INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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GSP Subcommittee
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 518
Washington, DC 20508

Re: Request for Review of the Intellectual Property Rights Practices of Brazil in the 2000 Annual GSP Country Eligibility Practices Review, 65 Fed. Reg. 41514 (July 5, 2000)

To the Subcommittee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the July 5, 2000 Federal Register a notice announcing the 2000 Annual Generalized System of Preferences (GSP) Country Eligibility Practices Review. USTR indicated that "interested parties may submit petitions to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in subsections 502(b) or 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c))." See 65 Fed. Reg. 41515.

The International Intellectual Property Alliance (IIPA) hereby submits its request that the eligibility of Brazil as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Brazil to remedy the deficiencies (outlined below) which have adversely affected U.S. copyright owners. In 1999, the U.S. imported $1.9 billion in products from Brazil under the GSP program; this represented approximately 16.8% of Brazil's total exports to the U.S., according to U.S. government statistics.

Petitioner and its Interest: The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries. IIPA's member associations are the Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Business Software Alliance

(BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

These member associations represent over 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software (such as videogame CDs and cartridges, personal computer CDs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

These U.S. copyright-based companies are the leading edge of the world's high technology, entertainment, and publishing industries. According to Copyright Industries in the U.S. Economy: The 1999 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for $348.4 billion in value added to the U.S. economy, or approximately 4.3% of the Gross Domestic Product (GDP) in 1997 (the last year for which complete data is available). In 1997, the total copyright industries accounted for $529.3 billion in value added, or approximately 6.53% of GDP. The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those which create copyrighted materials as their primary product. The U.S. copyright industries are also among the nation's most dynamic and fast-growing economic sectors. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1997 (6.3% vs. 2.7%). Employment in the core copyright industries grew three times the rate of national employment growth between 1977 and 1997 (4.8% vs. 1.6%). More than 6.9 million workers were employed by the total copyright industries, about 5.3% of the total U.S. work force, in 1997. The core copyright industries generated an estimated $66.85 billion in foreign sales and exports in 1997, an 11.1% gain over 1996 and larger than the foreign sales and exports of the food, tobacco, apparel, textile, and aircraft industries combined. Preliminary estimates for foreign sales and exports for 1998 are $71.0 billion. For more detailed information on the IIPA and its members, visit www.iipa.com.

The U.S. creative industries represent one of the few sectors of the U.S. economy that regularly contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide free and open markets and high levels of protection to the copyrights on which this trade depends. Inexpensive and accessible reproduction technologies make it possible for U.S. copyrighted works to be pirated -- stolen -- in other countries, and including specifically for the purposes of this petition, Brazil. However, the copyright industries represented in IIPA lose an estimated $20-22 billion annually due to piracy outside the United States. These staggering losses, if not halted, could reverse this path of growth in these sectors, threaten the high wage employment that these industries bring to the U.S. economy, and damage U.S. competitiveness. To combat the problems of inadequate legislation and ineffective IPR enforcement in developing countries, the U.S. copyright-based industries joined with the Administration and Congress to fashion new legislation and negotiating tools. IIPA and its members have supported various trade tools with IPR provisions over the years, including the GSP Program, Special 301, Section 301, the Caribbean Basin Economic Recovery Act, the Andean Trade Preferences Act and the U.S.-Caribbean Trade Partnership Act.

Action Requested by Petitioner

Pursuant to the Trade Act of 1974, as amended (19 U.S.C. 2461 et seq.), IIPA, on behalf of its seven trade association members, hereby petitions the President to review the eligibility of Brazil as a GSP beneficiary developing country, and if requisite improvements are not made swiftly by Brazil, then IIPA requests the President to suspend or withdraw GSP benefits of Brazil, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.

Legal Authority for this Petition and Discussion of the IPR Criteria in the GSP Statute

A full discussion of the legal authority for this petition, and the specific IPR provisions and legislative history of the GSP programs is found in Appendix A. To summarize, in the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."[1] The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving "beneficiary" status under the GSP Program. When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."[2]

Brazil Fails to Provide "Adequate and Effective Protection" of U.S. Copyrights

To the best of petitioner's knowledge, much of the information describing the deficiencies in Brazil's copyright enforcement regime has been presented previously to members of various U.S. governmental interagency groups, including the Special 301 interagency group, several members of the GSP Subcommittee, as well as the Trade Policy Staff Committee, in the context of USTR's Annual Special 301 Review. On February 18, 2000, IIPA presented its annual Special 301 submission to Assistant USTR for Services, Investment and Intellectual Property Joseph Papovich; this submission was widely distributed among the interagency for its internal consideration in the 2000 Special 301 Annual Review. IIPA's entire report is available on our website.

USTR continues to highlight enforcement issues in Brazil. With respect to copyright-related issues, Ambassador Charlene Barshefsky stated the following in her May 1, 2000 Special 301 announcement in which she kept Brazil on the "Watch List":

> Progress has not been sufficient on Brazil's commitment to increase effective enforcement actions, from raids through judicial decisions, against intellectual property infringement; the rate of CD piracy in Brazil continues to worsen. Failure to address this problem could lead to the collapse of the market for legitimate CDs in Brazil. We look to Brazil to significantly increase its enforcement efforts against

[1] See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.
[2] GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

> video, music CD, video game, as well as other piracy in the coming year, consistent with its WTO obligations. We hope that the newly formed inter-ministerial IPR task force will prove effective in this regard.[3]

1. Because of inadequate and ineffective copyright enforcement in Brazil, both the levels of piracy and the estimated trade losses due to piracy remain very high, causing U.S. copyright owners significant economic loss.

This GSP petition details the on-the-ground situation regarding piracy and enforcement in Brazil. Over the years, the Brazilian government has made numerous commitments to U.S. government officials to address the core problems of high piracy and inadequate enforcement. These commitments continue to remain unfulfilled today. This petition will not recount the numerous bilateral contacts on copyright and intellectual property rights issues which have taken place over the last decade.

In sum, there have been few concrete, tangible results taken by Brazilian authorities to acknowledge the size and scope of the copyright piracy problem and to address the high piracy levels and the ineffective criminal enforcement system in Brazil. In fact, recent revisions in the procedures in criminal cases have resulted in more defendants in copyright infringement cases being released, instead of serving their sentences. As our industries continue to expand their local presence, increase their anti-piracy investigations, and foster public awareness campaigns, the scope of the problem only worsened. Estimated trade losses due to copyright piracy of U.S. products in Brazil increased to over US$873 million in 1999, and the forecast for 2000 appears equally dark.

Pirated optical media product, primarily manufactured in southeast Asia and Paraguay, cross the porous Brazilian borders, devastating the local markets. There is also local manufacture of pirated optical media product within Brazil. Organized crime elements, both within Brazil and outside, exercise control over the production and distribution of infringing copyrighted products. The isolated efforts of some Brazilian police units, which have conducted a substantial number of raids, were to no avail. The number of criminal copyright cases which went to judgment in 1999 can be counted on one hand. Out of over 1,400 criminal complaints filed by three of our industries with Brazilian authorities in 1999, only four criminal sentences were issued (and most of these related to cases initiated in prior years), and all involved small fines totally insufficient to deter piracy.

[3] Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 1999

INDUSTRY	1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	35%	125.0	40%	110.0	30%	100.0	35%	90.0	38%
Sound Recordings / Musical Compositions[4]	300.0	MC95% CD35%	290.0	MC95% CD30%	110.0	80%	80.0	50%	70.0	45%
Computer Programs: Business Applications[5]	319.4	58%	298.8	61%	315.7	62%	366.7	70%	307.6	74%
Computer Programs: Entertainment Software	116.2	90%	103.2	89%	99.1	87%	92.5	82%	82.5	80%
Books	18.0	NA	20.0	NA	26.0	NA	27.0	NA	30.0	NA
TOTALS	873.6		837.0		660.8		666.2		580.1	

Attached as Appendix B is the methodology used by IIPA members to calculate estimated losses due to copyright piracy. This methodology was also submitted to USTR in IIPA's 2000 Special 301 submission. Below is a description of the piracy problems our industries face in Brazil.

Optical media piracy threatens the entire Brazilian market

CD piracy exploded in Brazil in 1998, leading to dramatic increases in losses for U.S. recording companies, music publishers, film companies, book publishers, and publishers of entertainment software and business software. During 1999, the CD piracy problems worsened as a result of Brazil's economic recession. The recording industry was able to confirm that a significant part of the problem involved the unrestricted, international distribution of optical media product, emanating primarily from production facilities in Southeast Asia. Such optical media distribution networks are under the control of organized criminal elements including Chinese, Taiwanese, Paraguayan, Bolivian, Panamanian and last, but by no means least, Brazilian nationals. Chinese and Korean groups seem to control the pirate CD distribution in São Paulo. These groups are known to bribe the police in order to facilitate distribution. Another problem involves the organized crime element of Brazilian nationals who are involved in retail sales of pirated products within Brazil.

Yet another problem is the large-scale distribution networks in Brazil, whether these involve thousands of street vendors with established facilities (such as gas stations) which blanket the major highways in Brazil, or the non-established facilities in "camelodromos" (flea markets) or on the streets. And finally, another phenomenon is the large quantifies of blank recordable compact disks (CD-Rs) which are being imported into Brazil. There are also growing numbers of small duplication facilities which assemble CD burners, and in turn these facilities can produce a significant amount of pirate CDs each day.

[4]RIAA estimates that the piracy levels in Brazil in 1999 were 95% for audiocassettes (MC) and 35% for compact discs (CD). The composite level of audio piracy in Brazil is 50% for 1999.

[5] This list include BSA's final estimates for 1999, which are slightly less than its preliminary estimates reported in IIPA's 2000 Special 301 report, which were $362.9 million in losses at a 61% level of piracy.

The software industries have faced the digital piracy problem in Brazil for many years, given the nature of their products. As technology rapidly changes, the motion picture industry is the last of the copyright industries to face the threat of digital piracy. Of course, all of the copyright industries face the challenge of dealing with online piracy. In general, this petition against Brazil focuses on the kinds of piracy described below.

Piracy continues at unacceptably high levels

As exemplified by the chart above, the piracy levels for most of the copyright industries exceeds 50%, meaning at least half of each market is composed of pirate products.

In 1999, the widespread audio piracy problem in Brazil worsened, due to several factors including: the growing pirate market, the shift of street vendors from selling pirate audiocassettes to selling pirate CDs, and to a lesser degree, Brazil's economic troubles. For three consecutive years, Brazil's audiocassette market has been completely lost to pirates, and there was no reversal of this disastrous fact in 1999. In 1999, cassette piracy now accounts for 95% of the cassette market, with the legal industry selling 300,000 audiocassettes and the pirates selling approximately 60 million units. Now in the year 2000, cassette piracy accounts for 98% of the cassette market. Estimated losses due to audiocassette piracy are about $100 million for 1999. Alarming increases in the levels of CD piracy in Brazil first hit in 1998, when the recording industry began to call attention to the fact that piracy was increasingly threatening to destroy the world's sixth largest market for sound recordings and music. Audio CD piracy is also on the rise, blanketing about 35% of the Brazilian market in 1999, an increase over 1998, and causing about $200 million in estimated trade losses.

In all, the sound recording and music industries suffered $300 million in estimated losses due to piracy in Brazil in 1999. The forecast for the year 2000 is not positive. The main States which are being attacked by piracy are São Paulo, Parana, Minas Gerais, Rio de Janeiro, Goias, the Federal District (Brasilia), and the States in the North East.

The main reasons for the rapid increase in music CD piracy are: (a) the lack of strong and coordinated action by the Brazilian government against unrestricted imports, distribution centers and street vendors; (b) the regional CD problem caused mainly by neighboring Paraguay, and unrestricted imports via airports and seaports in Brazil and its links to Southeast Asia; and (c) the lack of proper legislation and judicial guidelines to allow the judiciary to proceed definitively against the suspect infringers. The CD piracy problem is so sophisticated that it makes investigations and actions very difficult to accomplish without the full intervention and commitment of the federal government. For example, rising CD piracy caused commercial sales of legitimate product in Brazil to fall 20% in 1998 (compared to 1997) and 15% in 1999 (compared to 1998). When the legal recording market sales dropped 30% in the first four months of 1998, the industry pleaded with the Brazilian government for action, but to no avail.

For years, pervasive audiocassette piracy has basically destroyed the legitimate Brazilian market. In the southern cities and in the interior, the pirate cassette market is still strong. Based on the industry's past experience, this market will gradually switch toward selling pirate CDs, which will totally undermine the legitimate music CD market. It is important to note that almost 75% of this pirate product in Brazil affects Brazilian repertoire. The industry believes that this fact alone would suggest that the Brazilian government would be even more concerned in addressing the piracy problem. In recent years, the pirate market switched very rapidly from audiocassettes to

CDs, as street vendors, flea markets, and "sacoleiros" and contrabandists crossing from Paraguay into Brazil increasingly sold CD product. This phenomenon is obvious in major cities like São Paulo, the interior of São Paulo, Salvador, Curitiba, Recife, Fortaleza, Rio de Janeiro, Belo Horizonte, Goiania, and even in Brasilia, where more and more street vendors now sell pirate CDs and cassettes. In fact, industry and police random anti-piracy efforts in São Paulo have caused the street vendors to react and create new strategies to avoid raids, thus making the anti-piracy efforts even more difficult. These vendors now are more mobile and carry small bags of CDs instead of setting up fixed stalls. In northeast Brazil, the pirate sales are beginning to take the place in established shops. Gas stations throughout the country freely distribute pirate CDs. There is an urgent need to attack this problem in a direct and coordinated manner.

Pirate and bootleg cassettes and CDs mainly enter Brazil from Paraguay via Foz de Iguazu, Corumba, Cascavel, Londrina, Riberao Preto, Maringa, Campo Grande, Cuaiba, Goiania and Ponta Pora, and also through the ports of Santos, Paranagua, Recife and Salvador, as well as at the airports at Manaus, Rio de Janeiro, São Paulo (Congonhas, Guarulhos and Viracopos) and Foz de Iguazu. Paraguay acts as a bridge to deliver pirate CD product from Taiwan, Korea, Thailand, Singapore, and China, as well as from the emerging CD plants in Paraguay, the U.S. and several European countries (Italy, Germany and France). Brazilians take advantage of the lack of border controls and install manufacturing, assembly and printing facilities on both sides of the border, bringing their products back and forth without any kind of control. During 1999, the recording industry found and dismantled two huge CD plants in Ciudad del Este which were targeting the Brazilian market. Amazingly, the CD plants entered Paraguay from Brazil, with no restrictions at all.

In response to piracy, the recording industry introduced a hologram seal of authenticity for placement on all legitimate CDs. In December 1998, the Brazilian government issued a decree to establish an official, numbered stamp, issued and sold exclusively by the government, to be affixed to IPR goods, including sound recordings, videos and books, and grant authenticity to them. The recording and audiovisual industries remain concerned that this stamp is not properly implemented, it could in fact be used against these industries by spawning an entirely new counterfeit stamp industry. This stamp program was implemented on March 15, 2000. The Brazilian Video Union (UBV) filed a legal action on behalf of all of its member distributors (MPA member companies included) against the stamp. The UBV member companies have agreed to continue to oppose the stamp implementation legally and politically, not only because it constitutes an additional financial burden, but also because of administrative problems in its supply by the government, and its possible "promotion" of piracy by re-recording pirates. Since this government-issued stamp confers authenticity by the Brazilian government to the VHS physical support bearing it, pirates will be able to re-record pirate films over the original films contained in a VHS physical support bearing the stamp. The recording industry is also challenging this stamp in a separate legal action. The industries will continue to watch the implementation of this stamp closely.

The biggest problems for the interactive entertainment software industry in Brazil remain the lack of border controls and the high level of piracy. The vast majority of illegal software for all entertainment software platforms is made in Asia (Hong Kong, Macau, the People's Republic of China, Taiwan, Thailand, Malaysia or Singapore) and is shipped to Paraguay, and then Brazil. Pirated videogames in cartridge format, produced in Southeast Asia, enter the Brazilian market, often via Paraguay where they were assembled. Pirate CD-ROMs containing entertainment software products are mixed in with other shipments of optical media directly from Southeast Asia. Reports also indicate that there is an organized crime element involved in videogame piracy, and this makes it very difficult to engage local authorities in this fight.

The retail videogame industry in Brazil continues to experience serious piracy problems, with stores having large quantities of counterfeit videogame cartridges for sale. Videogame pirates have gone from imported silver industrials CDs to huge gold-disc burning operations, run by organized crime. Gold discs are recordable discs, called "tostadas" in Brazil. These burning operations are very profitable. Often what happens is that advertisements offering games are placed in newspapers and other sources. The customer calls, orders are taken in a fly-by-night telephone room, and the product is delivered to another location. The disc is then burned (made to order), taken to yet another location where it is given to a delivery person who often makes the delivery on a moped. These kinds of "tostada" operations are very difficult to investigate and track back, up the chain of command, to those directing and managing the infringing activities. Reports indicate that police are reluctant to arrest the delivery people, who are often teenagers and children. Pirate videogames can also be found in flea markets. Lastly, parallel imports from Asia also enter Brazil, thus harming the ability of copyright owners and their licensees to distribute locally. Estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs and multimedia products) in Brazil in 1999 were $116.2 million, with an estimated piracy level of 90%.

Video piracy in Brazil is the major piracy problem facing the motion picture industry there. The established video market in Brazil is by far the most extensive in Latin America, with an estimated 12,000 video stores throughout the country. And that number may be underestimated; there is an unknown number of small "underground" video stores that never buy legitimate product and are not registered by any commercial or government survey. Yet this enormous market potential is extremely difficult to develop, because video piracy in Brazil has reached a high degree of integration into the video market. Approximately half of the pirated material in video clubs is copied back-to-back from legitimate product, while the other half is distributed from numerous small clandestine duplication laboratories. Excellent quality counterfeit videos, sold by clandestine duplication and distribution organizations, are common throughout Brazil. These organizations use legitimate tapes as masters for illegal duplication. Typically, these titles can be found on the pirate market shortly after the video release, and pirate tapes often contain counterfeited security stamps. To counter the use of counterfeit security stamps by these organizations, the Brazilian Video Union (UBV) adopted a completely new and uniform system for labeling videocassettes, including security marks, and has agreed to use a single color (gray) cassette for original tapes. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Brazil are estimated to be $120 million in 1999. This slight reduction in estimated losses is due to devaluation, not a reduction in piracy.

The book publishing industry reports that photocopying of English language study materials and individual lessons and chapters from textbooks, as well as entire books, continue to be the major forms of book piracy in Brazil. AAP indicates that photocopying on university campuses remains rampant, despite the combined efforts over the years of local publishers and the Camara Brasileira do Livro (the local publishers association) to address this problem. More unauthorized photocopying occurs in the northeastern states of Brazil, compared to São Paulo, Rio de Janeiro, Minas Gerais and Porto Alegre. Imported educational materials are commonly photocopied, due in part to their high price. Some of the largest universities are now discussing legitimizing the photocopying that goes on in their libraries. Imported books and journals for the computer market are also widely photocopied. The potential problem in the near future may be unauthorized translations, as U.S. publishers begin to enter that specific market in Brazil. Estimated trade losses due to piracy were $18 million for 1999.

The Business Software Alliance (BSA) reports that its estimated 1999 trade losses due to business software piracy in Brazil rose to $319.4 million. Meanwhile, the estimated level of business software piracy in Brazil dropped slightly, to 58%. BSA was very active with its enforcement campaign in 1999, supported by good regional press coverage. The enforcement campaign was aided by the passage in February 1998 of amendments to the 1973 copyright law, which increased civil penalties to 3,000 times the retail value of the pirated software, and the passage (also in February 1998) of a new software law, which provided greater protection for software copyright, including stiffer criminal penalties for certain types of software piracy.

BSA focuses its anti-piracy activities in the following states: Minas Gerais, Paraná, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, São Paulo and the Federal District of Brasilia. Software piracy continues to exist in its traditional forms in Brazil, including illegal reproduction/duplication of software programs both for commercial (i.e., sale) and noncommercial (i.e., use) ends, illegal use by end users, hard-disk loading of illegal software by computer resellers, and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience and, especially, for the unauthorized electronic distribution of illegal software. Although Brazilian Internet pirates have been responsive to cease and desist letters sent by BSA and its member companies, many of these pirates simply close down one Website and open up an identical Website undetected (with a different Universal Resource Locator or Web address). The Internet may well eclipse other media for advertisement and distribution of illegal software in the near future. In respect of end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against large and medium-sized companies, which has had some impact on the level of piracy. However, there still exists a considerable small business segment in Brazil that has far from legalized.

2. The Brazilian criminal enforcement system fails to impose deterrent criminal penalties for copyright piracy.

Brazil continues to exhibit a general lack of interest and unacceptable delays in effective enforcement of the copyright law throughout the enforcement system, including police corps, judges, prosecutors and customs officials. While isolated police efforts have been moderately successful at the raiding level, the actions they take rarely reach conclusion in the courts. There is still a lack of clear and direct instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Policia Federal, Policia Civil, Policia Estadual, Policia Fazendaria, Alfandega) to act with clear guidelines.

a. Police raiding activities against piracy are inconsistent.

The level of police attention to piracy varies throughout the country. Corruption has emerged, and in some cases, the police are leaking most of the information that is contained in the legal cases filed by the industry. Certain industries are able to achieve adequate cooperation with police officials, often depending on the region and on personal contacts. Most of the enforcement efforts are commenced by investigations conducted by the copyright industries themselves, and are not the result of any major Brazilian government initiatives. It should be noted that because Brazil has many police corps, the rivalry among them is affecting their ability to conduct efficient raids.

The police, prosecutors and judges have demonstrated a lack of understanding of IPR issues in many instances. Rightholders may initiate criminal actions with either federal or state police officials to obtain search orders based on proof of copyright infringement. The federal police and judiciary are not considered to be effective in copyright enforcement. Federal police officials have jurisdiction over the types of crimes that are generally viewed as producing large-scale corruption (such as border controls and drug trafficking). There should be a centralized unit that could work the most important cases, and specific guidelines should be given to the police corps (for example, the Policia Fazendaria, regarding tax evasion cases) to take the lead in executing a centralized plan.

Perhaps as an indication that the criminal authorities apparently have begun to recognize the socioeconomic significance of the crime (or perhaps to prepare itself for future assertions of non-action), police statistics in São Paulo now include piracy as an official statistical classification. This will now allow for comparative measurements, but most importantly it allows for the creation of a database of offenders. So far, the piracy levels have not declined.

The local recording anti-piracy association, APDIF do Brasil, has been very active for more than four years, working primarily in the states of São Paulo, Paraná, Minas Gerais, Mato Grosso do Sul, Goias, Bahia and Rio de Janeiro. During 1999, APDIF brought 777 actions, which resulted in the seizures of 1.46 million pirate audiocassettes, and 1.4 million pirate CDs. While these numbers appear to be impressive, they actually reflect only a very small portion of the entire pirate market. These 3 million pirate units are few, compared to a pirate market of some 95 million units.

Although the Brazilian police seemed to start cooperating in actions against street vendors of pirated music during 1998, such cooperation declined in 1999 and this trend continues in 2000. This downward spiral is happening because there is a lack of clear guidelines and direction from senior Brazilian officials. In addition, in those rare cases where the police were helpful and took action, the cases got bogged down with the prosecutors, who with few exceptions are unwilling to bring cases against street vendors. Evidence of the lack of enforcement can be found in the following areas where music piracy thrives openly: São Paulo City (the surroundings of the 25 De Marco Street, 12 de Octubre Street), the downtown of São Paulo, Camelodromos of Campinas, Riberao Preto, Porto Alegre, as well as throughout the cities of Florianopolis, Curitiba, Goiania, Cuiaba, Feria de Santana, Vitoria de Conquista, Teresina, Natal, Feria de Sulanca and Caruaru. These are just a few examples of the locations where piracy exists with impunity.

The recording industry notes that it has been almost impossible to proceed with its more serious piracy cases due to the high incidence of leaks. In other countries, one of the only ways to deter piracy is to affect their revenue stream (by using tax evasion laws) and to impose serious jail terms against convicted pirates.

The motion picture industry also has been very active in Brazil. During 1999, the Motion Picture Association (MPA) initiated 1,518 investigations, conducted 1,671 raids and seized 212,063 pirate videos (69,857 in São Paulo and 54,605 in Rio de Janeiro). MPA investigations uncovered three large duplication centers in the São Paulo area. Thirty-four laboratories were dismantled, and 441 VCRs were seized, the most effective effort in several years. MPA revamped its enforcement program mid-1999. In two operations run in the fall of 1999 in São Paulo, MPA and police officers discovered a well-equipped laboratory with two dozen VCRs, counterfeit labels and other equipment. The suspected operator of this lab is an active police officer. The individuals apprehended, including the police officer, have been indicted and are awaiting trial, for piracy as well as for the theft of the VCRs found in the lab. In addition, MPA investigated and dismantled an

organized ring of pirates which illegally reproduced tapes and then forcefully sold them to businesses in the Korean community by threats and extortion. The defendants in this case, too, are awaiting further legal process.

In early March 2000, Southern Brazil's most notorious video pirate, was arrested for possession of pirate videos. His laboratory, at the time of his arrest, had not yet been located. This represented the first time in which the industry has been able to successfully investigate and pursue large-scale distribution in the Southern part of Brazil.

Regarding business software efforts, BSA, in collaboration with the Associação Brasileira Das Empresas de Software (ABES) (the local software association), brought 88 criminal police actions against resellers in Brazil from June 1999 to May 2000. Out of these actions, 11 were against small stores where 7,562 CDs were seized, and 64 actions were brought against street resellers where 59,082 CDs were seized. ABES reports that a total of 73,734 CDs have been seized as a result of these actions and estimates that the retail value of the software is in the range of US$21 million. In all of 1999, BSA brought 118 criminal police actions against resellers in Brazil in 1999, a significant increase from the 34 criminal police actions brought in 1998.

In a rare example of the police acting mostly on their own initiative (BSA provided some technical assistance), in Rio de Janeiro the consumer affairs police (DECOM) brought actions against street vendors selling pirate software, which has resulted in one conviction to date (two year's probation and a fine), with several other cases still pending. In São Paulo, BSA continues to work closely with DECOM in bringing cases against computer resellers that load hard disk pirate software on computers. In all the DECOM São Paulo cases, the suspects were arrested, but promptly released on bail, which almost always requires the payment of a small sum ($600 or less). The signs are that DECOM in São Paulo will prosecute these suspects, although there have been no convictions as yet due to long delays in the criminal process. In Recife, BSA worked with DECOM, which resulted in the arrest of five individuals in 1999 suspected of selling illegal software; again, these individuals were immediately released from custody upon the payment of small bail amounts. There have been no cases to date in which BSA has been involved where an individual has served a jail term for software piracy.

After years of effort, the Brazilian software industry, with the support of the U.S. software industry, succeeded in obtaining a "fiscal crime" provision in the Software Law enacted in February 1998. Under the Software Law (Article 12, section 3, paragraph II), tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as an independent public action. With certain limited exceptions at the state level, two and one-half years into the new Software Law, it is clear that the Brazilian IRS (Receita Federal) and the respective state tax authorities are dedicating no resources to pursue this kind of tax evasion. The exceptions referred to were the ten (10) tax evasion cases in 1999 brought about by lobbying efforts of the software industry, and which were brought by the state police (tax evasion departments) in coordination with state Tax Departments in the Federal District of Brasilia and the state of Bahia. The basis of these actions is that the state is suffering great losses due to the sale of illegal software as pirate resellers are not collecting the ICMS tax (equivalent to a value added tax) from purchasers upon such sale. BSA was extremely hopeful that this type of tax evasion case would have a big impact on the level of piracy in Brazil, especially by medium- and large-sized companies. Indeed, the few cases brought in the Federal District of Brasilia and the state of Bahia attracted a lot of press coverage, which disseminates to the public the risks associated with software piracy. While the software industry continues to work with certain state tax authorities under the fiscal crime

provision of the new software law, action is needed by the Receita Federal, which to date has shown absolutely no interest in pursuing tax crimes of this nature.

b. Unnecessary requirements for technical analysis causes excessive delays and exposes viable cases to unwarranted dismissal.

MPA reports that it has had several cases dismissed because of improper technical analysis by police experts and also reports that the majority of its over 3,600 cases are stalled because of the improper application of a technical analysis of the evidence. Police experts currently insist on physically examining the suspected pirate tape, looking for physical evidence of piracy (lack of UV label, home-made labels, etc.) and are requesting equipment for internal examination (e.g., a cross-pulse monitor to determine second-generation copying, etc.). This type of exam is based on a trademark paradigm where the essential element is falsification, but in copyright the essential element is lack of authorization.

Note that Article 184 Section 2 of the Criminal Code defines a criminal copyright violation for video as: (1) the sale, rental, introduction into the country, etc., (2) of an original or copy, (3) for a lucrative purpose, and (4) in violation of copyright. Article 184 Section 1 of the Criminal Code then defines such a violation of copyright as: "the lack of the express authorization of the author or representative." A criminal expert's opinion regarding the physical state of the tape signifies absolutely nothing as to whether or not a copyright violation of the work contained in the tape took place. The criminal expert's opinion may create a presumption, but it cannot determine if it the tape was authorized or not. Only documents can prove that because Article 184 defines violation of copyright as the lack of express authorization.

One current motion picture case proves the point: in Minas Gerais, based on a technical exam stating that the seized tapes were genuine, the judge ordered the return of the tapes and dismissal of the case. However, the law clearly states that the non-authorized commercial use of original tapes is a criminal violation of copyright. MPA has had numerous other cases dismissed on similar grounds, when the police expert, based on a physical exam, has reported to the judge a "lack of evidence" sufficient to proceed. In no case, however, has the expert requested documentation regarding authorized use, which is the true basis of a copyright violation.

MPA does not argue that a technical analysis is improper (apparently Article 158 does require such a report be given to the judge), but asserts that it is being improperly applied in copyright cases. The expert exam of the evidence must be oriented towards the existence of express authorization (usually some form of documentation), leaving a physical examination to trademark and patent falsification. Resolution of this issue is important and not difficult. It does, however, require that Brazilian criminal authorities re-examine their procedures and understand the difference between copyright and trademark violations.

c. Brazilian prosecutors pursue very few criminal copyright cases, despite the high numbers of complaints filed and raids conducted.

Prosecutions are ineffective; few cases reach the courts, and those few that do fail to impose deterrent penalties. During 1999, throughout the entire country of Brazil, the courts issued only a handful of judgments (four) in criminal copyright infringement cases. This is even worse than the six cases reported in 1998. Mid-year 2000 statistics are not yet available for all industries.

Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Case backlogs constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities in the law and a general lack of resources. Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence. A major problem has been the low penalties imposed in the few criminal copyright infringement cases which have been decided by the courts. This problem may be alleviated if the penal code is reformed to index penalties for inflation and if the courts actually impose deterrent levels of penalties in copyright cases. Regulations aimed at reducing the backlog of court cases further undermine and weaken deterrence. Courts usually suspend jail terms for first offenses, thus returning defendants to the streets to return to their illicit activities.

In 1999, the recording industry filed 409 complaints with the police, and this resulted in actions against approximately 777 targets. Out of the 409 cases, 117 made their way to court in 1999, and only 3 convictions were reached. These three sentences were so low (the judgments having been converted to fines) that the defendants walked out of the courtroom without going to jail.

With respect to audiovisual cases, the MPA reports that out of 1,671 raids in 1999, 832 criminal investigations were initiated (although in the majority of cases, that simply means that the MPA has legally presented itself as representing the rightsholders and a file has been opened; it does not mean active investigation). As for legal resolutions in 1999, 144 cases were suspended, 91 were dismissed, and there were no convictions. Most of the dismissals occurred either because the accused was found not to have the criminal intent to engage in copyright infringement or because the experts' reports were not conclusive enough to identify the seized tapes as piracy (see the comments on unnecessary technical analysis). The 114 cases were suspended under Law No. 9099, which provides for the suspension of sentences for first-time offenders. Judges have been suspending cases under Law No. 9099 and ordering compensation which varies from providing a few pounds of food for public distribution to a penalty of $20 per tape (or less) to be paid to the MPA member companies. This low level of penalties does not come close to meeting the TRIPS Article 61 standard of providing for deterrent "criminal procedures and penalties to be applied" in cases of commercial piracy.

MPA reports that the pattern of no deterrence at the prosecutorial and judicial levels continues. Already this year (January-June 2000), MPA has filed 864 complaints with the police, which resulted in 474 raids. 108 of these cases have been suspended or dismissed. There have been five convictions, which included one (1) jail sentence (which was converted to community service) and four minimal reparations (no community service, no jail time).

As for business software actions, BSA's criminal campaign against resellers is focused on

seizures and publicity, and includes conducting actions with DECOM (consumer protection), the state police, the fiscal authorities (under the new Software Law), and the filing of private criminal suits (usually against the directors of an end user, subsequent to the filing of a civil damages suit). As discussed above, in 1999 there were 118 criminal business software complaints filed in Brazil. Some of these actions were brought in collaboration with ABES, the local Brazilian software association. One criminal verdict was issued, for two years' probation and a fine of less than US$600.

CRIMINAL COPYRIGHT ENFORCEMENT
STATISTICS IN BRAZIL FOR 1998, 1999 and 2000

ACTIONS	Recording Industry 1998 (1999) [2000]	Motion Picture Industry 1998 (1999) [2000]	Business Software Industry 1998 (1999) [2000]
Number of complaints filed with police	530 (409) [NA]	1,320 (832) [864]	34 (118) [NA]
Number of raids Conducted	680 (777) [NA]	2,381 (1,671) [474]	34 (118) [NA]
Number of pirate copies seized	2.85 million (2.86 million) [NA]	243,581 (212,063) [133,113]	NA (NA) [NA]
Number of cases Suspended or dismissed	NA (18) [NA]	148 (235) [108]	(0) (0) [NA]
Number of defendants convicted (including Guilty pleas)	5 (3) [NA]	1 (0) [5]	0 (1) [NA]
Criminal sentence Issued	Minimal fines (1-year jail term, commuted to small minimal fines) [NA]	Community service (None) [1 Community service]	None (2 years' probation plus fine < $600) [NA]
Ratio of convictions to the number of raids conducted	0.7% (0.8%) [NA]	0.04% (0%) [0%]	0% (0.8%) [NA]

Notes:

- Statistics in this chart are provided by IFPI Latin America, the Motion Picture Association (MPA) and the Business Software Alliance (BSA). MPA's 2000 statistics are January through June 2000.
- The suspensions or dismissals cited above are the result of judicial decisions. See discussion below regarding Law 9099-95, which permits judges to sentence first-time offenders with up to two years' probation and monetary damages.
- NA = Not Available.

3. Unwarranted delays by the police, prosecutors and judges, are commonplace in criminal cases.

For those rare criminal cases that do make their way to court, the time to complete a case takes a very long time. Delays in criminal copyright infringement cases can take as long as two to three years in the courts of first instance. Not surprisingly, there is a tremendous backlog of cases in the Brazilian courts. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case.

As one example of the unnecessary delay in prosecution, the MPA reports an October 1998, raid on a video duplication center in the City of Santo Andre, where it seized 152 VCRs and fake security stickers. Initially faced with the prosecutor's unreasonable assertion that the case lacked sufficient evidence, this important case continues to sit without progress. In addition to that one example, however, MPA faces a large backlog of 3,686 cases pending (1,127 in São Paulo and 719 in Rio de Janeiro), including over 600 dating from 1997.

One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which should significantly improve intellectual property rights enforcement. Our reports indicate that these courts are restricted to industrial property matters. IIPA and our members continue to recommend that courts also be established to handle copyright infringement cases. Although no specific action has been taken to create these courts, our last report indicated that the Brazilian Judicial Commission has assigned the issue as a specific agenda item (number 15) in its list of pending actions.

4. Brazilian border measures are ineffective.

In 1999, the copyright industries requested that the Brazilian government focus on improving border enforcement. There seemed to be little progress made on improving this problem. Because of the lack of coordination of the actions of Brazilian customs and federal police, border controls are lax and must be tightened to stop the massive amounts of pirated and counterfeit product (including piratical CDs, audiocassettes, videocassettes and videogames) entering Brazil from Paraguay, particularly at the cities mentioned above, among these being Foz do Iguazu, Corumba, Campo Grande and Maringa. Bolivia and Uruguay are also potential sources of counterfeit production for the Brazilian market.

Brazil promised the U.S. years ago that it would work with the Paraguayan government on border issues, but only recently have few enforcement efforts been observed at the Brazilian border. The Brazilian airports are also a significant source for pirate shipments around the country. While coordination efforts may be underway, they have not resulted in any tangible improvement on the ground. According to the Brazilian Government, they implement a "red traffic light" system in the major seaports with Paraguay. A few months later, the industry found that two large CD plants made their way to Paraguay via Brazil (via the ports of Santos and Paranagua).

5. Unwarranted delays are also prevalent in civil cases.

The business software industry also uses civil actions in its anti-piracy campaign in Brazil. BSA continues to bring civil search and seizure actions, followed up in most part (unless the defendant settles within thirty days of the search and seizure) with the filing of civil damages suits. BSA brought 67 civil actions against software pirates in 1999, an increase in the number of actions from 1998, and has brought 24 civil actions up to the end of July in 2000. If the level of software piracy in Brazil is in any way connected to the number of denunciations received by the BSA anti-piracy hotline telephone service, it should be noted that the hotline received 18,292 calls in 1999 (an increase from 5,600 calls in 1998), which produced 1,450 leads of suspected piracy (an increase from 730 leads in 1998).

The civil court system in Brazil is notoriously overloaded, inefficient, and slow. In São Paulo, judges may be responsible for 3,000 or more cases in a year. Cases usually take from eighteen months to two years to come to trial. Moreover, defendants have many grounds for appeal, and this process regularly takes three years before a judgment is issued by the relevant superior court. Incredibly, BSA has cases in São Paulo dating back to 1991 and 1992 that have still not received a judgment from the relevant superior court.

Nonetheless, in two civil cases in 2000, BSA has received extremely favorable judgments for multi-million dollar sums. The judges in these cases applied Article 301 of the Copyright Act of 1998 (Law No. 9.160/98) ordering the defendants to pay damages of 3000 times the retail value of the illegal software seized. The level of damages awarded in these cases is unprecedented worldwide with respect to software copyright infringement suits.

6. The Brazilian criminal codes fail to provide effective deterrence. Amendments to improve this legislation have been pending for years and have not yet been adopted.

The Brazilian penal code was amended in 1993. Unfortunately, those amendments failed to include procedural provisions which would have permitted the police to seize all infringing copies (instead of just the amount of product necessary for evidentiary purposes) and implements used for reproduction which are found during an anti-piracy raid. The legislation should be amended to provide this seizure authority. In addition, the levels of fines in the 1993 amendments have been overwhelmed by inflation, and should be tied to the indexing system in the general provisions of the Brazilian penal code. The Brazilian government promised to make best efforts by June 1994 to pass legislation to ensure that the range of higher penalties available under the indexing system in the general provisions of the penal code applied to copyright infringement. This has not been achieved.

Presently there are two amendments pending to the current Brazilian penal code. The first is Bill No. 2.681/96, which has strong copyright industry support. This bill would amend Article 184 of the penal code to include unauthorized rental of a work or sound recording for profit and add provisions permitting the destruction of seized materials by Brazilian authorities.

The second proposal, Portaria 232/98 proposed by the Ministry of Justice, reflects a substantial revision of the entire penal code. The concern here is that this proposal would lower the level of criminal penalties and remove the authority of the police to initiate searches and seizures on their own initiative (ex officio), and instead would make them available only upon judicial warrants. The copyright industries oppose this proposal. Our experience around the world

has been that the only way to deter piracy effectively is to increase the criminal penalties for copyright infringement and impose these deterrent sentences on the defendants.

It is important to know that a criminal procedure regulation was issued in 1995 to alleviate serious court overcrowding. This regulation, Law No. 9099-95, provides for the suspension of proceedings with a two-year probation for first-time offenders, requiring the defendant to redress monetary damages as a condition to granting the suspension. When the regulation first went into effect, the copyright industries were hopeful that it could have a positive impact on piracy, because it requires the defendant to pay damages as a condition to granting the suspension, and the accused remains on probation for a period of two years. As the courts have begun issuing these suspensions, there is growing concern that these regulations are not supporting the creation of a system which has expeditious and deterrent penalties. As detailed above, most copyright cases are cycled through this system. Many offenders receive suspended sentences or very low fines, community service, or no sentences at all. This lenience clearly is not providing a deterrence to piracy.

7. The Brazilian government must take action to reduce piracy of business software programs within its ministries and agencies.

The Brazilian government should consider stronger efforts to support government software management in its public ministries and agencies. The Brazilian Government has done less to reduce government software theft (piracy) than perhaps any other major Latin American government. The President has never enacted a decree ordering federal agencies to buy legitimate software. Moreover, public entities are required by law to appeal any decisions against them to the end of the appeals process, with the result that software piracy actions against government agencies involve costly legal battles that last for many years.

CONCLUSION

Brazil has failed to provide any degree of certainty or clarity in its efforts to address the dramatic levels of copyright piracy that adversely affect the copyright industries in that country. Therefore, IIPA requests that the TPSC initiate a review the GSP country eligibility of Brazil for its failure to provide adequate and effective copyright protection for U.S. copyright owners. If requisite improvements are not made in Brazil swiftly to remedy these deficiencies, then IIPA requests that the U.S. suspend its eligibility or withdraw GSP benefits of Brazil, in whole or in part.

Respectfully submitted,

Eric H. Smith
President
International Intellectual Property Alliance

APPENDIX A

Statutory Basis for the Country Eligibility Practice Review of the Intellectual Property Rights Practices of BRAZIL under the Criteria of the Generalized System of Preferences

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The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from approximately 140 countries and territories designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP program was instituted on January 1, 1976, and authorized under Title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.) for a 10-year period. Since 1997, an additional 1,770 items are eligible for GSP treatment for specified least developing beneficiary developing countries.

The GSP program has been renewed several times since its establishment. Most recently, in 1999 Congress reauthorized the GSP program through September 30, 2001.[6] What was unique about this extension was that, for the first time in several years, Congress extended the GSP Program for more than a single year. IIPA has supported a multi-year extension of this program to support the use of the GSP program as a tool to protect the interests of U.S. copyright owners around the world.

Provisions tying intellectual property protection to trade benefits were first added to the Trade and Tariff Act of 1984 [hereinafter "TTA 1984"]. Title V of the TTA 1984, known as the GSP Renewal Act of 1984,[7] renewed the GSP Program and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. While there has been a minor change in the statutory language between the GSP Renewal Act of 1984 and the GSP Renewal Act of 1996, the GSP provisions as related to IPR remain essentially the same as in 1984. The legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP benefits and strong IPR protection.

The GSP Renewal Act of 1984

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights." [8]

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[6] See Extension of Duty-Free Treatment under Generalized System of Preferences, Section 508 of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170 (codified at 19 U.S.C. 2465).
[7] See the Generalized System of Preferences Renewal Act of 1984, Title V, Pub. L. No. 98-573 (1984) (codified at 19 U.S.C. 2461-2465).
[8] See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving "beneficiary" status under the GSP Program. The mandatory criterion prohibited the designation of a country from becoming a "beneficiary developing country" if, for example, "such country has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens." See Section 503(b)(4) of the GSP Renewal Act of 1984, now codified at 19 U.S.C. 2462(b)(2)(D).

The GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that

> the President shall take into account ... the extent to which [each] country is providing adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.

Section 503(c)(5) of the GSP Renewal Act of 1984, codified at 19 U.S.C. 2462(c)(5). The Senate Finance Committee Report explained that:

> To determine whether a country provides "adequate and effective means," the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country's system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No.98-485, 98th Cong., 2d Sess. At 11 (1984). The Senate Report also noted:

> In delegating this discretionary authority to the President, it is the intent of the Committee that the President will vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for non-complying countries ....
>
> Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country's market access policy or protection of intellectual property rights, for example, it is expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country.

Id. at 12-13 (emphasis added). The House Ways and Means Committee stated that "countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities" in the intellectual property area. House Rep. No. 98-1090, 98th Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Act authorized the President to "withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or any country" and requires the President, when taking any such action, to "consider the

factors set forth in Sections 501 and 502(c)." TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. 2464(a)(1) (emphasis added). The Act also created a system of "general reviews" to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. 2464(c)(2)(A); see also 15 C.F.R. 2007.3.

IIPA requests that this GSP Subcommittee follow the explicit intent of Congress, and advise the President to "vigorously exercise" his authority to withdraw, suspend or limit GSP eligibility of Brazil for its non-compliance with the statutory criterion on IPR in the GSP Program.

The GSP Renewal Act of 1996

When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."[9] The expired law specified (as discussed above) that each beneficiary country provide "adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." Otherwise, the GSP Renewal Act contains identical IPR provisions, including "mandatory" criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorizing the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria.

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[9] GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

APPENDIX B

Methodology Used to Estimate Trade Losses due to Copyright Piracy And Levels of Piracy

Estimated trade losses due to piracy are calculated by the member associations of the International Intellectual Property Alliance (IIPA). Since it is impossible to gauge losses for every form of piracy, we believe that our members' statistics for 1999 (and prior years) actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries. The methodology in this petition is identical to that which has been used by IIPA members in the IIPA's submissions to the U.S. Trade Representative in the annual Special 301 review.

TRADE LOSSES DUE TO PIRACY

In general, pirate production for export for the records and music, computer programs and book publishing industries is included in the loss figure for the country of manufacture, not the country of ultimate sale. For the motion picture industry, losses are generally counted in the country in which the sale of product occurs.

COMPUTER SOFTWARE: BUSINESS APPLICATIONS

The Business Software Alliance (BSA)'s calculation method compares two sets of data -- the *demand* for new software applications, and the legal *supply* of new software applications.

Demand: PC shipments for the major countries are estimated from proprietary and confidential data supplied by software publishers. The data is compared and combined to form a consensus estimate, which benefits from the detailed market research available to these member companies.

Two dimensions break the shipments into four groups. Splitting the PC shipments between Home and Non-Home purchasers represents the market segments of each country. The PC shipments are also compared to the change in the installed base of existing PCs. The part of PC shipments which represents growth of the installed base is called "new shipments" and is separated from the "replacement shipments" which represent new PCs that are replacing older PCs.

A scale of the installed base of PCs by country compared to the number of white-collar workers was developed. PC penetration statistics are a general measure of the level of technological acceptance within a country. The level of penetration, for a variety of reasons, varies widely from country-to-country. This level is then ranked and each country is assigned to one of five maturity classes.

The number of software applications installed per PC shipment is provided by member companies, and the following ratios for the four shipment groups are developed:

Home-New Shipments
Non-Home - New Shipments
Home - Replacement Shipments
Non-Home - Replacement Shipments

For each shipment group, ratios are developed for each of five maturity classes. U.S. historical trends are used to estimate the effects of lagged technological development by maturity class.

Piracy rates can vary among applications. Grouping the software applications into three Tiers and using specific ratios for each Tier further refined the ratios. The Tiers were General Productivity Applications, Professional Applications, and Utilities. These were chosen because they represent different target markets, different price levels, and it is believed, different piracy rates.

Software applications installed per PC shipped are researched and estimated using these dimensions:

1. Home vs. Non-Home
2. New PCs vs. Replacement PCs
3. Level of Technological Development
4. Software Application Tier

From this work, a total software applications installed estimate was calculated for each country.

Supply: Data was collected by country and by the 26 business software applications. Shipment data was limited in some instances, hence, uplift factors were used to estimate U.S. and world-wide shipments.

Piracy Estimates: The difference between software applications installed (demand) and software applications legally shipped (supply) equals the estimate of software applications pirated. The piracy rate is defined as the amount of software piracy as a percent of total software installed in each country.

Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate weighted by the amount of shipments within each software application category.

To develop the wholesale dollar losses for U.S. software publishers, the wholesale dollar losses due to piracy were reduced by the ratio of the software shipped by U.S. software publishers as a percent of software shipped by all software publishers.

COMPUTER PROGRAMS: ENTERTAINMENT SOFTWARE

The calculation method of the Interactive Digital Software Association (IDSA) uses market data of dedicated platform and PC entertainment software in both compact disc and cartridge

formats, and hardware shipments along with an estimate of the level of piracy in the target country. Where possible, losses due to exports and/or online piracy are included. Export losses are attributed to the source country, where possible. Here are the basic steps involved in determining losses to entertainment software publishers:

1. For each dedicated platform, the 1998 entertainment software units are divided by hardware units. This results in the number of applications per dedicated platform.
2. For each multimedia PC, the 1998 entertainment software units are divided by hardware units. This results in the number of entertainment applications per multimedia PC.
3. The number of applications per PC or dedicated platform is estimated (this varies country-to-country). The actual number of applications per dedicated platform or PC is then subtracted, resulting in the number of illegal applications per hardware unit.
4. The number of illegal applications per hardware unit is divided by the estimated number of applications per hardware unit, resulting in the estimated percentage of illegal software units in use.
5. The illegal software units per hardware unit is multiplied by the average wholesale price (which varies country-to-country) which is multiplied by the number of legitimate hardware units. This results in the dollar amount lost to piracy.

MOTION PICTURES

Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: Losses are estimated using one of the following methods:

1. For developed markets:

    a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate tapes rented or sold per shop or vendor each year;
    b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.

2. For partially developed markets:

    a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;

b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.

3 For fully pirate markets:

a. Either: (a) the number of blank videos sold in the country annually is multiplied by the percent of those tapes used to duplicate US motion pictures to equal the number of pirate copies of US motion pictures sold in the country each year; or, (b) the number of VCRs in the country is multiplied by an estimated number of US motion pictures on video that would be rented and sold per VCR per year;
b. The figure resulting from each of the foregoing calculations is an estimate of the number of legitimate sales of videos of US motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate videos, to equal losses due to video piracy.

TV and Cable: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;
2. The resulting total number of illegal transmissions is multiplied by the average number
of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;

2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;

3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal performances.

SOUND RECORDINGS AND MUSICAL COMPOSITIONS

RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses, and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale. In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

BOOKS

The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.

PIRACY LEVELS

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or non-existent copyright laws and/or lack of enforcement.