In a preliminary research, more than 50 LAN Houses were counted at Rocinha, each one charging approximately US\$0.30 for an hour of Internet access. See pictures at annex I.

<sup>38</sup> Cidade de Deus is a community located in Rio de Janeiro, which was made famous by the film “City of God”. It is a large community created by the government in the 1960s, and then turned into a very poor area, located in the Western areas of Rio de Janeiro. Even though the precise number could not be determined, it has more than 20 LAN Houses. See pictures at annex I.

<sup>39</sup> A very important case demonstrating the potential and possibilities of this model has been documented throughout the website Overmundo, where the community of Ellery, in the Northeast outskirts of the city of Fortaleza, State of Ceará in Brazil is using LAN Houses to create a virtual community and even to engage in citizenship journalism, in the style of the so-called “web 2.0”. See *Comunidade.com*, at <http://www.overmundo.com.br/overblog/comunidadecom>



In these circumstances, with the right incentives, LAN houses can eventually achieve the same objectives that other digital inclusion initiatives are expected to fulfill. In addition, LAN houses can go beyond simply offering internet connectivity and multiplayer games: and can develop and use social tools to promote and develop the cultural activities of their own communities, facilitate access to e-government and e-citizenship, and promote communication with communities in other areas of Brazil, exchanging social practices and cultural products. This could be an alternative paradigm that could influence future public policies regarding digital inclusion.

In short, there is an unexplored capacity of LAN houses to become places where citizenship can be put in practice and culture can be created and disseminated. The positive potential of LAN houses can be further developed by creating the right incentives and evaluating the effective importance of the LAN houses to the communities in which they are located. LAN houses are a perfect example of how peripheries are appropriating technology in order to provide solutions for their own problems, without any intervention from the state or from the third sector. They demonstrate that these initiatives should be investigated and taken seriously, inasmuch as they can offer clues about how technology will help in the near future to provide<sup>40</sup> tools for access to information, citizenship and development.

### **3.2 Social Commons: Cultural Industries Emerging from the Peripheries**

Giorgio Agambem defines the idea of “state of exception” as follows:

[It] is a historical matter: the state of exception or state of emergency has become a paradigm of government today. Originally understood as something extraordinary, an exception, which should have validity only for a limited period of time, but a historical transformation has made it the normal form of governance. I wanted to show the consequence of this change for the state of the democracies in which we live. The second is of a philosophical nature and deals with the

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<sup>40</sup> Cf. <http://film.guardian.co.uk/features/featurepages/0,,1737425,00.html>

strange relationship of law and lawlessness, law and anomy. The state of exception establishes a hidden but fundamental relationship between law and the absence of law. It is a void, a blank and this empty space is constitutive of the legal system.<sup>41</sup>

The idea of “social commons” is connected with Agambem’s “state of exception”. It is the result of historical and social circumstances that generate a situation in which the very idea of intellectual property becomes inapplicable, irrelevant, unfamiliar or unenforceable. As de Souza Santos<sup>42</sup> demonstrated in the 1970s in his studies about the illegal occupation of land in Brazil, two parallel legal realities could be detected. The first was the “official” legal system, regulated by the Brazilian Civil Code, which governed the acquisition and transfer of property. The other was a collection of social practices taking place in the *favelas* (shantytowns), which regulated the acquisition and transfer of “property” within that particular environment. These social rules were rooted in the ideas of illegality and informality: illegality because the occupation of land in the *favelas* was in the majority of cases the result of the illegal “squatter” settlements by migrants to large urban areas, and informality because due to this original illegality, the rules subsequently applicable to govern the acquisition, use, and transfer of the land were forged by the community itself, without any direct contact with the “official” legal system. De Sousa Santos points out in his work that the courts exercised basically no jurisdictional power over the land transactions taking place in the favelas, and that from the perspective of the favelas’ inhabitants, the courts were seen as a “foreign” element, connected with the “official” legal system, that had no role to play in local disputes regarding the occupied land.

As with many developing and developed countries, the same social “state of exception” issues which lead to “illegality” and “informality” persist within the Brazilian society, not only at the peripheries but also elsewhere. At the peripheries these circumstances are especially visible. At the same time these peripheries deconstruct the idea of “rule of

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<sup>41</sup> AGAMBEM, Giorgio, Interview with Giorgio Agamben Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life, German Law Journal, May 2004.

<sup>42</sup> Idem.

law”, the fact that one simply cannot rely on the intellectual property system as a means of organizing a business leads to an interesting situation when digital technology comes into play. Digital technology makes fully apparent the non-competitive and non-rival characteristics of intellectual creations: unlike physical property, ideas and other intellectual creations can be simultaneously used by many people without reducing the value for any individual. In the digital environment, scarcity is longer a problem. Hence, the “official” legal system functions as a way of recreating scarcity by means of the law. But under the “state of exception”, in places where intellectual property is simply not socially available, it is reasonable to expect that the recreation of scarcity by law will not be successful. Accordingly, when digital technologies start to be appropriated by the peripheries, the absence of the “official” intellectual property system creates a “social commons”, a situation in which any cultural businesses emerging out of it has the characteristics of an “open business model”<sup>43</sup>, in the sense that intellectual property does not play a significant role and content is regarded as part of a “commons”.

Below is a description of some forms of cultural industries emerging out of “social commons” circumstances.

### **3.3 The Nigerian Film Industry**

The most eloquent case for a cultural industry emerging out of the global peripheries is the Nigerian film scene. Nigeria features in the *2005 Atlas of World Cinema*, published by the French magazine *Cahiers du Cinema*, with an impressive amount of more than 1200 movies produced in that year. It is interesting to note that India produced some 911 films and the United States produced 611 in that same year, according to the magazine.

Both important newspapers such as *The Guardian* and business magazines such as *The Economist*<sup>44</sup> have recently been publishing articles describing the Nigerian

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<sup>43</sup> About the definition of Open Business, cf. the open business project at <http://www.openbusiness.cc/>

<sup>44</sup> Cf. [http://www.economist.com/displaystory.cfm?story\\_id=E1\\_SNNGDDJ](http://www.economist.com/displaystory.cfm?story_id=E1_SNNGDDJ)

phenomenon. According to the former, the Nigerian movie industry is the third industry in the world in terms of revenue, producing more than 200 million dollars per year. And according to the latter, the industry employs more than 1 million people, making it second only to agriculture as the largest source of employment in the country.

The interesting thing about the Nigerian market is that it emerged through an innovative business model. Instead of high-cost and high-profile films, a film in Nigeria costs between US\$15,000 and 100,000 to produce. Movies are shot in most cases in digital video and distributed directly to the domestic market, in videocassettes or, in the last few years, DVDs. Charles Igwe,<sup>45</sup> a well-known producer in Nigeria, notes that contrary to other industries in the world, the Nigerian film industry is ready to absorb technology changes promptly. As an example, he cites the fact that the films are shot in high-definition format, a new trend in that market. Another remarkable element of the Nigerian market is that it emerged without the support of any strong intellectual property laws. Just like the majority of developing countries, Nigeria struggles to enforce the laws and even to educate people about what the idea of intellectual property means. It is a case where culture lives in a state of “social commons”, a commons that is generated not by the use of legal structures to create it, but by the absence of enforcement, cultural inadequacy, nonexistence, or other elements of an imperfect intellectual property regime. Regardless of whether this “social commons” is good or bad, or whether it should be fought or fostered, the fact is that if one considers intellectual property as the only, or even the primary, incentive for creative and for doing business out of cultural industries, the Nigerian case eloquently demonstrates that other incentives and other models are viable.

The Nigerian case is not alone. It is safe to assume that everywhere in the world, where there is a peripheral, marginalized area, this area is likely starting to produce some form of cultural expression, regardless of the intellectual property regime that applies. When technology is assimilated by these forms of cultural production emerging from the

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<sup>45</sup> For a very comprehensive and interesting report on the Nigerian film industry, see the transcription of the conference given by Charles Igwe at the Center for Technology & Society at the FGV Law School in Brazil: [http://www.culturalivre.org.br/index.php?option=com\\_content&task=view&id=80&Itemid=60](http://www.culturalivre.org.br/index.php?option=com_content&task=view&id=80&Itemid=60)

peripheries, autonomous industries can be generated. This is the case, for instance, for the “champeta” rhythm in Colombia, the different musical and economic scenes based on the “cumbia” rhythm throughout Latin America, and for the multitude of singers and composers in the Arab world who make a point of freely disseminating their songs online<sup>46</sup> because their source of revenue comes from live presentations such as performing at weddings (and being well-paid for that, sometimes more than US\$20,000 for one performance). This phenomenon is not a privilege of developing countries, but it also takes place in the developed countries, especially in the poor areas of the biggest cities. As mentioned above, the “mix-tape” markets in New York and London follow the same patterns. Scenes like the “dubstep” and other rhythms in the peripheries of London emerged thanks to the dissemination of the music through pirate radios the mixtape market. In other words, the idea of “periphery”, and consequently of “social commons”, emerge regardless of any geographical or geopolitical status. It takes place both in the peripheries of the developing world and in the peripheries of the developed world.

### **3.4 The *Tecnobrega* Industry in Belém do Pará, Brazil**

One of the most important examples of this new forms of industry based on the “social commons” is the *tecnobrega* scene in Belém do Pará, a city located at the Northern region of Brazil. While the “official” music industry in Brazil is struggling to produce a handful of CDs per year, the *tecnobrega* in Belém do Pará has generated a multi-million dollar industry releasing numerous new CDs each year. There are no official statistics about how many CDs are released in the region, but the numbers obtained from the initial research undertaken by the Open Business project in the city of Belém indicate that more than 400 new CDs are released there every year.

If one tries to find any of these CDs in a traditional music store in Belém do Pará, the probability of success is close to none. *Tecnobrega* CDs are produced and recorded to

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<sup>46</sup> Cf. websites for freely disseminating music in the Arab world, such as Mazika (<http://www.mazika.com/en/default.aspx>) or 6arab (<http://www.6arab.com>), which calls itself “the Arabic music revolution”.

be directly distributed throughout the street vendors, the same vendors that a few years ago sold only “pirated” content. In the case of tecnobrega, the CDs are deliberately delivered to the network of street vendors, so that they can disseminate them as much as they can. In other words, tecnobrega artists see the CDs as a form of advertising, rather than a source of revenue.

One might ask how a tecnobrega artist can make money in such circumstances. The answer to that question is complex, and is also the object of research of the Open Business project<sup>47</sup>, which will be concluded by April 2007. An initial explanation is that the revenues at the tecnobrega scene are generated primarily by live concerts and presentations, which take place at the so-called “*aparelhagem*” (soundsystem) parties in the outskirts of Belém. These parties are big events, sometimes attracting 5,000 or more people. In some weekends, more than one *aparelhagem* party takes place, increasing the numbers of the tecnobrega fans attending different parties simultaneously in one single night to occasionally more than 20,000.

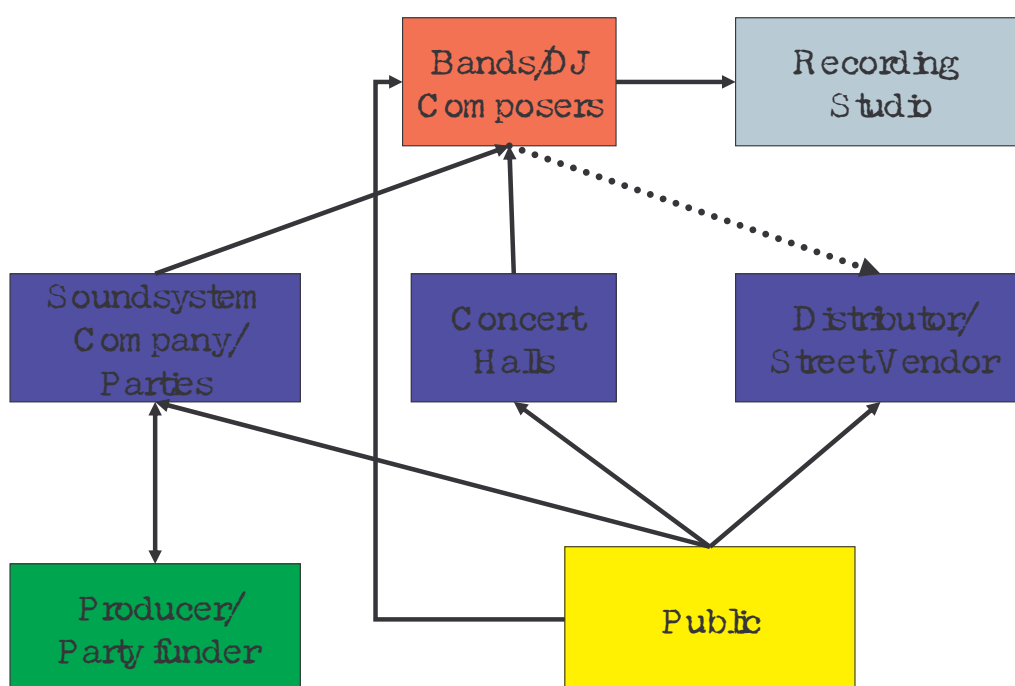
The *aparelhagem* parties are the focal point for generating revenues in the tecnobrega industry. The party organizers collect an entry fee from the tecnobrega fans, and receive other revenues for selling drinks and other tecnobrega-related products. The *aparelhagem* organization also pays the artists and DJs for their performances. Artists present their new songs at the tecnobrega party, and “test” the acceptance on the part of the public. An interesting aspect of the tecnobrega system is that concerts are occasionally recorded live, and a few CDs are produced to be sold at the exit of the *aparelhagem* parties when party is over. These few CDs are sold at a premium price (approximately R\$15, corresponding to approximately U\$7). Sometimes, the live recording produces material that is considered outstanding, for instance, when the DJs and artists present new songs that are well-received by the public and have not previously been distributed. In this case, the material recorded live is further replicated in the days following the party and the CDs are delivered to the street vendors, who disseminate them widely.

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<sup>47</sup> [www.openbusiness.cc](http://www.openbusiness.cc)

The dissemination through the street vendors is the primary promotional tool for the artists and DJs. A popular DJ becomes, then, highly demanded by the aparelhagem party organizers, and then the circle is complete. Figure 8 shows the basic economic cycle of the tecnobrega scene.

**Figure 8: Linkages Among Economic Actors on the Tecnobrega Scene**



The solid arrows depict the economic transactions between the various agents in the tecnobrega chain. At the beginning of the chain, one can find the bands, DJs, and composers. In many cases, the composer is the same person as the DJ or the performer, so in many instances the composer is not an autonomous figure in the graphic. Musicians and DJs record their tecnobrega songs at a recording studio, in many cases paying the studio a certain fee. The bands then disseminate the music through the distributors/street vendors (represented by the dotted arrow). There are also other modalities of dissemination. One of them is traditional radio, which in Belém,

thanks to pressure from the public, reserves some airtime for locally produced music, including tecnobrega. Popular artists then perform live at the *aparelhagem* (soundsystem) parties, as well as at regular concert halls, receiving money in both cases. Another important ancillary link of the chain is the existence of intermediaries between the artists and the street vendors (distributors). These intermediaries are responsible in many cases for compiling the best songs, and for selecting the artists they think will best meet consumers' taste at that moment. The *aparelhagem* parties are also important taste-makers. A successful live performance at an *aparelhagem* party might be recorded and then sold, helping to improve the popularity of the artist.

The public purchases tickets from concert halls, and also from the *aparelhagem* parties. They also purchase CDs, either from the street vendors, or directly from the bands and artists at the end of the concerts. In the first case, when CDs are purchased from street vendors, the artists do not receive any royalties or revenue. When the purchase is made directly from the bands, that money goes to them. It is important to mention that the sales of CDs and DVDs by the street vendors do not compete with the direct sale of CDs and DVDs by the bands. The street vendor generally sells a poorer quality product, for a lower price. The CDs are generally plain CD-Rs, without any graphic material or pictures, and sometimes without even the tracklist. The bands selling CDs and DVDs directly at the concerts sell them for a higher price. These CDs come with graphic material, tracklist and better packaging. The direct sales of CDs and DVDs by the bands represent a significant source of income to the artists.

One last link of the tecnobrega chain is the producer or party sponsor. These are individuals or companies that are responsible for funding the *aparelhagem* parties. Sometimes they provide loans to the owners of the soundsystems, and sometimes they become partners in the parties. Accordingly, they both provide money to the *aparelhagem* parties, and can receive either interests over the loans provided, or a percentage of the profits earned.



Some critics have argue that the tecnobrega model is a “pre-industrial” form of organization of the music business. This argument, however, is not correct. The first element to consider is the fact that although the tecnobrega scene takes place in the poor areas of Belém, it is very intensive in its use of technology. The appropriation of technology, in fact, is what makes it possible for such an economically important scene to exist. Secondly, most artists on the tecnobrega scene actually make more money through the business organization of the current industry than they would make otherwise. An evidence of that is the fact that during the interviews conducted by the Open Business project, some artists mentioned that they had previously tried to market their music through traditional channels, and they know that it has become impossible to make money through recording contracts and CD sales in today’s market. The Open Business tecnobrega research indicates that 88% of all artists on the scene have never had any contact with record companies.

The most successful artist arising from the tecnobrega scene, the band called Calypso, has been approached several times by traditional record labels, but has turned down all the offers. The reason is that they make more money by means of the existing business model. In an interview to the largest Brazilian newspaper, the singer of the band Calypso expressly said<sup>48</sup>: “We do not fight with the pirates. We have become big because of piracy, which has taken our music to cities where it would never have been”. Calypso is well known for attracting huge crowds wherever they play in Brazil, not only in Belém but in any other city in the country. Sometimes they attract more than 50,000 people to one single concert. The *Folha de São Paulo* newspaper mentions that Calypso has sold more than 5 million albums in Brazil.

Finally, one might ask what would happen should broadband internet become widely available in Belém and in Brazil as a whole. How would this impact the tecnobrega business model? Considering that the tecnobrega cycle depends primarily on the broadest possible dissemination of content (i.e. making tecnobrega music freely available, so that more people go to the aparelhagem parties), it would be reasonable to

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<sup>48</sup> Folha de São Paulo, November 29, 2005.

assume that the model would actually become stronger, although the link represented by the street vendors would probably become less important. The internet would represent a more efficient way to make tecnobrega music broadly and freely available to audiences, which would increase even more the attendance at the tecnobrega parties and the popularity of the artists. As discussed in the next section, a transition from the “social commons” to the “legal commons” would then become necessary, and a legal structure such as the Creative Commons would have an important role to play in that transition.

Once again, the tecnobrega industry does not rely on intellectual property enforcement in the formation of its business model. It is a business model arising from the circumstances of “social commons”. The corresponding elements of this particular “social commons” surrounding tecnobrega, i.e., the fact that the business model depends on the free and broad dissemination of content, can also be reproduced online, for instance by the adoption of Creative Commons licenses. This would be a perfect example of a case in which new technology would be in harmony, rather than competition, with a music business model.

#### **4. The Legal Commons and Its Role in Developing Countries**

This section focuses on how the legal commons, represented for instance by the Creative Commons licenses, can play an important role in the developing countries. The arguments here are based on the experience with the Creative Commons project in Brazil over the past three years.

##### **4.1 Creative Commons – Criticism and a Developing World Perspective**

Criticism of the Creative Commons project can come not only from intellectual property constituencies and beneficiaries but also, for instance, from copyleft activists and copyleft enthusiasts. From the developing world perspective, especially based on the Brazilian experience, there are important elements that should be taken into account to

rebut these critiques. There is no intention of being exhaustive in this paper, but some major critiques are singled out and addressed below.

#### 4.1a) *Creative Commons is based on the copyright system*

This is a critique coming especially from academic researchers and professors who would prefer that the intellectual property system be completely reformed or even suppressed. The point of the critique is that Creative Commons reinforces the current intellectual property system, rather than challenging it. The ambition of this criticism is that Creative Commons should engage in activism to reform or eliminate the copyright system, rather than in developing copyright-based licenses that allow creators to permit certain uses of their works.

It is curious to note that this criticism comes primarily from academics. One of the most important problems of the current intellectual property regime is the fact that it has been systematically changed in the past 20 years without any impact assessment. In other words, intellectual property law has been changed, or in some cases, changes have been proposed without any form of study or any empirical background that could support such change. Neither beneficiaries nor harmed groups are identified. The law is changing based on abstract assumptions.

Accordingly, accepting the criticism that Creative Commons should simply engage in activism against the intellectual property system would be to make the same mistake. One of the most important elements of the Creative Commons is that it provides a safe way to experiment with works that use a different form of intellectual protection regime. In June 2006, Creative Commons reached approximately 140 million linkbacks to the licenses, indicating that there exists a significant universe of works free and available to be used and reused according to the permissions granted by the licenses. This number has grown even further since that time. Based on the various types of business models that are emerging from Creative Commons works, it will be soon possible to make an assessment of the real impact and benefits of intellectual property, and then propose a

change to the law that is based on empirical evidence. These business models include well-respected projects such as the Public Library of Sciences (PLOS) for academic journals, the website Flickr for photos, and the record label Magnatune for music, among many others.

The problem of this criticism is that it is often mediated by a theoretical framework or theoretical assumptions that in their turn are not directly connected with empirical evidence or with problem-solving issues. Accordingly, it might work well from a theoretical point of view, but it fails to reach, for instance, the “disintermediation” of reality discussed by authors such as Gilles Deleuze, who is often quoted by the supporters of this particular criticism.

Another important aspect that this criticism fails to consider is the fact that the possibility of reforming the intellectual property system has been deeply limited by the adoption of the TRIPS agreement under the World Trade Organization. In other words, changes in the intellectual property system that conflict with the TRIPS agreement can imply commercial retaliations that developing countries simply cannot afford. From the point of view of a developing country as Brazil, being part of the WTO has brought significant trade benefits, which are put at risk by any modification to the Brazilian law that might conflict with the TRIPS agreement.

Not by coincidence, Brazil is one of the members of the group of countries called “Friends of Development”. These 14 countries have proposed to the World Intellectual Property Organization the so-called “Development Agenda”, a set of proposals aimed at promoting more equitable means for access to knowledge and culture. The Development Agenda argues that intellectual property should not be seen as an end in itself, but rather as a means to foster development. In this sense, the original Development Agenda document expressly mentions free software and the Creative Commons projects as important forms of experimentation that should be fostered, and that can indicate new possibilities of development in the near future.

Accordingly, the criticism that Creative Commons licenses support the legal status quo expressly rejects the present system in favor of an unknown future. The experience with the Creative Commons project in Brazil provides indications that a more incremental and balanced path is possible.

Creative Commons has two important merits worth emphasizing. The first is that it puts into practice right here and right now a different model of intellectual property, a model that is compatible with business models that do not depend on the legal scarcity generated by the copyright regime. Conversely, it promotes business models where the economic impact of the cultural product increases the more this same product is shared and disseminated. Another important aspect of Creative Commons is that it promotes an environment favorable to experimentation, avoiding any form of “social engineering”, that is, changing the law without a prior assessment of the corresponding social impact.

Hence, Creative Commons allows experimenting in practice with the variables that might lead to a change in the intellectual property regime, based not on theory, but on empirical evidence. Creative Commons can be an important tool for “open business models” to develop and become economically sound. The more these business models emerge, the stronger will be the case to reform of the IP system.

#### *4.1b) Creative Commons has a “non-commercial” option*

Another criticism that is presented against Creative Commons is that the project offers different “levels” of licenses. For instance, one of the most popular Creative Commons licenses allows the free dissemination of the intellectual or creative work, but not for commercial purposes. This “non-commercial” license has been criticized by different academics and activists, who would say the non-commercial clause makes the license not “free enough”. This is a criticism that takes place, for instance, among the free software community, which adopts and defends one single model for licensing software, represented by the GNU General Public License<sup>49</sup>.

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<sup>49</sup> <http://www.gnu.org/copyleft/gpl.html>

However, the “non-commercial” license has proven very important in practice, especially in developing countries. The first element to be considered is the fact that cultural artifacts work differently than software. One might not use the same criteria for evaluating software licenses as for evaluating the licensing of a song, a film or a photograph. Additionally, if one agrees that an important public interest objective of discussing new intellectual property models is the goal of building a more open and decentralized society, where the barriers between producers and consumers of culture are irrelevant, and above all where everyone is invited to participate, then the non-commercial license becomes a very important step, especially in developing countries.

In developing countries such as Brazil, the “non-commercial” license is the type of license that actually empowers civil society to build channels for the dissemination and participatory building of information and culture. When an author chooses to license his or her works under a non-commercial license, what he or she is actually doing is allowing society at large to have free access to the work, with the exception of commercial institutions such as the traditional twentieth century media companies. In a developing country, this contrast and this particularity are important. As mentioned in the first portion of this paper, there are numerous symptoms of an ongoing crisis at the traditional twentieth century media in a developing country as Brazil. These media are failing to provide adequate channels for cultural dissemination and especially to provide adequate incentives for culture to be produced and circulated. The result is that cultural production is becoming increasingly disconnected from these traditional media forms. More than that, many traditional media companies are facing economic challenges in the twenty-first century, as they watch their business models transform dramatically.

At the same time, cultural production is migrating to civil society and/or the peripheries, which to a greater or lesser extent already operate in a “social commons” environment and do not depend on intellectual property within their business models. Accordingly, when an author licenses a work under a “non-commercial” license, important social players will be granted full access to the work: NGOs, schools, professors, telecenters,

cultural hotspots, libraries, cell phone users, “web 2.0” users etc. However, industry players such as the broadcast TVs, multinational labels, and movie theaters owners will not have access to this body of free culture.

In the long run, what the non-commercial clause allows is the creation of a massive body of free culture available to society at large, but not available to the twentieth century media industry unless a specific permission is granted by each individual author. In the software realm, a “one-size-fits-all” license that includes the permission for commercially exploiting the software piece is adequate for the dissemination of the knowledge within the software and the emergence of corresponding business models. However, in the realm of culture, things are more complex and this single model does not work. If the goal of promoting new business models and disseminating culture and knowledge is shared, then the non-commercial clause performs an important function in developing countries.

The example of Trama Virtual, mentioned above, illustrates this fact. The largest local Brazilian recording label, Trama, announced at the 2006 iCommons Summit<sup>50</sup> that they will provide the option for TramaVirtual website users to use Creative Commons to license their works. TramaVirtual has more than 35,000 artists at the website. Certainly, Trama does not want a competitor, say, a multinational record label to have access to this huge collection of recordings built in the past few years. Nonetheless, Trama does not care if society at large has access to this content. Accordingly, a “non-commercial” Creative Commons license is the model that allows a balance between the interests of Trama in receiving recognition for its efforts in building TramaVirtual, and the interests of society as whole in having flexible access to the content. At the same time, Trama is developing innovative business models around its open music catalog, which go beyond the sale of physical copies of the music to include sophisticated arrangements such as trademark licensing, as well as “wholesale” music licensing to cell phone companies, video-games, and other modalities that are benefited by the free availability of the

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<sup>50</sup> The iSummit Commons is the yearly Creative Commons community summit. The announcement was made at the iCommons Summit 2006, taking place in Rio de Janeiro. See [www.icommmons.org](http://www.icommmons.org).

content. The Creative Commons non-commercial clause is precisely the requisite necessary for Trama to allow experimentation with “free” models to distribute content, at the same time allowing it to innovate in terms of business models. The non-commercial license allows Trama to grant the at-large audience access to its content, online and without any form of technological protection, while ensuring that Trama’s commercial competitors cannot use the content that results from its unrestricted infrastructure. Thus, Creative Commons legally protects Trama from the competition of other players in the market while allowing it to develop innovative new business models, which are beneficial to society inasmuch as they involve open and technologically unrestricted content.

Accordingly, some criticism of the non-commercial licensing clause can be rebutted by practical examples taking place in Brazil. Criticizing this clause just for the sake of the “purity” of the copyleft movement would be an intellectual attitude similar to the positivist legal school thought at the end of the nineteenth century and first half of the twentieth century, which struggled for a “pure theory of law”. The nefarious consequences of this legal school of thought that were seeking for “purity” through a mere formalistic fashion can even today be felt in the many Latin American countries, including Brazil, where positivism played an important role.

#### **4.2 Creative Commons – Benefits from a Developing World Perspective**

Below I would like to highlight some of the benefits that the Creative Commons licenses can help to provide in developing countries, based on the experience with the project in Brazil.

##### *4.2a) Creative Commons has become a powerful brand*

Creative Commons has become a powerful brand, supported by millions: more than 140 million linkbacks to the Creative Commons licenses are currently counted. Additionally, the Creative Commons project has been able to build partnerships worldwide with



important institutions. There are more than 60 countries in which Creative Commons is now present, by means of a partnership with a local institution. A separate entity, iCommons, has been created to bring together the international Creative Commons community. While the original Creative Commons organization based in the United States is responsible for the legal maintenance of the licenses, the iCommons community brings together a diverse set of participants, including scholars, academics, activists, software programmers, and artists, as its constituents. In short, Creative Commons has become an important tool to promote discussions regarding the balancing of the intellectual property system in society as a whole.

#### *4.2b) Creative Commons brings people together who share the same values*

One of the most interesting aspects of Creative Commons in Brazil is the way it brings together different people, individuals, and institutions that share the same values in terms of promoting access to knowledge and access to culture.

As an example, the Creative Commons project in Brazil works in many instances with the Free Software movement, as well as hackers in general, lawyers, artists, journalists, bloggers, musicians, movie-makers, NGOs, and the government, to mention only a few. Traditional movements in the country, such as the consumer protection movement, have also begun to realize the impact that an unbalanced intellectual property regime has on consumer rights and consumer expectations toward cultural products.

#### *4.2c) Creative Commons promotes media decentralization*

Another very important feature of Creative Commons is that it works as a tool for media decentralization. As in most places, media ownership and access in Brazil is very concentrated. One of the short-term possibilities for the scenario to change is the emergence of the cell phone networks, as well as the emergence of digital radio and digital television, but even these networks risk reproducing the concentration model and content structure of traditional twentieth century media. Nevertheless, the first steps are

being taken toward the creation of a wireless broadband internet infrastructure that would be available to all. The year 2006 saw the beginning of discussions about opening public bidding for the construction of wireless broadband internet service countrywide.

If successful, this national internet infrastructure would make it possible for new media to emerge in a decentralized fashion. All this, considered alongside the fact that there is a huge interest in Brazil in collaboratively produced content, suggests a new possibility for culture and information dissemination in the country. By way of example, the social networking website called Orkut (operated by Google) has achieved tremendous success of in the country (Orkut indicates that there are approximately 15 million Brazilians on it, and 100% of the site's content is produced by its users). A significant portion of all the time spent by Brazilians on the Internet is spent at Orkut. The popularity of the social networking site creates a favorable environment for collaborative business models to emerge.

It is interesting to note that Orkut has become a phenomenon not only throughout the richest segments of the Brazilian society, but also among the poor areas in Brazil. In other words, the same peripheries mentioned above as the focal point for the new cultural production in Brazil are also using Orkut as a tool for communication and for sharing information and other relevant social data. Orkut has become a reflection of the Brazilian society, one still distorted by digital divide factors but becoming more and more accurate.

Another important element for media decentralization in Brazil is the role that Creative Commons plays in terms of securing the so-called "interoperability" of cultural content. One of the most important worries of the present day is the fact that cultural artifacts being sold digitally are protected by the so-called "DRM" (Digital Rights Management) systems. In other words, a song bought a particular music store might not work with a particular music player device, because the device was not certified by the music store. This creates economic inefficiencies in the music market, harms competition, and above

all, harms the consumers' interests in having flexible access to legally purchased digital content.

At the same time, Creative Commons-licensed materials can become a viable alternative for emerging media (such as cell phone companies, digital radio and digital TV), potentially making the adoption of DRM-based networks an inefficient decision. Creative Commons licenses include provisions that are violated if a DRM system is applied over CC licensed material, precluding the user from exercise all the freedoms guaranteed by the Creative Commons license. In other words, networks are compelled to technologically respect all the rights and freedoms established by the CC license: one can only use Creative Commons-licensed content if the DRM features do not conflict with the terms of the license.

Accordingly, Creative Commons licenses enable the creation of a catalog of free culture, which might then compete with the catalog of traditionally protected culture. This is important because one of the most powerful assets of the twentieth century media industries is their catalog of content. One might ask what would be the consequences if a decentralized catalog licensed under a Creative Commons license emerges, competing with and becoming as relevant as the "old" catalog of the traditional media, but without all the sort of restrictions such as DRMs imposed by the traditional industry. Usually, the power of the catalog is used by the traditional media industries to shape how new networks must be built (i.e. allowing access to their content only if the network complies with their DRM standard). From the moment a competitive and interesting body of free culture is built, a body that can compete with the traditional catalog, all the conditions are in place for the building of a much freer and open structure for the media, especially in developing countries.

*4.2d) Creative Commons can help bridge the gap between the "social commons" and "legal commons"*

As demonstrated above, the copyright-based industries in Brazil (and in many other countries) are failing to provide the adequate channels for promoting local content and for the dissemination of culture and knowledge as a whole. From the standpoint of a country with a thriving cultural scenario such as Brazil, this is a highly unsatisfactory situation. The result is the fact that many vibrant and important cultural scenes in the country are taking place in the peripheries, as described above with the tecnobrega case.

That is precisely where Creative Commons comes into play. There is an enormous demand for the dissemination of the culture being produced in Brazil in all fields. The majority of artists simply do not care about copyright protection, because their ultimate goal is to be seen, read, and heard. This explains, for instance, why Creative Commons has been significantly used in Brazil.

Additionally, this extreme situation in which the traditional cultural industry failed to provide adequate channels for cultural businesses has created an environment where “open business models” are becoming the standard business model for cultural production. The term “open” in this case refers to models in which copyright is not a factor, or plays a secondary role. This is the case for different forms of “brega” in the Northeast and North regions in Brazil (the brega in Pernambuco, the “cybertechnobrega” in Belém do Pará, the electronic forró in Ceará, the forró scene in Manaus, and so it goes).

Considering that one of the most important problems faced not only by Brazil but also by several other developing countries is how to bring “formal” business practices to the so-called “informal” economy, Creative Commons has a role to play in the process in regard to intellectual property practices. Creative Commons provides a simple, non-bureaucratic structure for intellectual property that might help to integrate the massive marginal culture that is arising in the peripheries with the “official”, “formal” structures of the Brazilian economy. Even if this role is not important at present, because the majority of the peripheral cultural scenes operate at the margins of intellectual property (under a

“social commons” regime), in the near future Creative Commons might provide the way for these emerging cultural forms to find their way online when broadband internet becomes widespread in the country.

## **5. Final Remarks**

Developing countries are seeing their traditional twentieth century media fail in the promotion of viable incentives for cultural production and cultural dissemination. At the same time, two forms of cultural “commons” coexist in developing countries. The first is the “social commons”, that is, social situations in which for numerous reasons intellectual property is not enforced, does not exist, is unfamiliar, or is irrelevant. Different business models are emerging from the “social commons”, especially because the most marginalized populations in the developing countries (the “peripheries”) are appropriating technology in order to produce their own cultural industries. In other words, in many places in the developing countries, technology, and its possibilities for sharing and freely disseminating content, has arrived earlier than intellectual property. More than that, the appropriation of technology on the part of the peripheries creates initiatives that end up helping to bridge the digital divide in an autonomous, bottom-up fashion, such as the LAN house phenomenon in Brazil.

It is important to mention that the idea of “social commons” is not a peculiarity of the developing world. It does not imply a dichotomy between the rich North and the poor South, or even between the idea of “center” and “periphery”<sup>51</sup>. The “social commons” exist in rich or poor countries, at the center or at the peripheries. For example, for many years in the beginning of the computer industry, software was held as a “commons”. The transformation of software that was originally “free” into a proprietary good (as it happened to the UNIX operational system), as described by Lessig<sup>52</sup>, was perceived as an action of enclosure. The reaction was Richard Stallman’s creation of the Free

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<sup>51</sup> For the discussion between “center” and “periphery” in Brazil, cf. VIANNA, Hermano, *Paradas do Sucesso Periférico*, in *Revista Sexta-Feira*, nr. 8, 2006, Editora 34, available also at <http://overmundo.com.br/banco/paradas-do-sucesso-periferico>

<sup>52</sup> LESSIG, Lawrence, *The Future of Ideas*, Random House, 2001, pp. 51-72.

Software Foundation and the beginning of the free software movement, which aimed to reclaim the idea of “freedom” for software in an effort to bring it back to the commons realm.

At the same time, the “open” business practices emerging in the peripheries of the developing world’s cities are similar to those taking place in the peripheries of the developed world cities. In this sense, the vibrant “mixtape<sup>53</sup>” markets in New York<sup>54</sup> and London operate under fundamentally the same logic as the emerging markets in peripheries in Brazil and elsewhere. They both face the challenge of “informality” and “illegality”, and circumstances where intellectual property is not expected to apply.

Finally, peer-to-peer file-sharing networks also contribute to the dissemination of “states of exception”, rendering the enforcement of intellectual property difficult. Peer-to-peer networks can then be seen as one of the forces promoting the globalization of informality/illegality. In this sense, different forms of “social commons” can be increasingly found on a global scale. As the Brazilian anthropologist Viveiros de Castro points out in a recent interview, making reference to Stefan Zweig’s book *Brazil, Land of the Future*:

Someone was talking the other day about how capitalism is changing in the whole world, changing the work force, eliminating social security, generating informality etc. Someone else then reminded that all that has always existed in Brazil. I thought with myself, there is a general belief that Brazil will be the land of the future. That is wrong, the future is becoming Brazil. The future has not arrived in Brazil, it is the opposite. Like it or not, now everything is Brazil.<sup>55</sup>

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<sup>53</sup> For more details, see the article by DAMES, Matthew K., Mixtapes are no Longer Underground, available at [http://www.copypense.com/2006/04/mixtapes\\_are\\_no.html](http://www.copypense.com/2006/04/mixtapes_are_no.html)

<sup>54</sup> LEEDS, Jeff, Cracking down on Mixtape CDs, in *The New York Times*, January 22, 2007, available at <http://www.nytimes.com/2007/01/22/business/22mixtape.html?ex=1327122000&en=c1b3c63511e8e3ed&ei=5088&partner=rssnyt&emc=rss>

<sup>55</sup> CASTRO, Eduardo Viveiros, Saque/Dádiva, interview to Azougue Magazine, nr. 11, January 2007, [www.azougue.com.br](http://www.azougue.com.br).

At the same time, the “legal commons” structure is beginning to play a prominent role in Brazil. An example of “legal commons” is the Creative Commons project, which allows creators of content to license their works so that society can have access to them, according to the terms and conditions defined by the licensor. These legal commons instruments use the legal system in order to create a body of content that is free for certain uses, and can work as building blocks for the emergence of a truly participatory culture. Both the “social commons” and the “legal commons” can learn from one another, as the “Open Business”<sup>56</sup> project demonstrates, and both, together, can also indicate important alternate paths to those of the traditional media industries, which are struggling to renovate their business models in the twenty-first century.

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<sup>56</sup> [www.openbusiness.cc](http://www.openbusiness.cc)