CRIMINAL PROTECTION OF COPYRIGHT AND THE LIMITS OF CRIMINALIZATION: (IN)APPLICABILITY OF SOCIAL ADEQUACY AND ALTERNATIVES IN LIGHT OF MINIMAL INTERVENTION

A TUTELA PENAL DOS DIREITOS AUTORAIS E OS LIMITES DA CRIMINALIZAÇÃO: (IN)APLICABILIDADE DA ADEQUAÇÃO SOCIAL E ALTERNATIVAS À LUZ DA INTERVENÇÃO MÍNIMA

LA TUTELA PENAL DE LOS DERECHOS DE AUTOR Y LOS LÍMITES DE LA CRIMINALIZACIÓN: (IN)APLICABILIDAD DE LA ADECUACIÓN SOCIAL Y ALTERNATIVAS A LA LUZ DE LA INTERVENCIÓN MÍNIMA

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ABSTRACT

In the context of a society with increasingly more technological devices and advances and changing concepts and perceptions of what constitutes reprehensible or not, the criminal protection of copyright in the Brazilian legal system deserves greater attention and discussion, with a focus on the (in)applicability of the Social Adequacy theory to Article 184 of the Penal Code. This article highlights the stance of the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) in rejecting this defense theory in copyright matters, based on state and social rejection of piracy. Therefore, more effective alternatives to criminalization are proposed, since copyright protection must be based on a balanced model, focusing on education, regulation, and social justice, avoiding the symbolic and disproportionate use of criminal law.

Keywords: Copyright. Criminal Law. Minimal Intervention. Social Adequacy. Alternatives to Criminalization.

RESUMO

No contexto de uma sociedade com cada vez mais aparatos e avanços tecnológicos e modificações de conceitos e percepções de atos reprováveis ou não, a tutela penal dos direitos autorais no ordenamento jurídico brasileiro merece maior atenção e discussão, com foco à (in)aplicabilidade da teoria da Adequação Social ao Art. 184, do Código Penal. Destaca-se no decorrer deste Artigo o posicionamento do Supremo Tribunal Federal (STF) e do Superior Tribunal de Justiça (STJ) no sentido da rejeição da referida tese defensiva em matéria de direitos autorais, sob fulcro de rechaço estatal e social à pirataria. Logo, são propostas alternativas mais eficazes à criminalização, visto que a proteção aos direitos autorais deve estar pautada em um modelo equilibrado, com foco na educação, regulação e justiça social, evitando-se o uso simbólico e desproporcional do Direito Penal.

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Palavras-chave: Direitos Autorais. Direito Penal. Intervenção Mínima. Adequação Social. Alternativas à Criminalização.

RESUMEN
En el contexto de una sociedad con cada vez más dispositivos y avances tecnológicos, y con cambios en los conceptos y percepciones sobre qué actos son reprobables o no, la tutela penal de los derechos de autor en el ordenamiento jurídico brasileño merece mayor atención y debate, con énfasis en la (in)aplicabilidad de la teoría de la Adecuación Social al artículo 184 del Código Penal. A lo largo de este artículo se destaca la posición del Supremo Tribunal Federal (STF) y del Superior Tribunal de Justicia (STJ) en el sentido de rechazar dicha tesis defensiva en materia de derechos de autor, sobre la base del repudio estatal y social a la piratería. En consecuencia, se proponen alternativas más eficaces a la criminalización, ya que la protección de los derechos de autor debe sustentarse en un modelo equilibrado, centrado en la educación, la regulación y la justicia social, evitando el uso simbólico y desproporcionado del Derecho Penal.

Palabras clave: Derechos de Autor. Derecho Penal. Intervención Mínima. Adecuación Social. Alternativas a la Criminalización.

1 INTRODUCTION

The protection of copyright in the Brazilian legal system is central to ensuring legal certainty, encouraging cultural production and respecting intellectual property, given the advancement of information and communication technologies, notably in the digital age, which have increased the challenges in combating piracy and ensuring fair remuneration for rights holders. and such a scenario has led to the expansion of the criminal incidence on conducts that violate copyright, especially based on article 184 of the Penal Code (Costa, 2008, p. 32-46).

However, this expansion of criminal protection has raised questions about its legitimacy, proportionality and adequacy, especially when compared to extra-criminal alternatives and the requirements of the principle of minimum intervention, through the prism of the recognition, by doctrine and jurisprudence, that Criminal Law should act as a *last resort* imposes a rereading of the policies of criminalization of piracy. In parallel, the debate on whether or not to apply the theory of Social Adequacy as an exclusion of criminal typicity in such cases reignites the discussion about the limits and foundations of criminal repression in the Democratic Rule of Law (Freitas, 2020, p. 111-128; Rodrigues, 2022, p. 12).

It is based on the hypothesis that, although article 184 of the Penal Code provides for the criminalization of conducts that violate copyright, its application must observe the principles of fragmentarity, subsidiarity and proportionality, arguing that the theory of Social Adequacy is not compatible with the Brazilian legal and factual reality with regard to piracy. it is possible, however, to build a more efficient state response through extra-criminal instruments.

The general objective established for this Article is, therefore, to analyze the limits of the criminal protection of copyright in Brazil, focusing on the inapplicability of the theory of social adequacy to the crime of copyright infringement and on the proposition of alternative mechanisms to criminal penalization. The specific objectives consist of identifying the legal foundations that justify the rejection of the theory of social adequacy to cases of piracy, proposing objective criteria to limit the incidence of Criminal Law on such conducts and, finally, examining extra-criminal instruments and good regulatory practices as more effective alternatives to criminalization.

To this end, the methodology adopted is qualitative, with a bibliographic approach and critical analysis of doctrinal, jurisprudential and normative sources, having been selected authors who objectively address the theme of intellectual property, the minimum intervention of Criminal Law and the regulatory models of copyright protection.

The relevance of the theme presented here lies in the need to rethink Criminal Law in a context of digital transformation, globalization and unequal access to cultural assets. Understanding the limits and possibilities of the criminal response to copyright infringement allows the construction of fairer, more rational public policies that are consistent with constitutional principles.

There is an urgent need for a model of copyright protection that overcomes the repressive emphasis and favors proportional, educational and effective normative solutions. It is intended, through the surveys and discussions to be presented on the following topics, to contribute to this debate, offering theoretical and practical subsidies for a more coherent, effective and humanized approach in the defense of copyright in Brazil.

2 COPYRIGHT INFRINGEMENT IN THE BRAZILIAN PENAL CODE

2.1 ORIGIN, LEGISLATIVE EVOLUTION AND TYPICAL STRUCTURE OF ARTICLE 184 OF THE 1940 PENAL CODEX

In order for a certain act to be considered erroneous and, consequently, must be fought or mitigated, it is initially important that the social, legal and cultural values of the society in question are in agreement, and then positivity occurs in a certain normative and legal source, such as Codes and Decrees. Therefore, in order to enter into specific discussions about the theme now set forth in this article, it is important to make comments based on a historical and social look at the evolution of Brazilian criminal law and, subsequently, the developments that culminated in the typification of copyright violation by article 184 of the CP/1940.

From the social point of view, the customs of the collectivity and certain daily circumstances, based on a specific legislative process, are affirmed, with the enactment of laws and other sources, but this path was not always followed, taking into account that Brazil, until shortly before the promulgation of the Penal Code of 1940, was still in imperial hands and perspectives that, even with the independence of the country, it was decided to remain with certain ordinances that drank from the Portuguese bosom, namely the Philippine Ordinances, until 1830, by the institution of the imperial Penal Code, providing only for the crime of "counterfeiting"/"theft", consisting of the falsification of documents, works, objects and its punishment would be the loss of the copies, that is, the confiscation of these, due to the copyright at the time, under classical influences of a rigorous punitive aspect (Costa, 2008, p. 47-48; D'Oliveira, 2014, p. 35).

This reality only underwent considerable modification after the proclamation of the Republic of the United States of Brazil, in 1889, where, a little later, in 1890, during the Provisional Government of Deodoro, the Penal Code was promulgated, still with classic

strands of strict punishment, in addition to the need to enact extravagant legislation due to considerable errors regarding the legislation, having only been revoked by the Penal Code now in force, which is also the subject of important changes to better adapt to social desires, concepts and customs, (D'Oliveira, 2014, p. 36).

Precisely, one of the changes suffered by the current Penal Code, instituted by Decree-Law No. 2,848/1940, was carried out by Law No. 10,695/2003, which added article 184, as well as reworded article 186 of this important criminal normative source, having the following text, in these terms, "Art. 184. Violating copyright and those related to it: Penalty – detention, from 3 (three) months to 1 (one) year, or fine", followed by §1 to §4, which deal with specifications for typicity and specific circumstances that cause an increase in the penalty, such as in case of total or partial reproduction aiming at direct or indirect profit on the intellectual work, performance, phonogram, interpretation and other issues without the proper authorization of the author, performer or performer, with exhibition, sale, introduction to the country, rental, concealment, reproduction in violation of copyright, offering via satellite, fiber optics, cable, among others, with the intention of direct or indirect profit, establishing a penalty of imprisonment, now, from 2 (two) to 4 (four) years, and fine (Brasil, 1940; Brazil, 2003).

It is observed that the Brazilian Criminal Law has evolved and the crime of violation of the author's rights is instituted, since, prior to Law No. 10,695/2003, another rule aimed at drafting about this, in this case, Law No. 6,895/1980, which initially established a lenient penalty of three months to one year and, by the way, an alternative to the payment of a fine, that is, before there was no cumulation as is currently the case, as Costa (2008, p. 50-51) notes. The same author, in a crystal clear way, recalls that the new perspective brought by Law No. 10,695/2003 comes from international provisions, such as the Universal Declaration of Human Rights, in its article 27, items 1 and 2, which demonstrates the worldwide concern with such crime.

Additionally, still at the Brazilian normative level, Law No. 12,853/2013 and Law No. 12,965/2014 (Civil Rights Framework for the Internet) that deal with collective management of copyrights, can be considered as elements that demonstrate the evolution in diligence and typicity of the violation of such prerogatives. The first source cited establishes relevant questions about the establishment of prices for the enjoyment of the members' repertoire, collection, principles to be followed especially so that fraud does not occur, ambiguation of similar titles, falsification of data, among other provisions (Brasil, 2013; Brazil, 2014).

As for the "Marco Civil da Internet" (Brasil, 2014) and its relationship with the fight against the crime of copyright infringement, there are provisions, in Section III, of liability for

damages arising from content generated by third parties, which removes possible liability from the internet connection provider and depends on the safeguarding of freedom of expression and other constitutional precepts. At this point, although no direct changes have been generated in the criminal type listed here, it is possible to verify a certain increase in criminal protection as a more effective response, since, in the course of the historical and social developments in Brazil, laws and conceptions were instituted in this regard, in order to combat such crime and protect the protected legal interest of the perpetrator.

2.1.1 Connection with the Copyright Law (Law No. 9,610/1998)

From the surveys and considerations set forth in the previous subtopic, we move on to the construction of paths and perspectives on the connection between article 184, of the CP/1940, with its amendments, in relation to the specific legislation, at this time, Law No. 9,610/1998 (Copyright Law), given that it was enacted with the objective of changing, updating and consolidating the legislation on copyright in the Brazilian territory. That said, there is no way to continue the theme by letting it be quoted or unveiled.

In the scope of Copyright, it is undeniable the recognition of categories that cooperate with the creation, diffusion and production of works, with a deserved separation and constitution of the attributions and activities of artists, performers, performers, among others, given, also, such prerogative is established over intellectual creation, that is, the work, with no confusion between the objects used for transmission and the intellectual creation itself, under the understanding that "[...] the work results from an intellectual effort, called creative activity, by which the author introduces into the factual reality a non-existent intellectual manifestation [...]", according to Nascimento (2014, p. 21).

In order to interpret the consummation of the copyright violation, it is essential to pay attention to the specific provisions on which works and their types would be protected, and such a list is presented in Law No. 9,610/1998, reading the so-called "works of the spirit" as "intellectual works", as they originate from creative activity that did not exist until then. Article 7 of the aforementioned law includes, by way of example, intellectual works texts of literary, artistic or scientific works (item I), dramatic or dramatic-musical works (item II), musical compositions that have or do not have lyrics (item V), cinematographic works, such as films, with or without sound (item VI), drawings, paintings, adaptations, translations (item VIII; item XI), among others, demonstrating the vastness of works that deserve protection and applicability and punishment in civil and administrative instances, and is also necessary in criminal instances, but this incurs the framework of article 184 of the CP in force (Brasil, 1940; Brasil, 1998).

The LDA, as a specific rule, is also extremely important for elements of civil, administrative and criminal typification, since, in its article 8, it provides for objects that do not have safeguards, such as ideas, methods, schemes, forms, isolated names and titles, information of common use, use of ideas by industry and commerce that cover the works, for example, following the establishment of the understanding brought by Article 10, *in verbis*, that "the protection of intellectual works covers its title, if original and unmistakable with that of a work of the same genre, previously disclosed by another author" (Brasil, 1998).

It is appropriate to consider, in view of the fact that there is a right to compensation for moral damages in the civil and/or administrative sphere, before the LDA, while the claim of the CP/1940, in its article 184, urges to punish with restriction of liberty the accused, but not exempting him from responding in other spheres and, consequently, paying in pecunia for his criminal acts. What has been achieved so far is the fact that criminal sanctions have the power to be applied only when the measures originated civilly and administratively have not been able to effectively meet the need and protection of the author's rights in the process and means chosen to repair the damage caused, as well debated by Barro (2017, p. 21) and Cunha (2017, p. 331-337).

Nascimento (2014, p. 94-103) also builds a unique line of thought regarding the application of criminal sanctions in the last form of reparation for damages caused to the author, aligning himself, throughout his Dissertation, with the idea that the LDA should be interpreted and applied in order to understand and respect civil, administrative, constitutional and criminal precepts.

In the past, the LDA, from article 46, comes to designate the acts that are not considered to violate copyright, a crime provided for in article 184, CP/1940, which are the act of reproduction by the press with due mention of the author, with signature, accompanied by a demonstration of where they were written, in addition to specific issues that cover portraits, literary works, citation in books, newspapers, theatrical representation for didactic purposes, onwards, being magna to conceptualize the non-possibility of applying criminal sanction, given the lack of typicality, and relative criminal principles must be obeyed, such as legality, exhaustiveness and absolute territoriality (Barro, 2017, p. 21; Paiva; Sartori, 2022, p. 66-73).

At this point, it is understood that, in addition to the connection between article 184 of the CP/1940 and the LDA, there is a need for conceptual attention between each normative source, given the principles that govern the various spheres of the country's Democratic State of Law, especially with regard to copyright, sanctions and measures to repair damages. In the following topic, we will take care to address singular issues, namely, about the crime of

piracy, which involves the provisions considered here, in order to establish an understanding of the applicability or not of the theory and principle of social adequacy on this typified crime.

3 THE THEORY OF SOCIAL ADEQUACY AND ITS (IN)APPLICABILITY TO THE CRIME OF PIRACY

3.1 DOGMATIC FOUNDATIONS OF THE THEORY OF SOCIAL ADEQUACY

The theory of social adequacy, which we now intend to discuss, originally conceived by Hans Welzel, a renowned German jurist and philosopher, emerges as a response to the need for compatibility between Criminal Law and the ethical-social values of the time of its creation, that is, given its historical reality, having in itself dogmatic pillars that rest on the principle that the function of Criminal Law is to protect the instituted social order, overflowing mere legal goods in a formal sense, because the conduct, even if formally typical, will not be criminally relevant if it is in accordance with the cultural and social values and customs shared by the community (Braga, 2021, p. 45-52).

For Braga (2021, p. 45), "social adequacy emerged as a result of a gradual process of dogmatic constructions that, in common, sought to limit the causal-positivist paradigm, spread by the philosophical and legal thought of the nineteenth and early twentieth centuries", so that the concept of action and its result were interpreted together, thus generating the need to think about and establish a link between such elements.

Welzel, according to Alcântara (2020), argues in his scores that social adequacy is based on the idea that certain conducts, although they could be classified as criminal, are socially tolerated or even encouraged, as it is, in a way, a consolidated cultural practical expression, and it is therefore not reasonable for Criminal Law to intervene in such a case, To the extent that:

> [...] It is true that a socially appropriate behavior could not be considered typical, but not because it does not fit the prohibited conduct described in a legal-criminal norm, but because, in an understanding and interpretation of the types, it would be outside the scope of criminal incidence. This is because the forms of conduct selected by the criminal types have, on the one hand, a social character, but, on the other hand, they are not suitable for an orderly life in society [...] (Alcântara, 2020, p. 43).

Now, the fundamental aspect of the theory lies in the recognition that criminal typicity must also be understood in its material dimension, because the mere subsumption of the conduct to the legal type is not enough, and the social relevance of the conduct in the context of community life must be assessed. In such a conjuncture, this harmonizes with the finalist conception of action, by which the social meaning of human behavior cannot be ignored,

since "[...] conduct needs to be valued socially even before it is finalistically valued" (Freitas, 2020, p. 112).

The dogmatic constitution of the theory of social adequacy gains more robust contours when it is inserted in the structure of the theory of crime, because, initially, in Welzel's perspective, social adequacy is located in the field of typicality, making a movement of migration to anti-juridicity later, but returning to the *status quo* of a limiting element of material typicality itself (Freitas, 2020, p. 110).

Both Freitas (2020, p. 110) and Alcântara (2020, p. 38-49) show the understanding that Welzel did not play the role of delimiting the basic aspects of the theory of social adequacy in a unique way, with a paradigmatic view of Joachin Hirsch. For Hirsch, the so-called theory "[...] constitutes a mechanism that allows actions not covered by criminal rules, in accordance with the will of the law, to be excluded from the type, given their criminal legal irrelevance" (Alcântara, 2020, p. 44-45), as a kind of problem regarding typicality, and should not be interpreted as an interlining between typicity and anti-legality.

Barro (2017), in a more current and linguistically basic approach, reveals that:

> According to the Principle of Social Adequacy, a conduct should only be typified as criminal if there is great reproach by society. If society tolerates it, there is no reason for the State to condemn it. This causes Criminal Law to change according to what society understands as right or wrong in a given historical period. Conducts that are foreseen as crimes are now considered "dead letters" and others that were previously acceptable become highly disapproved (Barro, 2017, p. 21).

In principled lines, therefore, it can be seen that the way in which society in general sees the action as reprehensible or acceptable stipulates how the current Criminal Law will position itself in this regard, establishing or not criminal typicality. However, the contemporary approach also proposed by Braga (2021, p. 63-73) reinforces the importance of the institute in the structure of culpability, even more, the field of prohibition error, placed on the repeated social practice of a certain conduct so that it does not perceive its illegality and, if excusable, such an element is removed and, if inexcusable, at least mitigates it, ruling out any valuation.

But, in the same way that social transformations occur and these shape the legal norms of the period experienced, the interpretations of the applicability of social valuations in specific cases, such as copyright violation, can be the target of certain conjectures, where "[...] intellectual property continues to be a legal asset that must be protected, for the good of society [...]", even if it does not even see it as relevant or reprehensible in its violation (Barro, 2017, p. 22). This point will be defended at greater length later.

The link between social adequacy and the concept of legal good is also important, as the latter, as a relevant ethical-social value, must reflect a need for criminal protection only in the face of conducts that cause effective injury or concrete danger, and the criminal classification of behaviors that do not significantly compromise such goods distorts the function of Criminal Law and generates undue aggression. Thus, it is necessary to consider the conjecture that "[...] the understanding of what is socially appropriate does not result from a democratic analysis of eventually aggressive behaviors, based on a judgment of the majority, nor on the feeling of the so-called average man [...]", and it is the role of the magistrate to perceive the social feeling about a certain fact (Nascimento, 2014, p. 96).

Equitably, Freitas (2020, p. 114) recalls examples such as the boxer who, within the rules of the sport, causes injury to the opponent, or the waiter who serves alcohol to an adult driver, without being sure of his drunkenness. Such conducts, although formally typical, such as bodily injury, participation in a potentially harmful fact, are socially tolerated, as they are inserted in a functionally accepted normative context.

The theory of Social Adequacy clearly dialogues with institutes such as the principle of insignificance and objective imputation, since the first removes the material typicity of conducts of minimum disvalue, and the second also requires that the harmful result be imputable objectively, which does not occur when the conduct is accepted as part of the social order (Alcântara, 2020, p. 55-69; Souza; Mota, 2022, p. 16-17).

The dogmatic foundation of the aforementioned theory is also based on constitutional principles, such as the dignity of the human person, freedom, legality, and the minimum intervention of Criminal Law, under the understanding that the criminalization of socially accepted conducts, even if by virtue of criminal types formally in force, compromises the legitimacy of the penal system and interferes with its preventive and pedagogical purpose (Rodrigues, p. 2022, p. 13-23).

As a result, the theory of Social Adequacy, although the target of resistance and criticism regarding its objectivity, is dogmatically grounded when understood as a hermeneutic criterion of restrictive interpretation of the penal norm, which aims to make the repressive system compatible with the ethical-social reality experienced by the collectivity.

Now, it is of interest in the construction of the path about the (in)applicability of the theory of Social Adequacy, to add a piece referring to the gloss of the Superior Courts, in the following subtopic, giving primacy to the rejection of this thesis to article 184, of the CP/1940, seeking current precedents of the Federal Supreme Court and, specifically, bringing up for discussion Precedent No. 502, of the Superior Court of Justice.

3.2 THE PRECEDENT OF THE SUPREME COURT AND PRECEDENT 502 OF THE STJ: REJECTION OF THE THESIS FOR ARTICLE 184 OF THE CP

Despite the similarity between the principle of Social Adequacy and the principle of Insignificance in certain characteristics and attributions, the latter have elements that separate them conceptually and influence their applicability and scope in Theses of General Repercussion and other interpretations of the Superior Courts. Immediately, the first stems basically from the conception that "[...] although a conduct is subsumed under the criminal type, if there is social acceptance, it is possible to make it atypical", with regard to insignificance, there is a difference in terms of the "tiny value" of the act practiced before the community (Rodrigues, 2022, p. 10).

Furthermore, the principle of Insignificance and Social Adequacy are still found in the fact that both do not have an explicit legal provision, which integrates the relevance of maximum interpretations regarding criminal matters, in particular, in view of Article 184, of the CP/1940. This is the case of the Extraordinary Appeal in *Habeas Corpus* No. 115,986 – Espírito Santo, of June 25, 2013, with Justice Luiz Fux, of the Federal Supreme Court, as Rapporteur, with the following summary:

> CRIMINAL LAW AND CRIMINAL PROCEDURE. ORDINARY CONSTITUTIONAL APPEAL IN HABEAS CORPUS (CRFB, 102, II, a). CRIME OF COPYRIGHT VIOLATION (CP, ART. 184, §2). SALE OF "PIRATED" CD'S AND DVD'S. ALLEGATION OF ATYPICALITY OF THE CONDUCT BY VIRTUE OF THE PRINCIPLES OF INSIGNIFICANCE AND SOCIAL ADEQUACY. DISMISSAL OF THE DEFENSE THESIS. INCRIMINATING RULE IN FULL FORCE. ORDINARY APPEAL NOT GRANTED. 1. The principles of criminal insignificance and social adequacy require judicious application, in order to prevent their indiscriminate adoption from encouraging the practice of property crimes, weakening the criminal protection of legal assets relevant to life in society. 2. The economic impact of copyright infringement is measured by the value that the owners of the works fail to receive by suffering from "piracy", and not by the amount that the counterfeiters obtain from their immoral and illegal actions. 3. The practice of counterfeiting cannot be considered socially tolerable in view of the enormous damage caused to the national phonographic industry, to regularly established merchants and to the tax authorities by the evasion of the payment of taxes. 4. In casu, the appellant's conduct perfectly conforms to the type of unjust provided for in article 184, paragraph 2, of the Penal Code, since she was identified selling pirated merchandise (100 CDs and 20 DVDs by various artists, whose works had been reproduced in violation of the legislation). 5. Ordinary writ of habeas corpus not granted.
> (RHC 115986, Rapporteur: LUIZ FUX, First Panel, judged on 06-25-2013, ELECTRONIC PROCEEDING DJe-160 DIVULG 08-15-2013 PUBLIC 08-16-2013)[2]

[2]RHC 115986, Rapporteur: LUIZ FUX, First Panel, judged on 06-25-2013, ELECTRONIC PROCESS DJe-160 DIVULG 08-15-2013 PUBLIC 08-16-2013. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=4331438.

From the above-mentioned jurisprudential understanding of the STF, it is necessary and possible to understand important elements, namely: a) the principles mentioned, especially regarding Article 184 of the CP in force, require a thorough examination for its actual application, so that there is no incentive to the community for the execution of criminal acts, under the pretext of atypicality and consequent non-punishment, which could also generate significant negative impacts on the patrimonial scope and on the harmony of society; b) in relation to the assessment of damages and financial impacts as a result of copyright infringement, this is carried out considering the amount that is not received due to "piracy"; c) it remains indisputable that society does not accept the practice of counterfeiting, taking into account the risks and losses to the tax authorities, industry, and commerce with regular registration.

Before analyzing the votes, it is important to note that, in the Report of the aforementioned REHC No. 115.986/ES, the number of 100 (one hundred) CD's and 20 (twenty) DVD's that contained content authored by third parties, without authorization for sale or reproduction, in direct violation of copyright, was considered by the Defense, the Public Defender's Office of the State of Espírito Santo, that "[...] criminal prosecution must fall on the authors of counterfeit products, and not on those merely responsible for the distribution of counterfeit articles [...]" (Supreme Federal Court, 2013, p. 2), a thesis harshly faced by the Distinguished State Court of Justice, not recognizing the principle of Social Adequacy on such conduct, in view of the incessant mobilizations of the State to mitigate such practice, with a penalty of imprisonment, given in the same way the typicity of the conduct due to the fact that there would be an interest in obtaining profit by the agent.

Already under analysis by the STJ, about the same case and defendant, the aforementioned Court took a position at the time for the rejection of the defensive theses used herein, having tried to declare the conduct atypical by the principle of insignificance and social adequacy of it, given the excessive repetition of the practice by the collectivity, due to the circumstance of rising prices, also arguing that the materials now counterfeited had a derisory value, ranging between R$2.00 (two reais) and R$6.00 (six reais) per unit, giving the total about R$320.00 (three hundred and twenty reais), in a trifle crime, which was not accepted by the Federal Supreme Court, 2013, p. 3-4).

In an assertive manner, the then Rapporteur, Justice Luiz Fux, opted for the interpretative line, rejecting, at first, any factor that would characterize procedural illegality and, with that, the immediate granting of an ex officio HC. After that, the arguments and defensive theses presented by the Public Defender's Office of ES were again rejected, with the STJ Ruling upheld and the defendant convicted of the crime of piracy, to the point that

the principle of insignificance for the "mere value of R$320.00 (three hundred and twenty reais)" was also not admitted as an alleged line of argument that this amount would not cause a relevant economic impact. Thus, the understanding was established that such impact would be characterized by the value of the violation of copyright would be how much the owners of counterfeit works fail to realize financially with piracy, being "[...] it is unfeasible to affirm that the patient's conduct presents little harm, which is only sustained from the distorted perspective of the defensive line" (Supreme Federal Court, 2013, p. 7).

Then, especially regarding Social Adequacy, this principle/thesis was set aside by the various forms, mechanisms, plans and institutions of the State that aim to combat piracy, which removes the bias of supposed acceptance of society under such practice, with a great movement towards collective awareness, that is, there is no "social tolerance, and there should be even greater abhorrence to conducts that exceed intellectual property rights, tax evasion, informality and consumer exposure to unimaginable risks. Therefore, REHC No. 115.986/ES was dismissed, with the continuation of the conviction for a crime provided for in article 184, paragraph 2, of the CP/1940 (Supreme Federal Court, 2013, p. 8).

The Superior Court of Justice, by means of Precedent No. 502, established, by Rel. Min. Maria Thereza de Assis Moura, on October 23, 2013, in these terms, that "in view of the materiality and authorship, it seems typical, in relation to the crime provided for in article 184, paragraph 2, of the CP, the conduct of exposing pirated CDs and DVDs for sale". Such a note remains consistent for the rejection of defensive theses of Social Adequacy and Insignificance under the criminal practice of copyright violation and related acts, and also, with respect to the proof of the crime, stipulated an interpretation that, by sampling, it is not necessary to carry out an expert opinion, in addition to the lack of need to identify the holders of the copyrights now violated, by Precedent No. 574 (Cunha, 2017, p. 436).

In view of the lines of interpretation of the STF and STJ in rejection of the application of the theory of Social Adequacy as an exclusion of typicity in criminal offenses related to piracy, within the scope of article 184 of the current Criminal Codex, together, it is possible to capture justification in the face of the existence of state and collective instruments that reaffirm the social disvalue attributed to such practice, demonstrating that this is not a conduct tolerated by society. Thus, the invocation of this thesis becomes inadequate and disproportionate to the contemporary normative and evaluative context.

3.3 CRITERIA TO RULE OUT THE APPLICATION OF THE THEORY OF SOCIAL ADEQUACY TO ARTICLE 184 OF THE CP

In view of the understandings established by the STF and STJ on the subject, seen above, it is essential to establish, in a systematic way, objective criteria that will justify the removal of the application of the theory of Social Adequacy in the context of Article 184, CP, which protects copyright, and it is necessary to recognize that, although it has dogmatic relevance, it cannot be invoked in an unrestricted manner, especially *in the face* of conducts that demonstrate a high degree of social, state and legal reproach, as well as concrete damage to the legal good provided.

As a criterion to be observed initially to dismiss such theory, it urges the existence of express and recent criminal protection, in this case, brought about by the amendment to the Penal Code of 1940, carried out by Law No. 10,695/2003, which added paragraph 2 to Article 184, being the result of an unequivocal and current legislative option of the criminal legislator, considering the scenario and need to typify acts related to "piracy", that clearly violate copyright and intellectual property (Brasil, 2003).

The criminal legislation in force, after the necessary changes, is shown to be the result of a modern value judgment on the seriousness of the conduct, which prevents its delegitimization by interpretations based on supposedly tolerant social perceptions, and such understanding is ratified by the jurisprudence of the STF, as seen in the Summary and in the course of the vote of the then Rapporteur Min. Luiz Fux (Federal Supreme Court, 2013, p. 4-5).

Law No. 10,695/2003, then, also comes in as a source for such consideration, since it aggravated the penalties and reformulated the wording of Article 184, creating qualified types, which is a clear indication of the relevance and relevance of criminal protection of copyright (Brasil, 2003; Cunha, 2017, 436-438).

The second criterion that can be raised refers to the existence of permanent mechanisms of inspection and administrative repression, as well signaled in the Vote of Justice Luiz Fux, the National Plan to Combat Piracy, joint actions of the Ministry of Justice, seizure operations by the Federal Highway Police, campaigns of the Federal Government to raise awareness of the community regarding criminal practices against intellectual property Federal Supreme Court, 2013, p. 7).

The performance of such bodies and institutions, incessantly, validates that one cannot speak of generalized social tolerance to "piracy" and, as Freitas (2020, p. 115-117) rightly notes, basically, that the theory of Social Adequacy should not be applied when there is a clear and reiterated manifestation of the State in the repression of certain conducts.

Continuing, it is necessary to consider the significant economic and cultural harm resulting from the practice of piracy, as this strongly affects the phonographic production chain and others, not only being large companies, but independent authors, artists, professionals in the creative industrial field are negatively impacted. According to Alcântara (2017, p. 166-168) and Braga (2021, p. 46-49), the legitimacy of the criminal sanction requires the demonstration of socially relevant damage, the absence of which makes the judgment of reprehensibility necessary to characterize the criminal unjust unfeasible.

Another criterion is associated with the agent's direct or indirect intention of profit, based on the amendments to Law No. 10,695/2003, in the criminal sphere, but also being provided as a criterion for civil sanctions, as seen in Law No. 9,610/1998, Art. 104. Specifically for the retreat of the defensive thesis and application of the theory of Social Adequacy, it is important that the existence of economic advantage in the practice of "piracy" is a sure indication of the absence of good faith and the presence of malice, which constitute elements that rule out the possibility of considering such conduct as socially appropriate.

Social Adequacy cannot serve as a shield for conducts evidently aimed at obtaining pecuniary advantage through undue exploitation of the intellectual creations of others. In the case of a blank criminal rule, the viability of Article 184, CP, in the typification and application of criminal sanction needs to be attentive to the provisions, concepts and limits imposed by the LDA, thus independent of subjective valuation, since the aforementioned law establishes the elements considered or not as intellectual property, the rights of the author, interpreter, producer, among other issues (Supreme Federal Court, 2013, p. 3-8; Nascimento, 2014, p. 107-110).

No less important, it can be understood that the wide availability of legal and accessible means for the enjoyment of cultural goods, phonographic materials, among others, made possible by the constant advancement of digital technologies, which have considerably reduced the costs of access, denote the argument that the unenforceability of different conduct, which could, in theory, legitimize the application of social adequacy, loses strength, and the theory of Social Adequacy is incompatible with scenarios in which the agent had lawful and reasonable alternatives of conduct, but consciously chose to violate the criminal norm (Supremo Tribunal Federal, 2013, p. 4; Cunha, 2017, p. 436-437; Alcântara, 2017, p. 146-150).

Below, these details will be presented in Table 1, in order to better understand and visualize:

Table 1

Criteria for distancing the theory of Social Adequacy from article 184, CP

No.	Criteria	Rationale
1	Express and recent criminal protection	The existence of a current criminal rule reflects a clear legislative choice, removing the unnecessity of criminal protection.
2	Permanent inspection and repression	The constant action of the State through operations and inspections demonstrates a lack of institutional tolerance.
3	Significant economic and cultural harm	The damage to creators, to the economy of culture and to the community justifies criminal repression.
4	Direct or indirect profit motive	The obtaining of economic advantage evidences intent and reprehensibility, ruling out good faith.
5	Availability of lawful means of access	The existence of accessible alternatives weakens the argument of the unenforceability of different conduct.

Source: Prepared by the author, based on the Federal Supreme Court (2013, p. 4), Cunha (2017, p. 436-437) and Alcântara (2017, p. 146-150).

From the criteria listed, a hermeneutic set is formed that is coherent with the current criminal jurisprudence, guided by constitutional and criminal principles, because the theory of Social Adequacy, although maintaining its theoretical value, cannot be an instrument of informal decriminalization to the detriment of the protection of relevant legal assets such as intellectual property.

4 MINIMAL INTERVENTION AS A LIMITER OF THE CRIMINAL PROTECTION OF COPYRIGHT: ALTERNATIVES TO CRIMINALIZATION AND INSTRUMENTS BEYOND PUNISHMENT

Understood as the *ultima ratio* of the legal system, Criminal Law, under the concept of minimum intervention, should be reserved for situations of concrete and relevant social harm, not lending itself to the protection of interests that can be protected by extra-criminal mechanisms. This guideline, widely established today, gains prominence in the circumstance of copyright infringements, even in the face of technological transformations and the normative possibilities of alternative protection.

According to Alcântara (2017, p. 62-65), the principle of criminal fragmentarity presupposes a careful selection of criminally protectable legal assets, restricting the use of criminal sanction to cases of manifest social intolerance and high damage, whereby. In the field of intellectual property, such a premise requires a contextual and concrete examination of the social impacts of the infringing conduct, given the inadequacy of the symbolic use of Criminal Law as an immediate response to the violation.

Barro (2021, p. 21-23) also asserts that the mere formal incidence of the criminal type does not justify, by itself, the application of the penalty, and it is necessary to investigate the

existence of concrete social repercussions, in addition to which, criminal intervention, in cases of unauthorized use of protected works, deserves to be measured with caution, considering the degree of reprehensibility of the conduct, the actual damage caused and the existence of regulatory, civil or administrative instruments capable of restoring or preventing the injury.

In this context, Santos (2020, p. 18-25) also enters the discussion by proposing a reconfiguration of the state's response to copyright infringements in the digital sphere, for example, favoring restorative solutions and extrajudicial composition mechanisms, arguing that classic criminal prosecution is, as a rule, ineffective in protecting the interests of the perpetrators and disproportionate to the nature of the conducts practiced, often motivated by lack of knowledge, lack of profit or inserted in shared cultural dynamics. It is in this scenario that the centrality of the custodial sentence imposed in the new wording of article 184, CP, should be rediscussed and alternatives more appropriate to the context should be sought.

Among the alternative instruments to criminalization, the mechanisms of regulation and self-regulation in the digital sphere, the systems of notice and takedown, the administrative measures of blocking access and legal monetization, collective compensatory models such as mandatory licenses and remuneration for access, since such mechanisms allow for more flexible protection, stand out with relevance. responsive and proportional to the legal good of intellectual property, avoiding the stigma of criminal sanction and favoring the resolution of conflicts in a more efficient and educational way, as alternatives implemented in the European Union and that can be included in Brazil (Pereira, 2022, p. 48-59).

The search for greater flexibility, milder and extra-criminal alternatives also contribute to greater speed in the resolution of judicial and extrajudicial conflicts, and in the protection of author's rights, with considerable benefits for all, both in terms of education and in terms of mitigating practices related to "piracy" and the movement to intensify social intolerance about it (Pereira, 2022, p. 44-64).

The implementation of public policies for access to culture, education about copyright and the incentive to the licit circulation of content should be understood as a priority strategy for the prevention of illicit acts, since the recognition of the plurality of social values and unequal access to cultural goods requires the State to have a pedagogical and inclusive action. not only punitive, but effective. From this angle, administrative, civil and educational sanctions need to be protagonists in the form of a state response, with the aim of reducing the costs and damages of criminal action (Pereira; Alves, 2025, p. 12-16).

The strengthening of civil settlement and mediation instruments in conflicts involving misuse of authorial works is also an effective measure to avoid unnecessary criminal

judicialization. Consensual solutions with provision for indemnity, retraction, or non-recidivism commitment are compatible with the principles of reasonableness and effectiveness, promoting the protection of the legal interest in a less onerous and more satisfactory way for the parties (Pereira, 2022, p. 67-67; Pereira; Alves, 2025, p. 8-16).

The principle of minimum intervention determines a rereading of the sanctioning options in matters of copyright, requiring from the legislator and the enforcer of the Law a commitment to more proportional, educational and effective solutions. In this scope, the reduction of criminal protagonism does not represent condescension to the infraction, but rather the recognition that punishment is not the only, nor the best, possible response to the protection of cultural and intellectual rights in contemporary society.

Continuing the previous reasoning, the search for alternatives to criminalization requires the integration of intersectoral instruments that simultaneously involve the areas of law, cultural policy, and digital inclusion, since Fernandes (2022, p. 63-72) states that criminal legislation must dialogue with the democratic principles of access to information and culture, under penalty of becoming an obstacle to the realization of fundamental rights of people already inserted in excluding socioeconomic dynamics, which is ineffective and unfair.

From this point on, the incentive structure for voluntary compliance with intellectual property rules proves to be more effective than criminal repression, taking into account that the availability of content in an accessible way, such as on *streaming* platforms, virtual libraries, free educational projects and more flexible models, which can reduce the incentive to informal consumption and compose the legitimacy of copyright.

Lima Filho and Santos (2022, p. 339) address that the adoption of mechanisms such as *Copyletf,* Creative Commons licenses*,* and *Open Access* models demonstrates that copyright protection does not necessarily depend on the criminalization of unauthorized use, but on the construction of a responsible and economically viable sharing ecosystem for all.

Copyletf and Creative Commons licenses*, according to Lima Filho and Santos (2022), can be understood from the following point of view:*

> The *Copyleft institute* can be considered the opposite of *Copyritgh* and is based on the free software system and is essentially a license in which the author authorizes the use of his work. For *Creative Commons*, it started as a public license and is now a non-profit organization. In this system, licenses are granted for the type of use preferred by the author, which can range from the most restrictive, prohibitive commercial use and modification of the work, to the most liberal, in which commercial use and modification is allowed, which requires only the author's report (Lima Filho; Santos, 2022, p. 364).

These institutes allow, in a way, greater flexibility in access to content and works covered as intellectual property, without necessarily configuring the practice of "piracy", providing access to information and protection of the fundamental rights of both the author and the citizen in general. According to Pereira and Alves (2025, p. 14-16), the fight against piracy requires the articulation of three fronts, in particular, copyright education, promotion of cultural production and technical regulation, from the perspective that the insistence on criminal responses contributes to the emptying of incentive policies and alienates users from a citizen understanding of intellectual property. Thus, it becomes essential to reconfigure the state function, towards a less repressive and more formative one.

The substitution of the sentence for reparatory or educational measures is supported by the following alternatives:

Table 2

Alternatives to criminalization and extra-penal instruments in the protection of copyright

Extra-criminal instrument	Main purpose	Legal and social benefits
Notice and take down	Remove infringing content quickly	Avoids judicialization and criminal stigmatization, with an effective and informal solution
Extrajudicial settlement and civil mediation	Resolve misuse conflicts without criminal penalty	Promotes negotiated settlement, indemnity and voluntary retraction
Copyright education and digital culture	Prevent infractions through training and citizen awareness	Reduces recidivism and promotes responsible and conscious access
Flexible licensing (copyleft, Creative Commons)	Offer legal alternatives to the use of protected works	Favors digital inclusion and circulation of knowledge, with legal certainty
Collective compensatory models (compulsory licences)	Guarantee remuneration for the broad and social uses of the works	Collective protection of data subjects with a focus on distributive and non-repressive efficiency

Source: Prepared by the author, based on Santos (2020, p. 18-25), Lima Filho and Santos (2022, p. 339), Pereira (2022, p. 48-59), Pereira and Alves (2025, p. 14-16), Lima Filho and Santos (2022, p. 339).

It is not intended to exhaust the discourse of minimum intervention, even with such alternatives, because here there is no denial of Criminal Law, but conditions for its legitimacy are aimed at because, when the harm is low, the social impact is diffuse and there are effective control alternatives, the penalization becomes an authoritarian manifestation without an educational character. As Braga (2021, p. 66-77) reminds us, Criminal Law is only compatible with the Democratic Rule of Law when it acts in a subsidiary, proportional and grounded manner

In this case, the current reflection on the protection of copyright also needs to emphasize non-criminal instruments, more appropriate to the principles of reasonableness,

cultural inclusion and social problem-solving, from the perspective that penalization, when unavoidable, should occur with moderation and only after exhausting the means of regulation, education and composition, and the future of intellectual property cannot be linked to punitivism, but to normative innovation, access to culture and the collective construction of sustainable models of protection and sharing.

5 FINAL CONSIDERATIONS

The endeavor began to analyze in a critical and reasoned way the limits of the criminal protection of copyright in the Brazilian legal system, with a special focus on the inapplicability of the theory of social adequacy to the conduct typified in article 184 of the Penal Code, as well as the need to observe the principle of minimum intervention, based on the premise that Criminal Law should be used sparingly, as the *last ratio* in the protection of relevant legal assets, avoiding the symbolic and disproportionate use of criminal sanction.

Based on the doctrine consulted, on the recent jurisprudential manifestations of the Federal Supreme Court and the Superior Court of Justice, and on the analysis of the grounds of (in)adequacy of the theory of social adequacy, it is possible to consider that there is no legal or factual support for its recognition as excluding typicity in conducts that violate copyright.

Brazilian society, although plural and sometimes contradictory, does not tolerate, institutionally, the practice of piracy. This is proven by the existence of updated and effectively applied criminal legislation, social awareness campaigns, policies to combat the violation of intellectual rights and permanent administrative oversight, which dispels any argument of neutralization of anti-juridicity through the supposed social meaning.

In this sense, objective criteria were proposed to rule out the incidence of the theory of social adequacy to article 184 of the CP, such as the presence of express criminal protection, the concrete harmfulness of the conduct, the existence of accessible legal means for the enjoyment of cultural goods and the intention of profit. These elements demonstrate that the so-called "piracy" cannot be framed as socially accepted or neutral conduct from the evaluative point of view, but rather as a practice harmful to the economic order, culture and the principle of fair competition.

On the other hand, it is recognized that the mere punitive option is not enough to guarantee the effectiveness of copyright protection, and it is essential that Criminal Law acts within the limits of proportionality, subsidiarity and reasonableness, resulting from this point the need to strengthen extra-criminal measures that are more appropriate to the complexity

of the phenomenon of digital piracy and the plurality of contexts in which copyright violations occur.

The repressive function must give way to the pedagogical, restorative, and regulatory functions of the State, which are embodied in instruments such as extrajudicial settlement, notice and take *down* systems, administrative instances of conflict resolution, mandatory licenses, collective compensatory models, terms of conduct adjustment, and educational awareness campaigns. All these mechanisms, properly implemented and articulated, have greater potential to prevent, repair and transform offending practices, without the high institutional and human costs of criminal prosecution.

Confronting copyright violations requires a comprehensive and balanced approach, which articulates criminal and extra-criminal mechanisms in a manner consistent with constitutional principles and the guidelines of the Democratic Rule of Law. The symbolic function of Criminal Law must be replaced by structuring functions, which promote education, distributive justice, adequate regulation of the market and social inclusion, because this will strengthen the protection of intellectual property without renouncing the rationality, humanization and effectiveness of the Brazilian legal system.

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