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Towards the consolidation of digital content markets?

A case study of the music industry in Brazil

Leonardo De Marchi

Doctor in Communication and Culture at the Graduate Programme in Communication of the Federal University of Rio de Janeiro (UFRJ). Visiting Lecturer at the Faculty of Communications of the State University of Rio de Janeiro (FCS-UERJ). Brazil.

leonardodemarchi@gmail.com

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Abstract

In reaction to the distrust of the feasibility of a market for digital music, e-companies have presented new business models that generate value for this type of content. The access economy that characterizes them requires such businesses to compete with markets worldwide. As they start operating in a particular national market, they insert the works of local artists, record labels and music publishers into their virtual and global system. This presents commercial potentialities as well as cultural challenges. The article presents an explanatory case study of the Brazilian record industry from 2010 to 2015. Based on interviews conducted with different actors involved in the music industry, the objective is to understand this new composition of forces and the resulting tensions that characterize the Brazilian record industry in the digital age. In the concluding remarks, we underline some challenges for the music industry as well as for media and culture policies in Brazil.

Keywords

Digital content; Record industry in Brazil; Music e-companies.

Introduction

The figures presented on recorded music marketing show that the recording industry¹ is undergoing a new phase of its digitization. After years of mistrust regarding the feasibility of establishing a digital record trade in light of free file sharing and the subsequent loss of value of sound recordings, some digital companies have introduced new business models that can generate value for access to such digital content, such as virtual stores and streaming services (Herchmann, 2010). According to data from the International Federation of the Phonographic Industry (IFPI), its revenue has grown again in recent years. In 2015, it reached the milestone of \$15 billion, which represented a 3.2% increase over the previous fiscal year (IFPI, 2016). This was due not so much to CD and DVD/Blu-Ray sales, which are steadily declining, but rather digital activities (paid downloads, streaming and podcasting), which accounted for 45% of the industry's total revenue in 2015.

The access economics that characterize these new digital platforms require the creation of large-scale demand-driven markets. This forces such companies to compete in international markets. iTunes, YouTube, Deezer, Spotify, SoundCloud, Pandora, etc. are services that have established themselves in several countries, in almost every continent. As they begin operating in a particular market, they insert the works of local artists, record labels and publishers into their virtual and global digital content system. This presents a range of commercial potentialities, as well as cultural challenges.

Although digital platforms identify themselves as providers of information services, claiming not to interfere with music production, it is clear that they affect key aspects of the music economy as they play a leading role in the music industry. In the end, they define the value of access to digital records, establishing the amount of money paid to content producers, regulating the kind of music that is accessible to the public through their algorithms, or demanding reforms in copyright laws, among other aspects. Therefore, what could the consequences of inserting these new global players into the communication and culture market be for local music industries?

¹ The 'music industry' is defined here as a complex of activities dedicated to the production and marketing of sound reproduction technologies, whose contents are constituted predominantly, but not exclusively, by musical repertoire, subject to legal regulation through intellectual property rights. It is a specialized part of other activities that form the so-called 'music industry.' Their products (records and/or video) acquire functionality only when they are consumed with reproductive devices (hardware), which requires the coordination and compatibility between their production chain and those of businesses that would otherwise not have any intelligible connection to one another, i.e., the electronics, telecommunications, entertainment, computer and music-related industries (concerts, publishing, musical instruments, etc.).

To answer this question, we must observe particular cases. In this sense, Brazil presents itself as an interesting example. The 2000s can be classified as the 'first phase' of the digitization of its phonographic market, characterized by experiences conducted by local digital companies (startups) and autonomous artists (who manage their careers without having a contract with record companies) who developed the first digital content distribution platforms (De Marchi, 2016). For a number of reasons, these ventures failed to establish a profitable and secure digital music market. Since 2010, however, the country has witnessed a continual influx of digital global companies, which have given a new impetus to the digital music market, opening the 'second phase' of the digitization of the local music market.

At this stage, global digital companies demand a profound adaptation from publishers, record companies, artists and the media, as well as local startups themselves, to their *modus operandi*. First, they require local digital companies either to become service providers for their platforms or to terminate their activities. They demand that publishers and record labels alike be technologically suitable to their payment reports. Because they are also platforms for the consumption of digital musical content, they begin to compete with local radio and television companies in the digital environment. This movement is due to the fact that these companies have already taken a leading role in the local market – in 2015, digital commercial activities accounted for 60.96% of the total revenue of the local music industry thanks to the performance of platforms such as iTunes, Spotify and YouTube, according to the Brazilian Association of Disc Producers (ABPD, 2016).

In order to understand the characteristics and consequences of this phase, an exploratory case study of the Brazilian phonographic market was conducted in the period 2010-2015². Adopting economic sociology³ as a theoretical reference, it is assumed that all economic action is rooted in social and cultural relations, which makes economic decision an inherently political action (Fligstein, 2001). In particular, it is understood that markets function as fields in which economic agents vie for specific economic opportunities (De Marchi, *op. cit.*). This arena of conflicts

² This article also derives from the postdoctoral paper *"Inovação nas indústrias culturais na era digital: um estudo de caso das empresas eletrônicas da indústria fonográfica brasileira"* ("Innovation in the culture industries of the digital era: the future of the eco-empowerment of the record industry" (proceeding 2012/10549-7), developed between 2012 and 2015. The author would like to thank the Research Support Foundation of the State of São Paulo (FAPESP) for the postdoctoral fellowship granted, as well as the Department of Cinema, Radio and Television of the School of Communications and Arts of the University of São Paulo (ECA-USP) for supporting the research. In particular, the author would like to thank the kindness and professionalism demonstrated by the research supervisor, Prof. Dr. Eduardo Vicente.

³ Economic sociology is the application of frames of reference, variables and explanatory models of sociology to the complex of activities related to the production, distribution, exchange and consumption of goods and services. This approach is also defined in opposition to the belief in the abstract rationality of the neoclassical economic theory, as well as the emphasis on the labor-value theory of the political economy. On economic sociology, cf. SMELSER; SWEDBERG, 1994.

of interest is structured based on the relations of domination between established, dominant and dominated agents. Nevertheless, at times, new agents enter the field, presenting themselves as challengers, e.g. entrepreneurs (introducing innovations to the market), initiating a process of transformation of the compositions of power in the field through the introduction of innovations⁴. At the end of this creative destruction, a new order of domination is established. Thus, the purpose of this article is to understand the new composition of forces that characterizes the Brazilian music industry in the highlighted period.

Two techniques are noteworthy in relation to the research methodology. The first is classified by Jean Claude Kaufman (2013), based on comprehensive interviews. Drawing on the method of understanding (*verstehen*), this type of interview should enable the researcher to analyze the meaning that each individual attributes to his or her actions. As Alfred Schütz (2008) defines *verstehen*, the subjective meanings that social actors attribute to their actions derive from the historical and social context into which each individual is inserted, presented as an objective reality. Thus, each speech delivered by an individual can be understood as a text that allows the interpretation of both the personal motivations and the sociocultural context into which the interviewee is inserted (Ricoeur, 2011). In order to achieve this, we chose to conduct individual interviews with a semi-structured script. The purpose was to induce informants to carry out a reflexive exercise based on themes that are developed in the interaction with the interviewer, before a tape recorder⁵. For the research that provides the foundation of this article, we approached 24 individuals, including agents of the Brazilian and international music market, politicians and employees of the Brazilian government.

The second technique is the analysis of data provided by the reports on the international (IFPI) and Brazilian (ABPD) phonographic markets. It should be noted that, besides the interest in the figures themselves, the discourse on the digital market was analyzed by entities representing the music industry. It is understood

⁴ 'Innovation' is defined precisely as a new combination of elements that produces some other type of product, production technique, distribution or consumption practice that necessarily has a disjunctive effect in relation to the current commercial and cultural practices of the market in question (Cf. De Marchi, 2016).

⁵ The materiality of the medium in which the dialogue between interviewer and interviewee is established is an important aspect for the analysis of the data. The awareness that the interview is being recorded (and that this speech can be turned into text) causes the interviewee to play a role before the recording device. Each recording is a performance conducted for the machine, on which the researcher must build in advance a text that is based on this experience. Thus, the idea of obtaining 'truth' in fieldwork becomes inadequate. In fact, it matters little if the interviewee lies or says what they believe to be true. What Kaufman (2013, p. 103) defines as the 'logic of the production of meaning,' i.e., how each agent builds a narrative on a particular subject, is of interest. It is not a matter of countering the informant's speech, but rather of understanding a singular and momentary expression that can allow the interpretation of the action of a specific agent and/or the wider context into which he or she is inserted.

that such publications operate as 'fictions,' as defined by Jens Beckert⁶ (2013), creating an image of the status of a market, which enables economic agents to make decisions based on projections that may or may not be realized⁷.

The text is divided into two subsections. The first is the entry of international digital companies into the local market. Following that, we address the changes in laws affecting the digital music market. In the final remarks, challenges for the local music industry are highlighted, as well as for the communication and culture policies in the country.

Consolidation of the Digital Phonographic Market in Brazil? International Digital Companies and Conflicts of Interest

Throughout the 2000s, innovations introduced by Brazilian entrepreneurs (startups and autonomous musicians) sought to develop the first systems for the distribution of digital records. Despite the potentialities of the technical solutions presented by these agents, they were not able to develop an autochthonous model for the digital content market, for various reasons to be discussed in detail at another time (De Marchi, 2016).

The Turning Point: The Entry of International Digital Companies

Nevertheless, two events mark a turning point in the trajectory of the digital phonographic music market in Brazil. These are the agreements between Google and the Central Office for Copyright Collection and Distribution (ECAD) and between

⁶ It should be acknowledged that the official reports present methodological problems. In the case of the phonographic industry, the IFPI documents are prepared based on the national surveys conducted by associations affiliated with the federation. Each country has different methodological problems in data collection (on the ABPD case, cf. De Marchi, 2016). Nevertheless, the data, as well as their interpretations contained in this type of report, are an important indication of the understandings given by the agents of this market regarding the circumstantial situation of their business. In other words, these documents function as fictions, a term defined by Beckert (2013, p.222) as projections of present and future situations that provide guidance in economic decision-making, despite the uncertainty inherent in the future. Fictions do not have to be true, but convincing, which implies that economic action also originates from emotions based on this fictional narrative.

⁷ Therefore, the fact that the figures themselves indicate the growth or retraction of the phonographic business is less important than the impression of the field's dominant agents as to whether these figures reflect a situation considered by them to be 'positive' or 'negative' for investment.

Apple and the Brazilian Union of Music Publishers (UBEM). Although YouTube⁸ had been serving Brazilian users since 2007, it was only in 2010 that an agreement was reached with ECAD for the payment of royalties for public performance. In 2011, Apple made UBEM its intermediary for the payment of related rights through iTunes⁹.

Although these agreements did not solve the problem of legal uncertainty in this market, they established a channel for dialogue between traditional players in the local phonographic industry and digital international companies. Unsurprisingly, other foreign companies began operating in Brazil as content (The Orchard, CD Baby, and Believe Digital) and streaming service aggregators (Deezer, Rdio, Spotify and Tidal, among others), shortly after these two major players began activity in the global digital content market. In fact, this causal relationship was made explicit during interviews conducted for this research. As the CEO of one of the most important international aggregators defined¹⁰:

When we make the decision to invest in a territory, when we look at the next market to do business in, we look at a number of factors. One of these factors is, as regards the digital music market, the introduction of iTunes. This factor alone is able to turn a place that did not make money into somewhere profitable. In addition, there is the entry of other agents, such as YouTube, which provides income from advertising, as well as Spotify, Deezer and other services that are successful in other territories. When they enter a territory [...], boom, a market is created in [about] two years. (Interview given on 4/20/2013. Translation by the author)

A similar response was given by the CEO for Latin America of another aggregator, also with foreign capital. When asked how he managed to persuade company directors to invest in the country, he noted:

The [company for which he works], as well as others with whom I spoke abroad, [had similar reactions when this individual proposed that they begin their activities in Brazil]. The first reaction was:

⁸ Although YouTube was intended for the audiovisual industry, the feature of being fed content generated by its users has allowed it to become a platform used for music consumption. YouTube is currently one of the main sources of access to music in many countries. According to the market survey published by the International Federation of the Phonographic Industry (IFPI, 2016b, p.10), 82% of users generally use it to access music (this number increases to 93% among users in the 16-24 age range).

⁹ UBEM is a collection society created in 2010, bringing together the main publishers in Brazil, notably multinationals (EMI Songs/Tapajós, Warner Chappell Edições Musicais Ltda., Universal Publishing/MGB and Sony Music ATV/SM). The entity was created with the obvious purpose of becoming the 'one-stop-shop', as per the market jargon, for Apple in Brazil.

¹⁰ During the research, some discomfort was identified on behalf of the sources that work in the phonographic market in relation to the publication of their speeches in scientific articles. To give informants greater security, we agreed not to publish the names of those interviewed.

"Wow, Brazil! Rio [de Janeiro]! Caipirinha!" [laughs]. [...]. The second [reaction] was: "Ah, Brazil is in the spotlight now..." But, are you going to Brazil? [...]. They said, "It's hard to open an operation there, right? It's an expensive, costly operation, without clear rules for investment, [with] too much taxation, very difficult to do business" [...]. On the other hand, [they said], "We have to go to Brazil!" Why? [...] The guys look at the big numbers. So, the guys look and say, "You have to be [operating in Brazil] because the country has a GDP of X, a growth rate of Z, it's one of the BRICS..." [...]

So, what I think happened to the companies abroad – and I say that because I think it's going to happen here – is that they all came together. "Look at iTunes making sales. Where is it making sales? Oh, it's [in country X], so let's go there." So, when those guys land here, pal, they bring investment funds with millions and millions of dollars. When I tell you that the business has to work, music has to work... you've got to invest the money. (Interview given on 5/29/2013).

The beginning of the operation of these global companies has changed the assessment of the traditional players in the local phonographic industry in relation to the digital market, urging them to negotiate with these platforms as they had not done before with the domestic digital companies. As the last sentence stated by the informant suggests, international companies had sufficient economic capital to generate revenue through the advance payment of royalties from copyright, something impractical for local startups. In addition, they offered access to the global market, as suggested by the president of an independent Brazilian label:

There are a lot of "gringo" [foreign] companies, because they have the technology, really. They also have a bigger market. As is already happening in the U.S. but not in Brazil, there is a stimulus for investment and [the] development of tools. Here, however, the market is constricted. (Interview given on 2/15/2013)

This, however, requires adjustments to the way international platforms work, including with regard to locally adopted business practices. For example, an effort was made to replace the free distribution of digital records with commercial strategies that generated income for access to such content¹¹, as noted by the label manager at the time of the interview, regarding a foreign third-party content aggregator:

I believe that the business model of O Teatro Mágico [an autonomous group] is old. The model of giving out things for free is outdated. I think artists should have a more diversified model. If

¹¹ During the 2000s, autonomous artists (i.e., without contracts with record companies) adopted the free distribution of their records as a commercial strategy to attract consumers (De Marchi, 2016).

you want, you can put something out for free, but do not give away everything for free, because you also have to educate the public. Nowadays, you just have to give a little [money] to listen to good music, giving something back to the artist. [...] I think artists should be able to choose whether to give it for free or not, and at this time [of free file sharing on the Internet], they cannot. (Interview given on 5/14/2013)

The interviewee's speech is interesting not because it 'reproduces' the discourse of her company, but rather because it synthesizes a worldview of the business world of challenging agents in the field who vie with other entrepreneurs. After all, the entry of these international digital platforms implies the importation of a business model agreed on the global scale, which problematizes understandings deemed obvious for the marketing of music at the local level, causing a chain of random consequences.

Such random effects can be easily identified in competitive relationships with other agents in the local market. For instance, the presence of these global companies quickly changed the conditions of Brazilian digital platforms. As soon as iTunes began its operations in the country, Brazilian virtual stores, such as iMusica and Mercado da Música, stopped operating as retail platforms. Competition extended to the highly profitable mobile market. While, during the 2000s, iMusica virtually monopolized this market niche (De Marchi, op. cit.), most mobile operators in the following decade began contracting the services of international streaming platforms: Oi signed an agreement with Rdio, TIM contracted Deezer, and Vivo began relying on the Napster/Rhapsody services. These contracts mean that such platforms have indirectly gained access to a large number of users who pay for the services of mobile operators. Consequently, in 2014, Claro (América Móvil, from Mexico) acquired the shares of iMusica, turning it into part of its company.

Unusually, this entry into the digital telephony market has also created competition with local broadcasting companies. As the Brazilian population began using mobile phones to access digital music content, they began to rely more on digital platforms, as opposed to online versions of traditional radio or television stations, as music services are already listed as part of their mobile plans. Furthermore, according to the current Brazilian telecommunications legislation, digital companies provide information, or over-the-top (OTT) services, as per the technical nomenclature. This type of company is exempt from regulation by the state for not demanding access to scarce resources, such as electromagnetic waves. On the contrary, broadcasting companies are regulated and required to invest in telecommunications infrastructure, paying different taxes. Thus, when broadcasting companies turn to the digital environment, they find themselves at a

great disadvantage in relation to global OTTs. In the case of music, an immediate result involved radio stations, which stopped investing in music for their online versions, prioritizing variety and news programs (Kischinhevsky; De Marchi, 2016). If it remains unchanged, this trend may turn global digital platforms into the main intermediary of the Brazilian music market.

Institutional Transformations, Yet Without Legal Certainty

Such disputes become more dramatic as the regulatory frameworks of the field experience an unrestrained process of change. While, during the previous decade, one of the most serious problems for the consolidation of the phonographic market was the complete lack of changes to its regulatory institutions, it is also true that the changes carried out in the following period did not contribute to ensuring greater legal certainty to entrepreneurs. In any case, two news items are worth mentioning: the Collective Copyright Act (Act 12,853/13) and the Civil Rights Framework for the Internet (Act 12,965/14).

The issue of collective copyright management goes beyond the debate on the phonographic market, but rather is a decisive aspect of its development. This convergence was evident when digital remote access companies (Internet radio and streaming services) began to dispute the legality of ECAD's charges. According to Pedro Francisco and Mariana Valente (2016), the first case of relevance in this sense was the case filed by ECAD against the former Rádio Oi, which belonged to the mobile operator Oi (Brasil Telecom S.A./Portugal Telecom). This airwave-based radio station had an Internet version, through which it offered content in the webcasting and simulcasting modes¹². During the trial, ECAD demanded that the digital platform pay the proceeds for the public execution of both modes. Rádio Oi, in turn, argued that the charge to the programming also broadcast in airwaves constituted duplicity. In the first instance, the defendant won. ECAD appealed, and it was then defined that the simulcasting mode fit the definition of public execution, while webcasting did not. In this case, ECAD should make the charge for what was deemed a private execution. Such a decision created a case law that, in practice, removed ECAD's right to negotiate with digital platforms using only the webcasting mode. Unsurprisingly, other streaming platforms were later exempted from paying

¹² Webcasting refers to the mode of access to digital content through the remote transmission of data packets in which the user individually chooses the content they wish to access, not being required to see and/or listen to a program predefined by the electronic platform. In the case of simulcasting, the user accesses only content pre-programmed by the company, without the possibility of selecting other content according to their wish.

the office, such as MySpace and Terra Sonora, as well as allowing YouTube to question the need to pay ECAD¹³.

Simultaneously, ECAD suffered political defeats. At the completion of the Fourth Parliamentary Inquiry Commission (CPI) into the office, a final report was published containing evidence of a series of crimes, such as ideological falsehood, tax evasion, gang formation and abuse of economic power, among others (CPI, 2011). This report would comprise the base for Draft Law (PL) 129/12, which would later be approved by the Legislature in the form of Act 12,853, of 2013. According to the text, ECAD would be maintained as a private, non-profit entity. A provision was made, however, for the transparency of the entity's procedures. Taken together, these procedures can significantly alter power relationships within the entity. As one agent involved in the drafting of the law explains:

The first question [...] is the [differentiation between] the original owners and the right holders. Who are the original owners? They are those who actually create: authors, composers, musicians [performers] and even producers, who at least hire the musicians and arrangers to create a record. Performers, musicians and producers alike are the original owners of the rights. [...] Publishers are referred to as derivative holders because, by signing publishing contracts with creators, they are able to manage those rights in a derivative manner. Therefore, when making this differentiation in the law and establishing that only the original copyright holders may hold management positions in societies and ECAD, the law prevents publishers from exercising the management of entities [...] This is an obvious and straightforward development, which is certainly a disturbance for publishers and is being subjected to this [Direct] Unconstitutionality Lawsuit..." (Interview given on 4/10/2014).

As the interviewee points out, ECAD filed a Direct Unconstitutionality Lawsuit (ADI 5,062) at the Federal Supreme Court (STF), as it considered that the law allowed the state to interfere in a private entity. On October 27, 2016, however, the STF decided against the ADI request, by 8 votes to one.

In the midst of ECAD's crisis of legitimacy, collection societies attempt to take on the revenue collection in the digital market. One of the most traditional entities, the Brazilian Union of Composers (UBC), has been equipped to handle digital companies. It became one of the shareholders of a failed development project for an international music repertoire database, the Global Repertoire Database, which should have facilitated data matching for member companies. The

¹³ In a ruling on March 23, 2017, Minister Villas Bôas Cueva, of the Superior Justice Court, ruled that ECAD may charge copyrights from digital platforms that broadcast Internet television as webcasting, as well as simulcasting.

directors of UBC, therefore, hoped that this system would ensure massive technological capital gains for the association, enabling it to take on a role for which ECAD was technically and legally unsuitable¹⁴. As one board member explained in an interview given for this research:

In Brazil, this interactive service [made by BackOffice] on the issue of reproduction and distribution rights is controlled by this group of publishers, which is collectively managing it through its association [the UBEM], which is only a trade organization aiming to establish a market. They do not have 100% of the repertoire, however. That is because a considerable portion – say, 10% – of the circulating repertoire is not owned by the members of that organization. [...] Above all, there is the European BIEM repertoire, which, as representatives of the publishers, cannot have the 100% in terms of reproduction and distribution, as it belongs to foreign societies.

So, you have an organization like UBC, at which I have developed the phono-mechanical, reproduction and distribution [rights] department here, aiming solely at digital rights. So, I have contracts with these BIEM societies and with companies that have phono-mechanical rights [...]. In theory, part of these rights in the foreign repertory, even if they represent the original publisher [in the country of origin of the work], the sub-editor here is not able to charge everything. They may charge one part for the publisher, but the part that belongs to the author, who is a member of the BIEM society, has to stay with me [UBC]. So, when that [digital record sales] report comes in a DDEX format [...] (this DDEX is all a language exchange compound with plenty of information.) So, they have modules. They have a module intended to provide [information on] the recording itself. [...] So, iTunes, Spotify, Deezer, or Muve send a DDEX to Brazil, to the organization of that publishers' association. They then account for distribution and reproduction rights of everything. One part will thus remain [staying out of that distribution of information and, probably, the money to be distributed to the publishers and authors], as they cannot charge what they do not have. So, you will have a margin of about five to ten percent of the repertoire used in limbo. [...] UBC is currently entering this limbo today. (Interview given on 4/19/2013)

The problem with this system lies in the fact that the payment of income goes through several agents, taking up more time and becoming more opaque for the owners of the works. Precisely because it is confusing, there is no guarantee that everyone will be able to find their money in this legal and technological limbo.

Another important regulatory change was the approval of Act 12,965 of 2014, also known as the Civil Rights Framework for the Internet (MCI). Regarding this discussion, two devices should be highlighted: net neutrality and network nonimputability.

¹⁴ In mid-2016, UBC released a note stating that it had contracted the services of the Argentina-based metadata solutions provider BackOffice Music Services to conduct the processing of the revenues related to reproduction and downloading rights.

Provided in Chapter III, Section I, Article 9, net neutrality is a device establishing no discrimination in relation to information traffic on digital networks, without distinction as to destination, origin, service, content, application, or communicational device. One of its purposes is to allow ISPs to offer band diversification, yet prohibiting blocking or limiting the speed of traffic within contracted packets. Thus, privileges are avoided for certain applications, websites or content, fostering free competition between OTT companies.

During the proceedings of PL 2,266/11, this topic generated strong resistance among mobile companies, as they understood that it harmed their commercial strategies, notably what is labeled in this market as zero rating. This commercial strategy allows customers, after using their entire franchise data, to continue accessing the Internet without penalty charges only through a certain application. This is because the mobile operator has an agreement with said digital company, not considering this use as part of the data package. Although mobile operators maintain that such a practice expands Internet access among social groups with less ability to pay for postpaid plans, it is undeniable that it favors certain digital companies. As the rapporteur for the bill, then Federal Deputy for the state of Rio de Janeiro, Alessandro Molon (at the time representing the Workers' Party) summarized in an interview granted for this research:

The point of the bill that generated the most resistance was definitely net neutrality. [This device] is fundamental to [preserve] the free, open and decentralized nature of the Internet. It goes, however, against the interests of the telephony companies, which provide and manage the cables that connect us to the Internet.

These companies wanted to be able to offer Internet in the form of pay TV. The idea was to create a basic plan, with an email only, on the grounds that this would democratize access to the Internet, because prices would be lower. Nevertheless, you would be charged an extra value for each service accessed other than the email. [...] That is to say, the complete experience that all citizens can have today would be the privilege of a few among the wealthier ones.

The lack of neutrality also opened doors for connection providers to make business agreements with certain services, to prioritize access to them. [...] Once again, major websites, with more resources, would be privileged. Internet users would then quickly access a [large newspaper] website, but would have a slower connection to see a more modest blog. This affects users' freedom of choice. The choices would be made by telephony companies, not the citizens. (Interview given on 4/4/2015)

During the processing of the PL, the ISPs' lobby was in effect able to guarantee the differentiation of data plans, creating a loophole in the law, which

may favor international streaming services, as they provide the technological infrastructure for the mobile operators.

Another controversial issue was net non-imputability. In Section III, Article 18, the MCI establishes that ISPs should not be held liable for damages arising from content generated by third parties, establishing that punishments should be dealt to those who committed the crime. Article 19, however, establishes that, in order to be completely exempt, ISPs should comply with judicial notices that require that such content and/or websites be taken down (a device known as notice-and-take-down in similar legislations). Nevertheless, there are several situations in which there is no clarity as to whether the removal of digital content constitutes a breach of the net neutrality rule. This issue becomes particularly opaque when the situation involves copyright infringement. As noted by Mariana Valente, the provision regarding the blocking of data packets from servers hosting illegal content involves three problems:

The first is of an interpretive nature, and concerns the exceptions set out in Article 9 on the principle of neutrality, which does not include the blocking of specific server data packets, for the pursuit of other purposes that may be understood as desirable. [...] The second problem is political: to establish, under the regulation of the Civil Rights Framework, a regime for the prosecution of contents that breach copyrights would mean an anticipation of the discussions that must be established democratically about how best to achieve the objective, taking into account the rights of citizens. [...] The third is linked to historically established disputes around the protection of business models based on copyright exploitation versus technological innovation and other legitimate interests. Packet blocking with the aim of blocking access to services altogether may not differentiate between lawful and unlawful uses thereof, which may mean openness to the censoring of legitimate content. [...] The identification of specific content from certain sites [...] raises serious concerns regarding monitoring. (Valente, 2015, p.21)

These shortcomings of the MCI draw attention to one decisive aspect: the maintenance of Copyright Act 9,610/98¹⁵. It is clear that even the innovations that the MCI presents for digital communication do not result in legal certainty for the digital content market, as a change in line with the culture market legislations is necessary.

¹⁵ The original MCI PL contained a chapter on copyrights. Nevertheless, the subject caused so much discussion behind the scenes of the National Congress that its rapporteurs decided to withdraw it, leaving the task to a new copyright law in the future. During their tenures at the Ministry of Culture, both Gilberto Gil (2003-2008) and João Luiz "Juca" Ferreira (2008-2010/2014-2016) strove to enact a new legislation on the subject. Although bills were presented, they were never put to a vote.

Despite these impasses, the figures presented by the ABPD in the analyzed period show that the digital sector has gained prominence in recent years. In general, the growth of the local phonographic industry was resumed. While its total revenue was \$347 million as of 2010, this number increased to \$ 581.7 million as of 2014 (ABPD, 2015). A closer look at the vectors that compose this figure reveals that the sale of physical records follows its systematic decline, but the digital sector presents a sustained growth. In the period 2010-2014, its revenue increased by 404.45%, from R\$53.9 million to R\$218 million. In the period 2010-2015, its share in the total revenue of the music industry rose from 16% to 60.96% (ABPD, 2016), surpassing, for the first time, physical media sales. This performance can be understood by looking at each category that makes up the digital market:

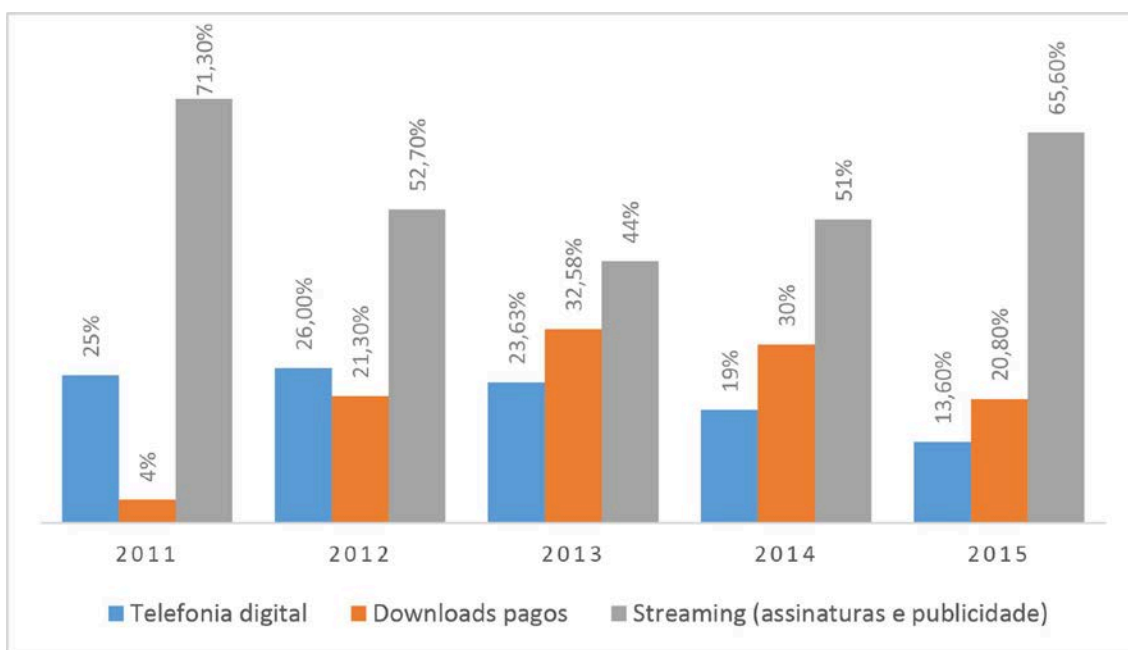


Chart 1. Collection share among digital formats, 2011-2015.
Source: ABPD.

In this figure, a few factors are worth mentioning. First, we see the robust growth of paid downloads from 2011, when the iTunes Store opened in Brazil (although it soon stabilized). The second factor is the importance of streaming services. After losing ground to paid downloads, streaming recovered its leading position starting in 2014. Finally, we can see the decrease in revenues from mobile telephony. After accounting for about 96% of the digital sector's revenue, in 2006, this category reached 13.6% less than ten years later (we must consider, however, that music consumption via mobile phones is carried out via streaming, which can lead to distortions in that figure).

More important than the figures themselves, however, is the fact that such data indicates that the Brazilian digital market already has characteristics that are common to the global scenario: the increasing importance of digital trade in the general revenue of the industry, particularly through remote access modes other than paid downloads. Nevertheless, it is not possible to state that the digital market in Brazil is consolidated, as there are delicate situations to be properly addressed.

Final Remarks

One of the main obstacles in the digital phonographic market is the distribution of income from digital commerce. As argued, there is legal confusion over the way in which money from digital platforms should be attained and distributed among the agents of the Brazilian music market. In the absence of legal certainty, a certain urgency arises for technological updating among the traditional agents of the local phonographic industry, who seek to obtain their own technologies that communicate with the digital platforms. Major labels and publishers are already mobilizing to halt such technology. Small and medium agents, however, remain at the margin of this process, hoping that collective entities can represent them. Nonetheless, ECAD's capacity for action in the digital market is being discussed by the Judiciary, which has made decisions based on individual understandings, which derive from the outdated Copyright Act 9,610/98. Thus, such confusion may result in a disproportionate distribution of money to certain agents (those who have the technology to monitor their share of the payments), thereby increasing economic inequality in the Brazilian music market. Furthermore, we should look at the disputes between copyright holders in Brazil and global digital companies. The continual friction between the interests of these agents results in the threat of withdrawal of this repertoire from the digital platforms. It is clear that copyright owners and related parties should pursue what they consider to be an appropriate response. Nevertheless, as digital platforms replace traditional radio and television companies, there is doubt as to what will be the alternative for national artists to access their consumer market.

Another aspect to be observed is access to the works inserted into this global and virtual digital content system. The inadequacy of the Copyright Act in Brazil means that the insertion of the works of local artists onto global platforms is confusing, inconstant and slow, making access to such content difficult in national territory. This creates unusual situations, such as the existence of works by Brazilian artists that are digitized from records licensed abroad and are not

accessible to consumers through the global platforms that operate in Brazil. Despite being a minority, this type of situation highlights the different threats to the cultural diversity of the digital music market. After all, how do we ensure access to the works of Brazilian artists on global digital content platforms by Brazilian consumers?

At this point in reasoning, one may assume that public policies are necessary to regulate such conflicts of interest. Brazilian politicians, however, also face considerable challenges: is it possible to regulate OTTs that function as global information flow systems? If so, would it be technically and legally feasible to regulate them as broadcasting companies? Or would it be more efficient if the Brazilian state proposed to be a distributor of content through public digital platforms? If the answer is yes, how to do it, since the costs of digitizing and maintaining digital files is high? If not, would it be of interest to propose measures that encourage the consumption of local music on these private platforms, such as the laws on broadcasting of 'national music'? But how do we make it, following a virtual and global business model based on algorithms?

These questions only point to the complexity of the challenges facing the Brazilian phonographic industry. Having failed to establish its own marketing model for digital content, its agents adapt in a disorganized way to the demands of a virtual and global business. As a result, the level of disputes between agents involved in this market reaches critical levels of volatility. Several bilateral articulations are being agreed upon or challenged at the same time (Apple and UBEM, streaming services and major publishers, YouTube versus UBEM and ECAD, etc.), even disregarding each other. None of these agents is sure as to whether their agreements will succeed, or for how long, and what the consequences will be in the near future. This creates a vacuum of identity in the field (it is unknown who are the dominant or the dominated entities), enabling the formation of diverse and unstable nuclei of power. It is not possible to be sure if these movements are a temporary phenomenon. Nor is it possible to predict whether institutional insecurity will hinder new investments in the Brazilian market. It is only possible to state that it is necessary to discuss the possible directions for this industry in the country.

References

- Associação Brasileira de Produtores de Discos. (2015). **Mercado Brasileiro de Música 2014**. Rio de Janeiro: ABPD.
- Associação Brasileira de Produtores de Discos. (2016). **Mercado Brasileiro de Música 2015**. Rio de Janeiro: ABPD.

Beckert, J. (2013). Imagined futures: fictional expectations in the economy. **Theory and Society**, 42 (3), 219-240.

Comissão Parlamentar de Inquérito. (2012). **Comissão Parlamentar de Inquérito destinada a investigar supostas irregularidades praticadas pelo Escritório Central de Arrecadação e Distribuição**. Brasília: Congresso Nacional.

De Marchi, L. (2016). **A destruição criadora da indústria fonográfica brasileira, 1999-2009**: dos discos físicos aos serviços digitais. Rio de Janeiro: Folio Digital.

Fligstein, N. (2001). **The architecture of markets**: an economic sociology of twenty-first century capitalist societies. New York/Oxfordshire: Princeton University Press.

Francisco, P. A., & Valente, M. G. (2016). **Da rádio ao streaming**: ECAD, direito autoral e música no Brasil. Rio de Janeiro: Azougue Editorial.

Herschmann, M. (2010). **Indústria da Música em Transição**. São Paulo: Estação das Letras e Cores.

International Federation of the Phonographic Industry. (2016). **Global music report**: music consumption exploding worldwide. Londres: IFPI.

International Federation of the Phonographic Industry. (2016b). **Music consumer insight report 2016**. Londres: IFPI.

Kaufmann, J. (2011). **L'Entretien compréhensif**. Paris: Armad Colin.

Kischinhevsky, M., Vicente, E., & De Marchi, L. (2015). Em busca da música infinita: os serviços de streaming e os conflitos de interesse no mercado de conteúdos digitais. **Revista Fronteiras**, 17(3), 302-11.

Kischinhevsky, M., & De Marchi, L. (2016). Expanded radio: rearrangements in brazilian audio media markets. **Radio, Sound and Society**, 1(1), 75-89.

Ricouer, P. (2011). **Hermenêutica e ideologia** (2nd ed.). Petrópolis: Vozes.

Schütz, A. (2008). **El problema de la realidad social**. (2nd ed.). Buenos Aires: Amorrortu.

Smelser, N. J., & Swedberg, R. (Eds.). (1994). **The handbook of economic sociology**. New Jersey: Princeton University Press.

Valente, M. G. (2015). Comentário Internetlab. In: Cruz, F.C. B., Marchesan, J. C., & Santos, M. W. (Eds.). **O que está em jogo na regulamentação do Marco Civil da Internet?** (p. 21). São Paulo: INTERNETLAB.