

THE CRIME OF COPYRIGHT VIOLATION IN BRAZIL:

APPLICATION OF THE CRIMINAL PRINCIPLE OF SOCIAL ADEQUACY

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In the legal sphere, the State called for itself the power to typify conducts that are socially intolerable and harmful to the rights of others. However, over the years, doctrinal currents have come to understand as admissible the conduct of those who violate the rights inherent to the author of literary, scientific and artistic works, based on the criminal principle of social adequacy. This precept excludes from the criminal tutelage all actions accepted by the community, as long as they do not offend constitutional principles. It is therefore argued whether such a rule would apply to the crime of copyright infringement, taking into account the already existing sphere of informality created parallel to the Law.

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I. INTRODUCTION

The Constitution of the Federative Republic of Brazil of 1988, innovated by establishing broadly in its list of fundamental rights- the freedom of intellectual, artistic, scientific and communication activity, independent of license or censorship, as well as the author's exclusive right to use, publish and reproduce their works for as long as the law fixes. Nevertheless, the constitutional legislator expressly provided for the defence and criminalisation of Brazilian cultural heritage in its Article 216,¹ including among them the forms of expression and, above all, scientific, artistic and technological creations.² It also explained that the Public Power in agreement with the society will protect the Brazilian intellectual heritage, by means of several cautionary measures.

In its original essay, written in 1940, Article 184,³ of the Brazilian Penal Code punishes the violation of copyright in cases of literary, scientific or artistic work. It was a blank criminal law, supplemented by civil law. However, legislative changes, especially in 2003, when the article was redrafted, expanded its scope of action, punishing any conduct that violates copyright and related rights. The author's rights, also known as 'copyrights', are protected through this criminalisation, especially with regard to the financial and moral interest that the Law recognises to the author of intellectual work, whether Brazilian or foreign. Such safeguarding is extended to works in the literary, scientific or artistic field, which are, in the words of Nélson Hungria, of a *quid novi*, that is, a new form of exteriorisation, an exclusive and unpublished creation.⁴

¹ According to Article 216 of the Brazilian Federal Constitution, the country's cultural heritage can be divided into assets of a material nature (which can be touched) and immaterial (intangible assets, such as rights), considered individually or together, as long as they refer to the identity, action and memory of the different groups that formed the Brazilian society, including in the cultural patrimony all forms of expression, ways of creating, doing and living, scientific, artistic and technological creations, works, objects, documents, buildings and other spaces destined to the artistic-cultural manifestations and, finally, the urban groups and sites of historical, landscape, artistic, archaeological, paleontological, ecological and scientific value.

² Still, according to José Afonso da Silva, the rights of culture comprise a set of norms that refer to culture, thus forming a normative system of its own, a branch of law. See JOSÉ AFONSO DA SILVA, *ORDENAÇÃO CONSTITUCIONAL DA CULTURA* (2001).

³ Article 184 of the Brazilian Penal Code creates the crime of copyright infringement, with the following wording: "Violating copyright and related rights: Penalty - detention, from 3 (three) months to 1 (one) year, or fine".

⁴ NÉLSON HUNGRIA, *COMENTÁRIOS AO CÓDIGO PENAL* 329 (1955).

This article discusses the possibility of applying the so-called penal principle of social adequacy to the crime of copyright infringement, provided for in Brazilian law, with the understanding that the principle stems from a true construction of doctrine and criminal jurisprudence, not from any provision in Brazilian legislation in force.

Its field of application is restricted to the cases in which society tolerates copyright infringement, since it is not uncommon for cases in Brazil where such conduct exists, as countless consumers end up buying counterfeit products. Thus, the Principle of Social Adequacy applies to cases in which the society understands that there is no injury to the legal good that is protected by the criminal law or, if there is an injury, it is unable to pass on to the criminal area, that need to be considered the *ultima ratio* in the Law.

Thus, it is a recurring feature in Brazilian law that the conduct of violating copyright and related rights would be socially tolerable, given that the collectivity would not incriminate, as an example, the seller of CDs and DVDs reproduced without the proper authorisation of the copyright holder. Such acceptance would be mainly due to the fact that there is a social consensus that, from this action, there would be a stimulus for the reduction of the prices of the products, which makes it possible for the acquisition by a large part of the society, generating a real sphere of informality.

The authors who support the impact of the Principle of Social Adequacy in concrete cases end up relying on other principles recognised in criminal law, such as the low lesivity of conduct, the minimal intervention (*ultima ratio*) or even the insignificance of conduct.

II. IMPORTANT CONCEPTS OF AUTHORAL LAW

Brazil initiated the protection of the author's interests from in Law no. 9.610 of 1998,⁵ in order to defend the authors and their intellectual works. The law was created with the idea that copyright is considered, for legal purposes, movable property. In addition,

⁵ In addition to the concept of author, Law n^o. 9.610 of 1998 formulated the juridical notion of co-authorship as a work produced by two or more authors, as well as participation in collective works, when several authors have their activities taught by an organiser, such as encyclopedias, legal and medicinal compendia, etc., respectively in Articles 15 to 17. The full text of law can be accessed at http://www.planalto.gov.br/ccivil_03/Leis/L9610.htm

it was conceptualised that an author that creates the literary, artistic or scientific work, was ensured the patrimonial and moral rights over the work created.

Both the natural person and the legal person may be holders of typical author rights. However, there is no doubt that only man, while being intelligible and unique endowed with earthly existence, has the ability to create and express himself through artistic ways.

Here, it is essential to bring some considerations about the concepts of Authoral Law and the inherent rights of performers, record producers and broadcasting companies, since they are the primordial elements of the present research.

A. Concept of Authoral Law

Firstly, the term 'copyright' was introduced into the Brazilian legal system by the philosopher and jurist Northeastern Tobias Barreto, a great student of the German language, to correspond to the Germanic word *Urheberrecht*, whose meaning is properly 'copyright'.⁶ Ownership of copyright belongs only to those who use the creative ability to conceive a work or to bring into existence material expressions formerly existing only in the field of thought. Thus, the intellectual work is the fruit of human creation, intelligence and imagination of all human beings.

It is with such words that some authors defend the notion that copyright is the only truly original branch of Law, because its existence depends on the creation of a proprietor. Moreover, although there is a difference between the author's association with work and the ownership of a particular work,⁷ certain legal writers understand that copyright is the only right that must be regarded as perpetual, since not even the end of life is capable of separating the work of the author. Thus, Law n^o. 9.610 of

⁶ See FERNANDO SHIMIDT DE PAULA, DOS CRIMES DE VIOLAÇÃO DE DIREITOS DE AUTOR, PONTIFÍCIA UNIVERSIDADE CATÓLICA DE SÃO PAULO (2009).

⁷ The expression "falling into the public domain" means that the work, be it literary, phonographic, artistic or scientific, will no longer generate typical effects of patrimonial law to its author. However, moral rights will be considered perpetual, and the State will have the protection of the components of the work, such as paternity and references. According to Deazley, Ronan, public domain "must be a place of refuge for individual creative expression, a sanctuary conferring affirmative protection against the forces of private appropriation that threatened such an expression". See RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE (2006).

1998,⁸ specifies that the author's moral rights, after his death, are transmitted to the heirs, so that they may continue their work, being able to claim the authorship of the work in the name of the dead author and also to ensure the integrity of the work, to any modifications that impair the reputation and honour of the author.

For a contemporary view of the legal system and its systematisation, Authoral Law is the new autonomous legal branch; notwithstanding its strict relation with the civilian institutes, which confers rights to the physical and legal person creating intellectual work or holders of author rights, so that they can enjoy the moral and patrimonial benefits resulting from the social and economic exploitation of their creations.⁹

Asserting the existence of this new branch and offering a doctrinal conception of Copyright Law, Carlos Alberto Bittar states that it is the branch of Private Law that regulates legal relations, arising from the creation and economic use of intellectual works aesthetic and understood literature, the arts, and the sciences.¹⁰

According to Gustavo Octaviano Diniz Junqueira, the concept of copyright is “*a complex of rights, moral and material, born with the creation of the work.*”¹¹ He also follows Elisângela Dias Menezes,¹² for whom it is a set of personal and patrimonial privileges, so that his original acquisition (appearance of the author's tutelage) is uniquely linked to the exercise of ingenuity and creative imagination, scientific, artistic and literary.

Finally, the civilian Maria Helena Diniz,¹³ testifies that it is nothing more than the set of prerogatives and rights of an extra-pecuniary and patrimonial nature that the law recognises and guarantees to every intellectual creator in what concerns his productions, as long as they have certain originality.

Therefore, copyright is born with the appearance of the work, raising the rights of protection of the innovative act itself, such as paternity, nomination and completeness

8 Lei Nº 9.610, de 19 de Fevereiro de 1998, Lei dos Direitos Autorais e dos Direitos Conexos (Braz.), http://www.wipo.int/wipolex/en/text.jsp?file_id=125393.

9 ECAD COPYRIGHT, <http://www.ecad.org.br/en/direito-autoral/o-que-e-direito-autoral/Paginas/default.aspx> (last visited Jul., 2017).

10 See CARLOS ALBERTO BITTAR, DIREITOS DE AUTOR (2003).

11 See GUSTAVO OCTAVIANO DINIZ JUNQUEIRA, ELEMENTOS DO DIREITO: DIREITO PENAL (2005).

12 See ELISÂNGELA DIAS MENEZES, CURSO DE DIREITO AUTORMAL (2007).

13 See MARIA HELENA DINIZ, DICIONÁRIO JURÍDICO (1998).

of the work. It is required, in order for the copyright to fall, that the work has a *quid novi*, to use the expression coined by Nélson Hungria, in his work. In other words, that the work is constituted as a new form of exteriorisation, an exclusive and unprecedented creation.¹⁴

Indeed, copyright has two facets: on the one hand, they can be considered elements of purely patrimonial order,¹⁵ as related to the creation of own works and solely for commercialisation or insertion in diverse work; on the other hand, an element of moral character, since it is limited to the authorship of the feat and the name of the creator or interpreter.

In fact, today, copyright is listed in Law nº. 9.610 of 1998, as follows:

I – to claim, at any time, the authorship of the work;

II – to have his name, pseudonym or conventional sign indicated or announced, as that of the author, in the use of his work;

III – to preserve the unpublished work;

IV – to ensure the integrity of the work, opposing any modification or practice of acts that, in any way, may harm or harm you, as an author, in your reputation or honour;

V - to modify the work, before or after it is used;

VI - to withdraw from circulation the work or to suspend any form of use already authorised, when the circulation or use implies an affront to its reputation and image;

VII - to have access to a unique and rare copy of the work, when it is legitimately in the possession of another, for the purpose of preserving its memory by means of photographic or similar process, in a way that causes

¹⁴ He means to say that the new work must be clothed with new creations - a real *ars nova* - whose characteristics are decisive for guaranteeing the state of originality and that it is possible to individualise it. From this point of view, there is a question of criminal protection of copyright only when the work appears as "new art". HUNGRIA, *Supra* note 5.

¹⁵ According to Maria Helena Diniz, "property law" refers to the legal branch that "has as its object properties susceptible of economic evaluation, being, as a rule, transferable or transferable". DINIZ, *Supra* note 14.

the least inconvenience holder, who shall in any case be compensated for any damage or injury caused to him or her.¹⁶

Added to this is the fact that the above mentioned law still mentions the perpetuity of copyright, which may happen even in the absence of successors. The legislator is bound to the end that the institute of copyright should be governed by the rules of property over material things. It is worth mentioning that this is a legal relationship that involves two aspects, based on patrimonial and personal or moral law, which ends up being a 'monopoly in time',¹⁷ since the author, and only him, can profit with the work until it falls into the public domain.

B. Concept of Neighbouring Rights

Neighbouring rights are those recognised in the categories that assist in the production or propagation of intellectual work. With the entry into force of the Criminal Code of 1941, there is a criminal type for the first time expressly referring to neighbouring rights, which are also called by the doctrine as 'related', 'analogous' or 'for instructors.'

Therefore, they are rights inherent to interpreters, performers, phonographic producers and companies practicing broadcasting, called by the French as *droits voisins* or by the Americans as *neighboring rights*. In this context, Eliane Y. Abrão, says that "*so-called rights related to the author, known as neighboring rights (droits voisins) in foreign terminology, are based on a tripod: artists, record labels and radio stations and television.*"¹⁸ The author points out that record labels and radio and television station make up the portion of multipliers and diffusers of the works, distributing them through the sales channels and giving access to the intellectual work.

It is to be said that Brazil only integrated the expression in the criminal law by force and influence of the international conventions such as the 'International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations', signed in Rome in 1961. Carlos Alberto Bittar while commenting on

¹⁶ According to Lipszyc, "Copyright is intended to protect representative form, externalisation and its development in concrete works capable of being reproduced, represented, executed, displayed, radio-tuned, etc., according to the genre to which they belong." See DÉLIA LIPSZYC, COPYRIGHT AND RELATED RIGHTS (1993).

¹⁷ See MARISTELA BASSO, O DIREITO INTERNACIONAL DA PROPRIEDADE INTELECTUAL (2000).

¹⁸ See ELIANE Y. ABRÃO, DIREITOS DE AUTOR E DIREITOS CONEXOS (2002).

neighbouring rights, states that: "(...) *in these conclaves, we have always had in mind the extraordinary number of capitals employed in the media, which circulate leisure, entertainment and culture, by infinitely distant and distinct publics and, as we have emphasized, by the fantastic mechanisms of reproduction and representation of (which offers us, among other forms, videodiscs) and various mechanisms of telematics (which, with the multifarious use of computers, has revolutionized the very conception of creation, often introducing new modes of communication of intellectual expressions).*"¹⁹

In addition, Law n^o. 9.610, of 1998, through Article 89 broadens the expression 'copyright', to include amongst the rights related to that of author, the rights of anyone who interprets or performs their own or other artistic work. Any artists, broadcasters and producers are included in the concept.

III. PENAL TIPICITY

The theory of crime has been modernised since the 1970s, with the advent of functionalist crime theories.²⁰ On the one hand, the German professor Claus Roxin brought to the discussion the teleological and functionalist theory according to which the criminal law exists for the purpose of preserving the juridical goods that are protected by law.²¹ On the other hand, Professor Günther Jakobs supports the systemic or radical functionalist theory, for which the function of criminal law is to maintain the system, preserve the norm, not legal goods.

The European doctrine, with emphasis in the German legal and doctrine, came to understand and classify the crime from an analytical criterion, which takes into account the elements that make up the structure of every crime, formerly treated in three subdivisions. Today, as argued by Professor Hans-Heinrich Jescheck, Wessels, Welzel,

¹⁹ BITTAR, *Supra* note 11.

²⁰ According to Masson, "Roxin's functionalism is concerned with the purposes of criminal law, while Jakobs's conception is satisfied with the purpose of the sentence, that is, Roxin's side is guided by political-criminal purposes, prioritizing values and guarantors principles, inasmuch as the guidance of Jakobs takes into account only systemic needs, and criminal law is what should fit them". See CLÉBER MASSON, *DIREITO PENAL: PARTE GERAL* (2014).

²¹ See CLAUS ROXIN, *DERECHO PENAL: PARTE GENERAL, FUNDAMENTOS, LA ESTRUCTURA DE LA TEORÍA DEL DELITO* (2006).

Winfried, Hassemer and Roxin,²² crime can be understood from a classification divided into four elements, namely: conduct, typicality, unlawfulness and culpability.

‘Criminal type’, as it exists in the Brazilian legislation, is the generic and abstract model, formulated by the penal legislator, which describes the conduct understood as crime or an allowed conduct. It is, therefore, the set of elements of the criminal infraction described by the law, but also the indication of the hypotheses in which the practice of a certain act is authorized. ‘Typicity’ represents investigation into the conduct to verify that it meets the requirements required by the legislator for the configuration of the crime. An example of this is the homicide crime in Brazil, whose conduct is specified by the words “*killing someone*”. That is, the ‘criminal type’ is the union of the two words, while ‘typical’ occurs when one practices what is prohibited by criminal law, consisting in killing a certain person.

However, type and typicality are not to be confused, for the former is a figure resulting from the imagination of the legislator, whereas typicality is the inquiry into whether a conduct presents the characters imagined by it.²³ In this sense, explains Jair Leonardo Lopes that, the type is a model of action, imagined and described by the legislator as a reprehensible occurrence in the reality of life, causing damage or exposing to danger a good or value, object of criminal legal protection.²⁴

The constant behaviours in the penal types, capable of subsuming a concrete event in the real world, are carried out through verbs, described both in the Penal Code and in special criminal legislation.

In this sense, Zaffaroni understands that the concept of the criminal type as an abstract model, reducible only to the action concretised in the world, is not a static concept, but possessing a descriptive nature. Such a view is linked to a poor liberal ideology, which wants the legislator to make a perfect instrument - the penal norm - so that the applicator of the norm only makes its comparison with the concrete case and the application.²⁵

22 See HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* (1998).

23 See, EUGENIO RAÚL ZAFFARONI, *TRATADO DE DERECHO PENAL – PARTE GENERAL* (2012).

24 See JAIR LEONARDO LOPES, *CURSO DE DIREITO PENAL: PARTE GERAL* (2005).

25 ZAFFARONI, *Supra* note 24.

The descriptions made in the penal types are abstract, that is, the type (*Tatbestand*, for the Germans), is not confused with the concrete fact. In this way, the interpretation of the criminal type is umbilically linked to the judgment, which must expose judgments of values about the action brought by the agent.

Indeed, the advent of the finalist theory of Hans Welzel's conduct has shown that, by typifying conduct - human actions or omissions, the legislator takes into account a process governed by the will directed to a particular purpose, not a mere causality of a mechanistic nature.²⁶

Adopting the idea that the criminal type has become valuative with the emergence of the finalist theory of conduct, Zaffaroni, for whom "*the criminal type is clearly valued because it is generated in an act of valuation and because it is used to translate a prohibition; not to mention that it must be valued when using it in this function of establishing a prohibition.*"²⁷

Thus, the lack of a criminal type presupposes that the conduct is allowed by law, which totally precludes the initiation of criminal prosecution against the perpetrator of conduct, even if unlawful.

It is up to us to carry out a detailed analysis of the species of typicity, that is, the formal and the material, which is of great importance for the present research, since it defines, at least theoretically, which behaviours should or should not be criminalised in the criminal legislation of each country.

A. Formal Tipicity

²⁶ The finalist theory of conduct, whose creator and main exponent is the German jurist Hans Welzel, who emerged in the mid-twentieth century, understands that conduct is nothing more than a human behavior - for animals have an instinct and moral persons (legal entities) are unable to practice conduct and guilt - voluntarily and psychically directed to a purpose. In it, the concept of pure normative guilt was introduced, displacing the deceit and guilt (allocated in the ambit of culpability when of the causal system), being no longer considered as species of guilt, but rather helping in the assessment of the criminal type, now divided in objective and subjective type (this, deceit and guilt).

²⁷ ZAFFARONI, *Supra* note 24.

The formal typicity is intrinsically linked to the principle of strict legality, referred to by the Romans through the axiom '*nullum crime, nulla poena sine lege*', for which there is no crime without previous law that defines it, nor a penalty without prior legal notice.

The traditional theory commonly recognised only the formal typicity as a kind of criminal typicity, conceptualising it as the framing or subsumption of the conduct perpetrated by the agent in the description given by the law and defined as a crime. Illustrating, because of the formal typicity, which is precisely the existence of criminal conduct written in the law, the one who practices the conduct described in article 184 of the Brazilian Penal Code, commits a crime of copyright infringement.

However, modern theory understands the existence of both the formal model and the material of criminal typicity. Francisco de Assis Toledo in his lesson on the notion of a purely objective criminal type says that "*subsumption (underlining of a real conduct to a legal type) has become insufficient for the affirmation of typicity, and something more is needed, which is the so-called material typicity.*"²⁸

It is emphasised that the phenomenon of subsumption is today subordinated to the material notion of the type, and it is not enough, for the confirmation of the typicality, the mere possibility of juxtaposition of the fact to the norm or the coincidence between the event real and legal type.

The original construction of Ernst von Beling,²⁹ from 1906, carried the criminal type with a purely formal meaning, not claiming on him any value judgment about the behaviour that presented the characteristics described by the norm.

Assis Toledo further states: "*modernly, however, we try to attribute to the type, beyond this formal sense, a material meaning. Thus, to be a crime, conduct must be typical, it must formally conform to a legal type of crime (nullum crimen sine lege). Nevertheless, one cannot speak of typicality, without the conduct being, at one and the same time, materially detrimental to juridical or ethically and socially reprehensible goods.*"³⁰

²⁸ See FRANCISCO DE ASSIS TOLEDO, PRINCÍPIOS BÁSICOS DE DIREITO PENAL (1998).

²⁹ The predominant notion of a "purely objective criminal type" was inaugurated in 1906 by Ernst von Beling, with descriptions in his work *Die Lehre von Verbrechen*, that is, "The doctrine of crime."

³⁰ TOLEDO, *Supra* note 29.

Therefore, it is used, beyond the purely objective or formal typicity, to the so-called material typicity.

B. Material Tipicity

Material typicity seeks to value conduct and result, that is, to make a judgment of value, going beyond legal writing (contrary to what makes formal typicity) and analysing action or omission through the cultural, historical, political and social prism.

This modality maintains links with the newly developed constitutionalist theory of crime, adopted in Brazil by Luiz Flávio Gomes, for whom it is "*founded on the inevitable approximation and integration between Criminal Law and the Constitution.*"³¹

In addition, the celebrated author understands that the said theory branches in three subdivisions: (i) formal typicity, understood as the literal subsumption of the fact to the norm ; (ii) normative materiality, regarding the disapproval of the conduct and the result ; and (iii) subjective typicity, characterised by fraud and guilt.

Thus, the constitutionalist theory of crime, which currently provides the figure of material typicity, approaches the doctrine of the Democratic State of Law and advocates the principles of security, such as the social reprobability of conduct and lesivity to legal goods.

Although the material typicity references the theory of the forbidden risk of Claus Roxin, Hans Welzel opines "*the object of criminal law protects the basic values of life in community. Every human action, in good and evil, is subject to two different aspects of value. On the one hand, it can be valued according to the result achieved (value of the result or material value), on the other hand, independently of the result of the action, in the sense of the activity itself (value of the action).*"³²

It demonstrates Welzel's first steps towards completing the so-called principle of social adequacy, since, as he says, criminal law has as its goal the protection of values indispensable to human coexistence in society, but for conduct that damages a legal

³¹ See LUIZ FLÁVIO GOMES, PRINCÍPIO DA INSIGNIFICÂNCIA E OUTRAS EXCLUDENTES DE TIPICIDADE (2013).

³² See HANS WELZEL, DERECHO PENAL: PARTE GENERAL (1976).

good but is socially accepted, there will be no typicality by exclusion of its material form.

Still, it corroborates with the position now demonstrated and described the lesson of Luiz Flávio Gomes, who emphasises that the typicality, from Welzel, ceases to be (only) objective and necessarily also becomes subjective (intentional crimes, or normative in guilty crimes, we would say). Crime is not the exclusive result of the action, but above all (in Welzel's view) the devaluation of action, which, in the system, has a primacy (by virtue of the personal conception of the unjust). The devaluation of the action, however, becomes a mandatory requirement of every crime.³³

Therefore, the concept of formal typicality includes a value judgment, consisting of the verification of the adequacy of the conduct to the criminal type, that is, the social inadequacy of the action or omission that generates materiality.

Material typicality is the great piece behind the principle of insignificance,³⁴ and, above all, of the principle of social adequacy, since both lead to exclusion from the material typicality of conduct.

IV. CRIMINAL PRINCIPLE OF SOCIAL ADEQUACY

The purpose and foundation of criminal laws are found within society itself, which, in the face of decision-making in one form or another, consensual or not with certain behaviours, will sometimes demonstrate which conduct is accepted or tolerated, that is, that should be excluded from the criminalisation exercised by criminal law. In fact, criminal law should only classify behaviours that cause social relevance, since the discipline constitutes a public branch in which the criminal type - instrument of control - only covers conduct contrary to the public interest.

³³ GOMES, *Supra* note 32.

³⁴ The principle of insignificance or criminality of bagatelle (Bagatelledelikte) has its origin dated in the times of primacy of Roman law, where the praetor did not or did not deal with minor causes, according to the Latin maxim of *de minimis non curat praetor*. Brazilian doctrine defines it as "the one that allows us to deny the typicality of facts that, because of their inexpressiveness, are actions of trifles, lacking in reprobability, so as not to merit valuation of the penal norm, thereby extinguishing them as irrelevant". See DIOMAR ACKEL FILHO, *O PRINCÍPIO DA INSIGNIFICÂNCIA NO DIREITO PENAL* (1998).

The principle of the social adequacy of conduct (*Sozialadäquanz*, for the Germans) was introduced in the Law, initially as a principle of interpretation of the criminal laws, by the German indoctrinator Hans Welzel, in the year of 1939. For him, the principle of social adequacy of conduct is the conduct that move inside of the framework of the ethical-social orders of social life, established through the intermediary of history.³⁵

From the premise that criminal law only typifies conduct that has a certain 'social relevance', since otherwise they could not be offenses, it follows, as a consequence, that there is conduct that, by its 'social adequacy', cannot be considered as offenses.³⁶ This is the essence of the so-called 'social adequacy of conduct' theory: conduct that is considered 'socially appropriate' cannot be a criminal offence, and therefore should be excluded from the scope of typicality.³⁷

Indeed, as seen, the suitability of fact to the social environment arises as a reply to the causal theory of conduct,³⁸ which has now given way to the final theory. The devaluation (here, understood as negativity, not as absence) of conduct and outcome was implicitly present from causal theory, but came to light with the teachings of finalist doctrine.

Juarez Tavares affirms that the unjust is not produced by mere causality, but only as a work of a certain person, in view of its objectives, motives or duties towards the fact, which present the same importance for the unjust as the actual injury of legal goods.³⁹

The theory or principle of social adequacy understands that conduct cannot and should not be treated as typical if, despite subsumption to the incriminating model - formal typicality, there is no injury to the legal good protected by the penal norm or is in

³⁵ WELZEL, *Supra* note 33.

³⁶ *Id.*

³⁷ See 1 EUGENIO RAÚL ZAFFARONI & JOSÉ HENRIQUE PIERANGELI, *MANUAL DE DIREITO PENAL BRASILEIRO* (2006).

³⁸ According to causal theory, conduct is voluntary human behaviour that produces certain modification in the outer world. The theory was conceived in the 19th century by Von Liszt, Beling and Radbruch, received in Brazil by several prominent authors such as Aníbal Bruno, Costa e Silva, José Frederico Marques and Nélon Hungria. Its nomenclature stems from the fact that the causal (or natural) theory of conduct submits to the rules of the natural sciences, which are governed by the laws of causality. MASSON, *Supra* note 21.

³⁹ See JUAREZ TAVARES, *TEORIA DO INJUSTO PENAL* (2003).

compliance with the dictates of social life - the so-called material typicality. In this way, the conduct will be typical from the formal point of view, but not material.

Seeking it takes an aspect of conduct which, taken into consideration, is apt to exclude the typicality of a criminal fact as described by law.⁴⁰ Thus, the judgment of value to ascertain whether or not a socially appropriate conduct works as a filter that includes or excludes from the typical sphere behaviours that conform or do not conform to the dominant ethical-social standards.

Guilherme Nucci states that society itself as a group of citizens value the conduct and classify it as appropriate or not, and thus, *“it concerns the magistrate to detect the position of society, consensual, and sometimes indifferent, toward certain human conduct.”*⁴¹

According to the national doctrine, the principle under consideration has two important functions— to restrict the criminal incidence, reserving criminal law only for the most harmful conduct to social welfare, and guide the legislative activity, that will select the prohibited conducts, through the penal types.⁴²

And so says Cezar Roberto Bitencourt on criminal incidence, that only in the most serious cases concerning life and society that the criminal type implies a selection of behaviors and, at the same time, a valuation (typical is already criminally relevant). However, it is also true that certain behaviors, typical in themselves, lack relevance because they are commonplace in the social environment, since there is often a mismatch between criminal norms and socially permissible or tolerated.⁴³

40 In this sense, see CARLO FIORE, *L'AZIONE SOCIALMENTE ADEGUATA NEL DIRITTO PENALE* (1966), for whom: Adequatezza sociale è dunque un'espressione con cui si contrassegna un'interpretazione, più conforme ai principi, dell'ordinamento, dell'azione típica e dell'interesse protetto, partendo da una revisione del significato tradizionale del bene giuridico e dell'idoneità del comportamento vietato.

41 See GUILHERME DE SOUZA NUCCI, *PRINCÍPIOS CONSTITUCIONAIS PENAIIS E PROCESSUAIS PENAIIS* (2015).

42 Rogério Greco approves this thesis, understanding that the principle of social adequacy limits the scope of the criminal type, restricting its interpretation and excluding it from socially acceptable and accepted conduct. Thus, the first function of the principle is to guide the legislator in selecting the prohibitive and imposing conduct. The second concerns the rethinking of criminal law, removing from its protective mantle the assets whose conduct has already adapted perfectly to the evolution of society.

43 See 1 CEZAR ROBERTO BITENCOURT, *TRATADO DE DIREITO PENAL* (2003).

Having reached such a perspective, it is now necessary to analyse the reasons of fact and of law that allow the application or non-application of the principle of social adequacy in cases involving copyright infringement, verifying the benefits that may exist if its incidence is accepted.

V. REASONS FOR THE APPLICATION OF THE PRINCIPLE

The starting point of monopolised reproduction of intellectual works (copyright) has been, from the earliest, as an instrument of censorship by the owners of the means of production. This monopoly continues in force, being supported until the present day in favour of the same agents, but with bias of economic censorship. The economic and technological development caused new problems to be added to the branch of copyright. Technology has long since introduced new methods and mechanisms capable of reproducing intellectual works, such as cinematography, xylography, mimeography, microfilming, photocopying, and, in recent times, xerocopy.

Thus, from the perspective of the first acquisition and consequent sale of counterfeit CDs and DVDs, which are highly disseminated and socially accepted, it is seen that society seems to act in a real 'collusion' with the counter-factor; mainly because of the ease provided by the media to everyone has easy access to literary and phonographic works, in particular. Today, with a simple download on the world computer network, private individuals supply their computers and other electronic devices with the works uncomplicatedly found in the virtual environment.⁴⁴

According to Túlio Vianna, "*the high value of books, CDs, DVDs and computer programs are sustained by a shortage of intellectual works artificially created by a monopoly of the right of copy granted by the State to the owners of the means of production.*"⁴⁵ And the author continues stating that "*(...) this artificial shortage, far from protecting the rights*

⁴⁴ Added to this is the fact that there are still, in large volumes, agents that use material means - and not virtual ones - for the counterfeiting of objects. A good example of this is the "xerox industry". In this sense, it is the opinion of Virginia Luna Smith: "The intention of the legislator was to strengthen the protection of the legal good, which, however, proved absolutely insufficient to face piracy, the 'xerox industry' in the university environment, which the teachers, especially in the Law course.". See VIRGÍNIA LUNA SMITH, PLÁGIO, PIRATARIA, FAIR USE E A (DES) CRIMINALIZAÇÃO DA VIOLAÇÃO DE DIREITO AUTORAL (2012).

⁴⁵ See TÚLIO LIMA VIANNA, A IDEOLOGIA DA PROPRIEDADE INTELECTUAL (2006).

*of the author of the intellectual work, mainly benefits the 'cultural industry', to the detriment of the poor class of the population, that is obliged to choose between the consumption of subsistence goods and cultural goods and ends up opting for those."*⁴⁶

It is undoubted that there is remarkable tolerance of society in relation to this type of trade. In fact, there is a parallel market for the sale of 'pirated',⁴⁷ CDs and DVDs, which is attended by a large number of consumers. Few, in fact, are those who prefer to invest more money to acquire an object, physical or otherwise, original and sold by specialised trades. For this reason, the commercialisation of counterfeit products is expressive and is everywhere, truly spread by society, without generating any negative valuation of the conduct, but not unanimity, to the people - and also the Public Power.

The immediate effect of this is the creation of a subsystem of culture, where all the projects and desires of life that the members of the social environment have are found. In the cultural environment are ideologies and ideas in general. And today, irrefutably, it is possible to consider that the collective desire is to possess goods, and few escape from this rule, as a true portrait of a society marked by commercial and capitalist values.

Citizens whose resources are earned through socially licit methods obtain the objects in a legally adequate manner. On the other hand, those who do not have these resources are inclined to acquire objects through oblique, or rather illicit, ways. The lack of space for the maintenance of life within the axes of normality means that the agent cannot integrate into the social fabric and, consequently, be thrown into the sphere of informality, particularly when it is a crime that society sponsors and applaud.

In the context of informality, these citizens eventually acquire goods from the same way. Thus, their own conditions of work, of social interaction and acquisition of goods and inputs, with proper regulations of a parallel society, with their own values and naturality of the illicit practices, are created. It should not be forgotten that in the field of criminality, the penal system consists almost exclusively of persons belonging to the

⁴⁶*Id.*

⁴⁷ In Brazil, the term "*pirate*" was created to refer to products that are falsified or created by non-licit means.

economically vulnerable social classes, attesting to the existence of a field called 'cultural criminality' and, even more, to a criminal selectivity.

The secular principles of Criminal Law mandate the duty to apply the incriminating norms indiscriminately, in homage to the constitutional principle of isonomy, it is possible to reflect that the criminalisation of conduct is carried out from the 'making' of the laws until the execution phase of the sentence, when the agent violates the norm. As it happens, there is a certain degree of selectivity in criminal matters erected by a makeup and a false discourse of equality, in which a minority of citizens is benefited.

Criminal law itself represents an *unequal par excellence* system, since large portions of the lower classes of the social fabric are inserted in their conduct and punishments, which are often influenced by those who are more affluent, generally detained of power and that dictate the rules of conduct.

And this is the Brazilian reality when talking about criminal selectivity. The criminal system, according to this trend, is not structured according to the ends it wants, but acts as an instrument of perpetration of power and arbitrariness, stirring up the problems related to violence and social exclusion. For this reason, criminal law would in fact be geared towards political purposes.

Criminal selectivity is one of the objects of study of modern critical criminology, whose discourse deconstructs criminal law as a system of crime prevention and punishment, especially because it is an egalitarian model, in which religion, sex, ethnicity, social class and origin does not matter to the incidence of the guarantees and penalties intrinsic to the Brazilian criminal structure.

This is what the distinguished doctrine Nilo Batista shows us: "*(...) the penal system is presented as an egalitarian, reaching people also in function of their conduct, when in fact their operation is selective, reaching only certain people, members of certain social groups, on the pretext of their conduct. (...) Finally, the penal system is committed to protecting the dignity of the human person, when in fact it is stigmatising, promoting degradation in the social figure of its clientele.*"⁴⁸

⁴⁸ See NILO BATISTA, INTRODUÇÃO CRÍTICA AO DIREITO PENAL BRASILEIRO (2007).

Therefore, faced with the socially tolerated commercialisation of goods of spurious origin, often falsified, it must be said that the first current seeks to legitimise the abstention of Criminal Law in copyright crimes because of the economic shortage and social situation of those involved in crimes of this nature, who are apparently victimised by the logic of the criminal system precisely because they commit an offence in a kind of 'state of necessity', in which they seek financial means for their own survival.

The discussion about criminal selectivity - which is very close to the American Labelling theory,⁴⁹ - gains strength when doctrine corroborates positively for such arguments. Some argue that crime is the product of a double selection filter: first, there is the choice of goods worthy of state criminal protection; and, second, the selection of stigmatised individuals among all those considered to be offenders of the criminal order. In the same vein, Eugenio Raul Zaffaroni affirms that the penal system is clearly directed more towards some people than against others and the respective types of criminal actions.

Therefore, to be criminal comes from the social labelling, without even being able to affirm that it is a logical consequence of the criminal conduct that practices.

This is compounded by the fact that it is possible to note the serious problems involved in work situations and high unemployment rates, which fully favours the construction, even if extremely informal, of places where the sale of artefacts that have been falsified and violated copyright and neighbouring rights.

Some work activities provide members with an economic insertion of the worker in society. This means that, from the capitalist point of view, the workers are nothing more than mere consumers, since such a model of society is driven by the unstoppable pursuit of profit and movement of the economy.

⁴⁹ The theory of the labelling approach (symbolic interactionism, labelling or social reaction) is one of the most important theories of conflict. Emerged in the 1960s in the United States, its main exponents were Erving Goffman and Howard Becker. By means of this theory or approach, crime is not a quality of human conduct, but the consequences of a process in which such "quality" (stigmatisation) is attributed. Thus, the criminal only differs from the common man because of the stigma he suffers and the label he receives". See NESTOR SAMPAIO PENTEADO FILHO, *MANUAL ESQUEMÁTICO DE CRIMINOLOGIA* (2012).

Francisco José Ramires, in his master's dissertation, criticising the labor situation in Brazil, explains that "(...) *this is a strong argument when a portion of the population spends much of their time looking for work, while the other lives with the fear of losing theirs. We can also add the own camelôs.*"⁵⁰ In several cases, these people have given up looking for occupation in the formal market. We must not forget the following: far from being mere obstacles to job creation, street workers are also unemployed.

As seen, it is argued, in favour of the social adequacy of the conduct, that the social control is shown anointed of typical characteristics of selectivity and discrimination.⁵¹ It is said that, since the possibilities of being labeled as delinquent do not depend, as empirical studies of Criminology show, on the conduct practiced, which generated social repercussions, but on the social state enjoyed by the individual in the design of the social class pyramid.

Callegari, addressing the selectivity of Criminal Law, which is one of the foundations used by the current favourable to the atypicality of crime, writes that Criminal Science "(...) *demonstrates that there is no process of selection of criminal conduct, but rather people who will be labeled as delinquents.*"⁵²

It is alleged that it is enough to circulate through the streets and avenues of any Brazilian city so that it is before thousands of people passing through and others acquiring counterfeit products with such naturalness, without any fear of police coercion.

And based on the reality faced by the Brazilian society about the fight against and retention of the crime of copyright infringement, Judge Roberto Coutinho Borba, in a remarkable sentence handed down at the request of the defendant's conviction by the Public Prosecution Service of the state of Rio Grande do Sul, for the practice of violation

50 In Brazil, it is called street vendors the set of shops created informally, without going through procedures with the public administration.

51 Some authors believe that the crime of copyright infringement in Brazil is a great example of what the doctrine calls "Symbolic Penal Law", that is, the consequence of a Promotional Criminal Law, that the State, considering the political anxieties, employs laws penalties, disregarding the principles of the discipline, such as minimum intervention, with the sole purpose of using material for social transformation.

52 See ANDRÉ LUÍS CALLEGARI & MAIQUEL ÂNGELO DEZORDI WERMUTH, SISTEMA PENAL E POLÍTICA CRIMINAL (2010).

of copyright, stated that “(...) and the most astonishing thing is that the practice of copyright-related facts is committed to the scanners in various sectors of the middle and upper classes, but, as usually happens in a legal system affected by selectivity, only the popular layers face the setback stigmatising of Criminal Law.”⁵³

In addition, some doctrinators and judges, accepting the notion proposed by Welzel, defend that the fact is atypical, by its non-social relevance. Under this approach, they consider it unjustifiable to maintain the punishment of the offence by the simple exercise of subsumption to a legal text, but that does not arouse actual danger to social harmony.

The Judge also explains other points, making a comparison with other everyday situations that demonstrate the violation of copyright. For example, high-end cars equipped with equipment for the reproduction of music, which are downloaded from internet sites, without any amount paid by way of copyright. It is also the case of people who circulate with their cell phones listening to songs that were downloaded irregularly, that is, without the artist expressly disposing of the work for that purpose.

Although the activity of informal traders is objectionable from a criminal-legal point of view, they are insignificant for those holding paternity rights and protecting works, such as record companies and artists.

Lastly, he urges us to cite another point strongly criticised by this doctrinal sector, concerning the punishment of the crime in question. In effect, the *camelôs* are nothing more than a small part of the complex scheme of falsification of products and, in this context, the legislator distressed the conduct with a minimum sentence of two years of imprisonment, expressing disproportionality in relation to the legal good of protection of the standard.

In view of this, we can make the following synthesis on the current argument defending the atypicality of conduct by the incidence of the principle of social adequacy: there is no denying the existence of a cultural crime formed within a sphere of informality and, therefore, the largest selected by the criminal type of copyright infringement are those

⁵³ The sentence is available in Portuguese at <http://s.conjur.com.br/dl/sentenca-camelo.pdf> (last visited Aug. 15, 2017).

who are placed in the lowest strata of society, since they do not have the material conditions to realise their dreams, thrown to a new society on the margins of the law. Thus, in addition to disproportionate punishment, the criminalisation of this crime violates the principles of justice and equity, since more affluent strata of society are part of the scheme violating copyright in ways other than selling on public roads.

Thus, the conclusion reached about the benefits of applying the principle of social adequacy is that certain acts such as copyright violation are no longer considered as a criminal behaviour reproduced daily in society, which is mostly prevalent amongst only the poorer portions of society, commonly marked by criminalisation in Brazil. However, applying the principle in this case represents granting a criminal permit for merchants selling 'pirate' products to have a way of obtaining income, without incurring a crime.

VI. REASONS FOR THE NON-APPLICATION OF THE PRINCIPLE

The dissenting part of the doctrine, which opts for the non-application of the penal principle, argues that the principles of social adequacy and insignificance should be used with caution, in order to avoid their indiscriminate application encourages the practice of crimes against property. The legal right protected by the crime of Article 184 of the Criminal Code is precisely the copyright, whose economic impact is measured by the value that is prevented from being received, when suffering from piracy, and not the amount received by counterfeiters and sellers.

So to speak, there are four arguments that deny the incidence of the principle of social adequacy in the cases of sale of imitated products, referring to the (i) the validity of the norm; (ii) the non-possibility of removal from the material typicity by virtue of the principle; (iii) that the conduct which is not only damaging to the author of the work but is also harmful to the tax authorities, which is not socially tolerable; and (iv) the fact that it is not possible to claim adaptation of society when, in fact, the Public Authorities are under control.

In fact, the criminal law is in force, as it was not revoked, expressly or tacitly, by any other later rule. The principle of social adequacy does not have the power to revoke the article of law.⁵⁴

The reiteration in illicit activities can demonstrate, on many occasions, the incapacity of repression of the conduct by the State. However, the continued practice of a crime does not necessarily mean that it has become socially appropriate, so that, if it accepts this thesis, it creates an environment in which the legal good protected by the criminal law is exposed to any injury or danger of injury.

Corroborating with the thesis of the impossibility of recognising the principle of social adequacy to the crime in question, this chain presents as an argument the phenomenon that, in fact, taking into account the inefficient control of the Public Power in relation to the sale and distribution of CDs and DVDs which rely on the violation of copyright, active subjects use illegal trade to earn profits, directly or indirectly.

In this same chain, the Supreme Federal Court has already ruled that conduct cannot be considered socially tolerable, given the significant losses suffered by the national and international music industry as well as by the inequality in relation to the merchants regularly established and by the tax authorities, since it is a fraud to not pay taxes.⁵⁵ Although there are few judicial decisions on the subject, it is quoted the following, coming from the Supreme Federal Court wherein the case concerned the sale of pirated CDs and the application of the principle of social adequacy:

“PENAL AND PENAL PROCEDURE. HABEAS CORPUS. CRIME OF INFRINGEMENT OF AUTHORAL LAW. SALE OF CDS "PIRATES". ALLEGATION OF LIABILITY OF CONDUCT BY STRENGTHENING THE PRINCIPLE OF SOCIAL

⁵⁴ Although it serves as a point for the legislator, who should have the sensitivity of distinguishing conduct that is considered to be socially appropriate from those that are being reprimanded for criminal law, the principle of social adequacy alone does not have the power to revoke incriminating criminal offenses. Even though the practices of some criminal offenses, whose incriminating conduct society no longer considers pernicious, are constant, it is not up to the agent's claim that the fact that he practices is now socially adequate. One law can only be revoked by another, as determined in the caput of art. 2 of the Law on Introduction to the Civil Code. See ROGÉRIO GRECO, CURSO DE DIREITO PENAL (2009).

⁵⁵ Some understand the complaints that unite the crime provided for in article 184 of the Criminal Code with the offence established in article 12 of Law nº. 9.609/98, which protects the copyright of a computer program (software).

ADEQUACY. IMPAIRMENT. INCRIMINATING STANDARD IN FULL VENTILATION. ORDER DENIED.

I - The conduct of the patient conforms perfectly to the criminal type provided in art. 184, § 2, of the Penal Code.

II - The incidence of the incriminating rule is not affected by the fact that the company allegedly accepts and even encourages the commission of the offense by acquiring the counterfeit products.

III - A conduct that causes enormous losses to the Treasury due to tax fraud, to the national record industry and to the regularly established merchants cannot be considered socially tolerable.

IV - Order denied.”⁵⁶

In the topic of tax loss, the understanding that is born is that Criminal Law would be responsible for the solution of what would be in charge of Administrative or Tax Law - which would violate the principle of minimum intervention, which, through its own institutes , would resolve the issue.

The fact that the trade in counterfeit goods is disseminated and vulgarized in the social environment does not make conduct socially irrelevant, reasonable or tolerable, since suppliers and consumers are fully aware of the spurious origin of goods and are not lacking in awareness of the illegality of the activity.

Indeed, the authorities' tolerance of copyright infringement is not strong enough to mean that conduct is no longer known as typical. As well as the distinguished penitentiary Cezar Roberto Bitencourt, the possible tolerance of the authorities or the indifference in the criminal repression, as well as the alleged disuse, do not appear in our criminal legal system as a cause of exclusion of typicality. The incriminating norm cannot be neutralised or considered revoked as a result of misrepresentation of the constituted authorities.⁵⁷

⁵⁶ STF - HC 98.898 / SP, Rapporteur Minister Ricardo Lewandowski, DJe nº 91, publicado em 21.05.2010.

⁵⁷ See 4 CEZAR ROBERTO BITENCOURT, TRATADO DE DIREITO PENAL (2003).

What is lacking, therefore, are major and repeated operations to combat the falsification of products by government agencies, including advertising campaigns to clarify the subject. This lack of care alone would not have the effect of making the crime atypical.

This chain is based on the thesis that the principle of adequacy is not able to rule out material typicity, since it cannot be understood as a cause of exclusion of typicity, but rather as a hermeneutic criterion, according to the legal system adopted in Brazil.

Luiz Flávio Gomes believes that the principle under study does not focus on the sale of counterfeit objects, saying that the sale of pirated CDs cannot be considered legally tolerable. This is not a legally approved fact. There are a huge number of court injunctions against pirating of CDs. This proves that the commercialisation of pirated CDs is far from a subject of quiet acceptance.⁵⁸

In this context, corroborating with the thesis of the inapplicability of the principle of social adequacy, the Superior Court of Justice issued Precedent 502,⁵⁹ which proclaims the typicity of the crime of copyright infringement for the purpose of profit (article 184, § 2, of the Brazilian Criminal Code) when the agent exposes pirated CDs and DVDs.

Finally, in order to cite important precedent on the application of the above-described Precedent 502, there is the following judgment:

“SPECIAL FEATURE REPRESENTATIVE OF CONTROVERSY. PENAL. OFFENSE TO ART. 184, § 2, CP. OCCURRENCE. SALE OF CDS AND DVDS "PIRATES". ALLEGED ATYPICITY OF CONDUCT. PRINCIPLE OF SOCIAL ADEQUACY. INAPPLICABILITY.

1. The jurisprudence of this Court and the Federal Supreme Court are directed to consider, typically, formally and materially, the conduct contemplated in article 184, paragraph 2, of the Criminal Code, thus removing the application of the principle of social adequacy, of who exposes for sale CDS AND DVDS "pirates".

⁵⁸ GOMES, *Supra* note 32.

⁵⁹ According to Precedent 502 of the Superior Court of Justice, "given the materiality and authorship, it is typical, in relation to the crime foreseen in Article 184, § 2, of the Penal Law, the conduct of exposing sale CDs and DVDs 'pirates'".

2. *In the event that the materiality and authorship is proven, it would be unfeasible to dispense with the resulting criminal consequence based on the above principle.*

3. *Special Appeal Provided.*" (STJ - REsp 1193196 / MG, Rapporteur Minister Maria Thereza de Assis Moura).⁶⁰

Thus, it is perceived that the Brazilian courts have preferred not to apply the principle of social adequacy in concrete cases, although their benefits are diverse, on the grounds that there are several injured by such conduct, being the Public Administration, the consumer and the tax authorities.

VII. CONCLUSION

Based on the present research, it remains to be seen that a considerable part of Brazilian doctrine and jurisprudence understands that certain behaviours, although they subsume the incriminating penal norm, there is no social relevance capable of negatively influencing the sense of justice or have great acceptance in the environment.

There is no doubt that the subject is controversial and finds two very well defined positions.

On the one hand, the first is that the individual who practices the typical behaviour is, in most cases, merely a '*camelô*', victim of criminal selectivity, who enters into the field of informality and from there acquires products to ensure their survival, which would legitimise the application of the principle of social adequacy as a cause of exclusion from materiality. On the other hand, the second current, followed by the Supreme Federal Supreme Court, emphasizes that the conduct is still provided for by the Brazilian legal system, without foreseeing in its composition any element that excludes its application as a crime or that testifies to its disobedience by society, claiming to be the problem arising from the lack of supervision by the Public Power, which ends up conniving with the situation.

It is certain that the discussion does not end there and ends up extending to the interpretation of the principle itself. For some, it is no more than a simple

⁶⁰ Superior Tribunal de Justiça **STJ**, RECURSO ESPECIAL : REsp 1193196 MG 2010/0084049-5, Inteiro Teor.

hermeneutical rule, aiding the interpretation of criminal law. For others, it is a cause of justification or exclusion of the typical, not only in the crime in question, but in various situations of daily life, such as, not to go too far, the popular "*game of the beast*", and others cited: child's ear to ornament with earrings, irrelevant restrictions of freedom and houses of prostitution.

In the meantime, the first conclusion reached is that it is necessary that the principle in question be applied with some reserve, and should not become, under any circumstances, a rule in the area of criminal law, especially when other legal disciplines are able to provide better and more effective solutions for concrete cases, as with Administrative and Tax Law.

Therefore, the judgments and remedies given in specific cases involving the crime of copyright infringement by the Brazilian High Courts are considered correct, not least because they do not admit the incidence of the principle of social adequacy, since they cannot visualise, with clarity, reason in the claims favourable to its application. It is to be noted that the offense does not only affect the author and the connected ones, but also the Treasury and the consumer, who ends up buying second-line products and certainly 'pirated'.

On the other hand, although we do not believe in the thesis of the application of the principle of social adequacy in screened cases, it is necessary to stress that there is no doubt that the main (re)incidents in the crime of copyright infringement are people who lack of possibilities to acquire goods through channels considered socially lawful and in a legally adequate manner. Indeed, allegations of utter ignorance of the prohibition of the conduct of selling products in violation of copyright, rather than social tolerance, by the subsystem created around culture are not infrequently visible.

Still, it is in this sense that there is no doubt that it is imperative that an immediate and urgent re-reading of the article in question be made, in order to avoid endless discussions, which will always be in charge of the accusatory and defence body in the concrete situation, offering positions certainly contradictory to each other, but which can only lead to quite different decisions in similar cases.

It is concluded, in this way, that although the conduct of marketing products understood as 'pirated' is not socially adequate, given the social tolerance and especially of the Public Power, which insists on turning a blind eye to the situation that is spreading in the various Brazilian cities, it is possible to argue, on the other hand, that the penalty commenced by the criminal legislator is completely uncalled for and should not serve to support a condemnatory decree, since it closely approximates conduct considered intolerable and that entails much greater damage and prejudice to the victims and family members.