

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2012.¹

Executive Summary: There has been some progress in Brazil's long-running struggle with widespread copyright piracy in the physical environment; but the main battlefield is shifting to the online dimension. In the "City Free of Piracy" initiative in Sao Paulo, a coordinated public-private assault on the production and sale of discs containing pirate music, movies and videogames has achieved some impressive results that call for emulation in other cities. But much of the piracy in these sectors is migrating to the Internet, and there Brazilian authorities have yet to implement the measures needed to mount an effective response. Even in the hard goods arena, systemic bottlenecks in investigation, prosecution and the courts add up to an enforcement system that fails to deliver deterrence. Online piracy flourishes essentially unchecked, because criminal enforcement against it has essentially halted, while the other players in the Internet ecosystem cooperate only passively or not at all. As a result, Brazil is home to a number of notorious Internet marketplaces linking to offshore pirate repositories; peer-to-peer (P2P) connections used to commit piracy; and service providers who look the other way as their facilities are systematically utilized for infringement. In this hostile environment, it is difficult for services for legitimate delivery of copyrighted works online to gain traction, even as broadband penetration increases rapidly. Meanwhile, piracy of books and business software persist as serious offline problems; source piracy of motion pictures through illicit camcording continues unchecked; and the delays and backlogs that plague criminal enforcement are endemic in the civil courts as well. Finally, recent changes to the structure of the government's main national anti-piracy coordinating body (CNCP) demand close monitoring to ensure its focus on concrete steps to fight piracy is maintained.

Brazil's outdated legal regime bears much of the responsibility for this state of affairs. Because the law does not adequately prohibit circumvention of technological measures used by copyright owners to control access and copying, and because of exorbitant taxes and duties on legitimate imported videogame consoles, nearly all the devices in Brazil have been modified to play pirate games, and the legitimate market for those games has been decimated. The copyright law lacks clear liability rules for the online environment, and thus there is little incentive for providers to work with right holders to clean up the digital marketplace. Proposed revisions to the copyright law would take some modest steps forward on some of these issues (but, unfortunately, some steps backward on technological protections). The draft revised copyright law needs significant improvements and its prospects are unclear, as it has not even entered the formal legislative process. Meanwhile, an overall "law of the Internet" proposal that has been sent to Congress completely overlooks the role of copyright protection in delivering a healthy and viable Internet marketplace in creative works to the Brazilian consumer, and actually risks impeding any copyright enforcement efforts that do take hold. To make needed progress to address all forms of piracy and bolster the growth of its creative industries, Brazil should be encouraged to enact improved provisions to modernize the Copyright Law; enact long overdue reforms to the enforcement system; reduce market access barriers; and ensure that any Internet legislation reflects respect for intellectual property rights.

¹For more details on Brazil's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For more on IIPA's global issues, see IIPA's 2012 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2012

Enforcement

- Build on the success of the “City Free of Piracy” initiative in Sao Paulo to implement similar coordinated and sustained attacks on hard goods piracy in other major cities.
- Ensure that the CNCP is structured and operated to maintain a priority focus on concrete steps to fight piracy, and that it receives enhanced resources to do that.
- Set up new roundtable negotiations between right holders and the ISP industry aiming to achieve a cross-industry agreement to combat Internet piracy in Brazil.
- Launch criminal enforcement actions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- Effectively enforce the Penal Code to address illicit camcording in theaters.
- As steps toward a deterrent enforcement system, prioritize a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; implement judicial policies that expedite criminal copyright investigations; and establish specialized IPR courts with copyright responsibilities in key jurisdictions.

Legislation and Regulation

- Further revise the Copyright Law reform legislation to correct fundamental problems, including by narrowing any new limitations and exceptions, and bringing provisions on technological protection measures (TPMs) and online piracy into line with global best practices.
- Ensure that the Internet “Marco Civil” bill reflects the critical role of copyright protection in promoting the healthy growth of e-commerce, including by avoiding any pre-emptive impact on copyright enforcement and by authorizing right holders, Internet service providers (ISPs) and consumers to enter into constructive and cooperative voluntary agreements and procedures to combat online piracy.
- Enact legislation to facilitate copyright prosecutions and to clarify forfeiture and destruction remedies.
- Reduce high tariffs and taxes placed on videogame products.

Brazil is a major beneficiary country of the U.S. Generalized System of Preferences program (GSP), which provides preferential access to the U.S. market for certain countries that provide “adequate and effective” protection to U.S. copyrighted materials. During the first 11 months of 2011, almost \$1.9 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code, about 7% of Brazil’s total exports to the U.S.

COPYRIGHT PIRACY IN BRAZIL

Internet piracy is a major challenge for all copyright-based industries doing business in Brazil. Piracy involving hard goods – mostly CDs and DVDs carrying pirate content, but also devices that circumvent access controls – continues to be a key concern for several sectors. The business software industry continues to combat high rates of end-user piracy by corporations and other enterprises. The book publishing industry continues to confront widespread unauthorized photocopying of educational materials.

A study conducted for the Motion Picture Association of America (MPAA) in April 2011 by IPSOS and Oxford University helps to quantify the overall impact of piracy in Brazil on the audiovisual sector.² It estimated that piracy caused direct losses of R\$ 3.5 billion (US\$2 billion) to Brazil’s Gross Domestic Product, with overall losses to the economy totaling R\$ 7.3 billion (US\$4.16 billion). The study estimated that this illegal activity cost R\$1 billion

²Economic Consequences of Movie Piracy: Brazil,” January 2011 (on file with IIPA).

(US\$ 570 million) in foregone tax revenues, and counted 92,000 jobs either not created or lost due to piracy. These figures constitute the second largest economic impact of piracy among the ten countries studied in the research.

Another study, prepared by the market research firm IDC for the Business Software Alliance (BSA), found that decreasing Brazil's software piracy rate by ten points over a four-year period would add US\$3.9 billion to GDP, generate US\$888 million in additional tax revenues and create 12,333 new IT jobs. The benefits would be even greater if the 10 point reduction were achieved in two years, yielding over \$5.2 billion in added GDP and nearly \$1.2 billion in new tax revenues.³

With regard to videogames, the market for pirate games, whether delivered online or via hard goods, has been enabled by the absence of enforceable legal remedies against game copiers, mod chips, and similar devices that circumvent technical measures used by game publishers and game console manufacturers to prevent piracy. As a result, most game consoles in use in Brazil (as many as 95% according to local industry representatives) have been modified to enable the use of pirated copies of games, and such games dominate the market.

Internet piracy. Internet access continues its explosive growth in Brazil, with double-digit increases in the level of broadband penetration in each of the past three years.⁴ But the development of a robust legitimate online marketplace in delivering copyrighted materials to these users continues to be stunted by the prevalence of online piracy. The Internet is certainly the fastest-growing piracy venue in Brazil, and has become the primary piracy challenge for several industry sectors.

Internet piracy problems in Brazil involve two main distribution channels. The faster-growing medium involves sites that link to infringing distribution hubs (sometimes called "cyberlocker" services), nearly all of which are located outside Brazil. (Brazilian websites that directly host pirate content remain relatively rare.) Link sites to infringement hubs account for the majority of the online pirate music and videogame markets, and an estimated 95% of the Internet piracy cases involving audio-visual works like movies and TV programs. Sites such as 3000filmes.com and baixedetudo.net are flagrant examples of sites that aggregate links to pirate movies (including via streaming)⁵ and music, with the latter also engaged in distributing hacked or cracked software codes or programs. Although some music linking sites, like baixedetudo (which translates to "download everything") and degracaemaisgostoso.org ("free is much better") have now moved their hosting out of Brazil to try to evade enforcement, and while the files to which they link are generally stored on offshore hosting sites such as 4Shared and Depositfiles, the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively. Baixedetudo has more than 1.2 million unique visitors per month, and is part of a "web ring" with 10 other blog sites, some of which specialize in links to other content such as films or software. Degraçaemaisgostoso boasts nearly 1.8 million unique visitors per month and is growing at an 80% annual rate. Many websites also offer links to infringing game files in downloadable form, and such links also continue to be propagated massively through social networking communities such as Orkut.

The second channel for Internet piracy is file sharing via illicit peer-to-peer (P2P) networks. While there is still file sharing of music and audio-visual works in Brazil, this medium stands out as a growing online piracy threat for the entertainment software industry; pirated games are widely available in Brazil on P2P networks. BitTorrent remains overwhelmingly the most popular P2P network, followed by eDonkey and Ares. Indeed, in 2011, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, moving up from fourth on the list in 2010 by surpassing China and Spain in this category. ESA research also identified Brazilian companies as three of the top ten ISPs worldwide in terms of the number of subscribers participating in peer connections to swarms where

³See http://portal.bsa.org/piracyimpact2010/cps/cp_brazil_english.pdf.

⁴See <http://www.budde.com.au/Research/Brazil-Telecoms-Mobile-Broadband-and-Forecasts.html>.

⁵For example, 3000filmes.com, hosted in Brazil, embeds and links to video players offering instant streaming access to over 2900 unauthorized titles of first-run motion pictures and TV content stored on offshore infringing distribution hubs such as videobbb.com and megavideo.com.

ESA member titles were illegally shared: Tele Norte Leste Participacoes S.A. (which ranked third in the world); Brasil Telecom S/A – Filial Distro Federal; and Telecommunicacoes de Sao Paulo S.A. – Telesp, debuting on this notorious “Top Ten” list at number 7. MPAA notes that Peer Media Technologies reported that during 2011, users initiated over 26 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Brazil⁶.

Other forms of networked dissemination of pirate products in Brazil include the use of online auction sites to advertise recorded pirate videogames that are delivered through the mail; LAN Houses and Internet cafes where pirated games are commonly downloaded; and the use of the Internet as a means of advertising illegal business software, along with the unauthorized electronic distribution of such software.

Taken together, these forms of online piracy have crowded out efforts to develop legitimate online distribution channels for copyright works in Brazil. This is of particular concern to the independent segment of the film and television industry, represented by the Independent Film & Television Alliance (IFTA). Revenue from these services, which are licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Since Internet piracy instantly exports troubled marketplaces and high piracy rates to other markets, this type of copyright infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

Hard goods piracy. Even as more of the piracy problem shifts to the Internet, pirate hard goods remain an enormous problem in Brazil. Large-scale distribution networks involve thousands of street vendors; established facilities (such as gas stations) which blanket the major highways; and stalls in camelodromos (street markets). Hundreds of millions of blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country, mainly from Paraguay, China, Hong Kong and Taiwan, and are used to burn pirate musical recordings, movies, and entertainment software.

ABES, the Brazilian anti-piracy organization for the entertainment software sector, reports that physical piracy of entertainment software remains quite prominent in Brazil's two largest markets, Sao Paulo and Rio de Janeiro, and is also prevalent in Minas Gerais, Pernambuco, Brasilia, and other states. For instance, the Galeria Page, in downtown Sao Paulo, houses over 170 vendors, many of whom sell pirated games, game circumvention devices and modified consoles (i.e., consoles with circumvention devices pre-installed). In Rio de Janeiro, the Camelódromo Uruguaiana features dozens of such vendors, especially on weekends, although the pirate activity has subsided somewhat in recent months due to aggressive enforcement. In the capital city, the large open air market Feira Do Paraguai has been the venue for sales of pirated games for many years. Pirate games are generally sold on discs (even for games published for platforms that use other media, such as Nintendo DS cards). Most of the pirate discs are produced by local disc-burning operations, which source their master copies either from counterfeit imports or, increasingly, from downloads of versions of pirated games on the Internet. In some specialized markets, like Santa Ifigenia Street in Sao Paulo, pen drives loaded with huge quantities of pirate games are increasingly prevalent.

Santa Ifigenia Street is also a leading venue for sales of circumvention devices, such as game copiers and mod chips for consoles such as PS2, Nintendo Wii and Xbox, and the R4 modification for Nintendo DS units, at prices as low as US\$39-59. Typically, sellers also include a memory card with 50-150 game titles that were illegally downloaded from the Internet. As noted above, these devices are the gateway to game piracy, since without them users are unable to play pirate games on these platforms. Game copiers and mod chips generally are produced in Asia and many are flown into Brazil from abroad, along with some high-end counterfeit games and cartridge products. There is also a steady flow of modified consoles entering Brazil from Paraguay, most of these modified in modding operations in Ciudad del Este.

⁶A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related online piracy activity (since the study excludes non-major releases, including local titles; other peer-to-peer protocols; and non-peer-to-peer means of dissemination, such as websites, and streaming via other technologies).

Hard goods piracy in the music sector is less visible than before, as more and more music piracy shifts to the Internet. However, major retail centers for pirate CDs persist in the streets and flea markets of Sao Paulo, Sao Paulo State, Rio de Janeiro, Belo Horizonte and Recife.

MPAA reports that while hard goods piracy remains a serious problem, it represents a declining trend, as illegal downloads and streaming from the Internet grow in prevalence, and as the scale and effectiveness of enforcement against hard goods piracy improves. The highest level of hard goods piracy is found in major cities like Sao Paulo, Rio de Janeiro, Salvador, Recife, Foz de Iguacu, and Vitoria, and specifically in many of the same large pirate black market venues cited by ABES for videogame piracy, such as Galeria Page, Feira do Paraguai, and Mercado Popular de Uruguaiana. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs, with the content sourced from illicit camcording of movies in theaters, and locally reproduced in hundreds of facilities of varying sizes throughout the country. Pirated film products also enter from Paraguay, and smugglers are moving to Guaira, Ponta Porã and Corumbá. Street sales of pre-release pirate DVDs (before the release of legal DVD and during theatrical release window) are especially damaging to legitimate businesses, including local movie theaters, video rental stores, and the home entertainment market.

IFTA confirms that hard goods piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute films and television programming worldwide. DVD sales in Brazil have been negatively impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD can provide. Unable to compete with free, legitimate DVD distributors are not able to commit to distribution agreements, or offer drastically lower license fees which are inadequate to assist in financing of independent productions. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, because national distributors release independent films on their own schedule in each country, producers of these films are unable to time releases in a way that would limit incentives for pirates to flood pirate product into markets where titles are not yet legitimately available. Brazilian as well as international film producers and distributors are adversely impacted by the damage from piracy and the shrinking of the local distribution channels.

Business software piracy. BSA reports that while gradual progress has been made, software piracy in Brazil continues to include unlicensed software use by businesses and other enterprises; illegal reproduction and duplication of software programs (both for commercial and non-commercial ends); hard-disk loading of illegal software by computer resellers; and the manufacture and/or sale of counterfeit software products. Digital piracy has grown consistently in Brazil due to the growth of broadband penetration as well as the increase in the possession and use of home computers by the Brazilian population in general.⁷

Book Piracy. The primary form of book piracy in Brazil continues to be unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials, resulting in significant harm to international and Brazilian publishers alike. Many universities tacitly or actively condone copying of *apostilas* (teachers' notes or folders), and anthologies made up of chapters from various books copied illegally, both in English and Portuguese. The most immediate concern of academic publishers in Brazil is the problem of university administrative rules that purport to authorize high-volume infringements of foreign works, including by commercial, for-profit copy centers. (See

⁷BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Brazil was 54%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$1.44 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

discussion below under legislation.) This phenomenon contributes to an overall climate of disregard for copyright in the academic context among universities in particular, and among government authorities more generally.

Camcorder piracy. Ninety percent of all pirated movies originate as illegal camcorders. Unauthorized in-theater audio camcording spiked in Brazil beginning in 2008 and continued to increase in 2011. MPAA identified 35 member company films stolen from Brazilian theaters in 2011. The majority of these were audio captures, which are married with high-quality video captures made available online. This infringing product is then disseminated across the Internet and burned onto DVD-Rs which are then distributed to Brazil's many black markets. While there was one enforcement action brought in 2010, MPAA is not aware of any such actions in 2011.⁸ IFTA reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

Piracy at the border. Brazil's extensive border is very vulnerable to smuggling of all sorts of goods, from drugs to DVDs. The tri-border area with Paraguay and Argentina remains an important focus of piracy.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings. While much of the picture remains the same for 2011, there has been some measurable progress in enforcement against hard goods piracy, as exemplified by a record number of seizures, an increased number of court convictions, and some exemplary coordinated enforcement programs which need to be emulated across the country. But a number of fundamental problems have not been adequately addressed, including the need for more law enforcement resources; staggering court backlogs; and the failure to deliver deterrent penalties, which enables pirates to continue to treat the enforcement regime as a manageable cost of doing business. And until the government begins to engage the growing menace of online piracy, the prospects, for all copyright sectors, of establishing robust e-commerce marketplaces in Brazil for copyright materials will remain bleak.

As IIPA has detailed in past reports, the CNCP (the National Council to Combat Piracy and Intellectual Property Crimes) is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign, and (despite some limitations) has been an important instrumentality for improving the enforcement of intellectual property rights in Brazil. CNCP was formed following the issuance of a report by the Brazilian Congress demanding reforms to attack piracy. Its adoption and implementation of multi-pronged action plans to address piracy and counterfeiting led to positive developments that were the basis for the U.S. decision, with IIPA support, to close a years-long GSP investigation of Brazil in 2006. A key to the effectiveness of the CNCP is its structure, which has allowed for robust participation by many of the copyright industries (e.g., ABPD, MPA and ABES) in seeking practical solutions to piracy problems. IIPA is deeply concerned about the recent Resolution published by the Minister of Justice reorganizing the CNCP and removing these organizations as formal members. This Resolution was just issued and we are seeking additional information about its impact. But it poses a real risk that the CNCP will lose focus on pursuing concrete steps to combat the copyright piracy that undermines the Brazilian market. It is essential that the CNCP be structured in a way that gives priority to the goal of enhancing legitimate opportunities for creators through robust educational and enforcement programs against piracy. This goal is best advanced through the high level of participation and cooperation with industry groups that has characterized the CNCP through most of its existence. We will closely monitor developments and urge the Ministry of Justice to take the necessary steps to ensure that CNCP continues to work closely with industry.

⁸MPAA appreciates the Minister of Culture's statement confirming that camcording is covered by the Penal Code. This formal opinion has been useful to MPAA in seminars and workshops with public officials.

Enforcement Against Physical Piracy: Signs of Progress, but Many Challenges Remain

During the first 11 months of 2011, more pirate DVDs were seized by the authorities in Brazil than in any other country in the world: almost 23 million units. Another statistic reported by MPAA may be even more encouraging: the number of piracy convictions obtained rose from 501 in 2010 to 704 in 2011 (through the end of November). Enforcement efforts were more focused on the larger and more important pirate channels (e.g., production labs and warehouses), and while this strategic shift led to somewhat fewer raids, it may have been more effective than the more scatter-shot efforts of the past. In the entertainment software sector, ABES reported similarly encouraging results: 680 raids were carried out, resulting in seizure of nearly 3.2 million units of pirate product, an 81% increase.

Multiple industry sectors hailed the results of the City Free of Piracy project carried out in the City of Sao Paulo. Under the coordination of Dr. Edson Ortega, the Secretary of Urban Security, several long-time hard goods piracy hot spots in the city, such as 25 de Marco Street, and Avenida Paulista, saw stepped up enforcement action. More than a dozen major malls were raided, and about 2000 stores closed. Significantly, most of these stores have remained closed, through coordinated enforcement of a number of laws that the stores were violating. Municipal, state and federal police, prosecutors, and customs agents worked together effectively in this project, aided by the joint partnership between the City and the Military Police of Sao Paulo State. The impact of the project was not limited to retail hard goods piracy however. BSA reports that it also increased awareness of business end-user piracy problem in that city, as well as in others where similar coordinated efforts are underway (e.g., Brasilia, Curitiba, Belo Horizonte). The Sao Paulo campaign, in particular, is a good example of effective enforcement that needs to be replicated in cities around the country.

The working relationship between copyright industry anti-piracy organizations and the Brazilian authorities in the field of physical piracy has never been better. This extends from the top to bottom of the enforcement regime. All the major copyright industry groups participate actively in the CNCP, which undertook stepped-up efforts in 2011, particularly against street level piracy. This underscores the importance of ensuring that the CNCP is structured to maintain this focus on actual enforcement activities. Besides the good coordination that all sectors enjoyed with the Sao Paulo authorities, ABES notes a markedly improved relationship with the DRCPIM (Specialized Police Station of Rio de Janeiro) and continued good cooperation with border enforcement officials in Foz de Iguacu.

Despite these encouraging signs, many critical bottlenecks and deficiencies in Brazil's enforcement system remain to be addressed. While the number of actual prosecutions and even criminal convictions increased in 2011, it remains the case that the great majority of persons arrested never face criminal prosecution. Even for those who are charged, cases are usually dropped or suspended indefinitely. Due to huge case backlogs and other systemic problems, even those cases that are prosecuted to a verdict take three to four years before sentencing, and deterrent penalties are rarely imposed. Among the main deficiencies, which have been described in detail in past IIPA reports:

- The police do not have deadlines to complete investigations and deliver results to prosecutors. As a result, investigations may take up to five years, with the interested rights holders having to push the process every step of the way. Among other detrimental impacts, the requirement to store all seized goods throughout the long pendency of the case drains away resources that could be better applied to running more enforcement operations.
- Criminal case experts can only be appointed by a judge, and there are too few experts in the country. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint experts. The process of identifying and verifying low-quality pirated products is not difficult and should not require highly trained experts. The appointment of specialized IPR experts at the "*Instituto de Criminalistica*" (CSI Institute of Brazil) with the capacity for full-time dedication to piracy cases would also help address the problem.
- Prosecutors and judges lack specialized training in IPR cases, and there is no effective national program to train them. Although currently most training for judges, prosecutors and police officers is organized and

financially supported by the affected industries, CNCP has been active in stimulating, promoting and participating in such events at the national, regional, and state levels, but these efforts must be expanded considerably.⁹

- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and Sao Paulo, would improve judicial expertise and help expedite case processing. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts, but this authority has never been exercised with respect to copyright.
- Finally, criminal penalties imposed on pirates are too frequently suspended. Since prosecutions take so long to reach final disposition, a defendant who may have been caught multiple times is treated as a “first offender” so long as none of the prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, so long as the defendant agrees to provide minimal monetary compensation to the victim.¹⁰

In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system does not adequately deter copyright piracy. The same is certainly true of Brazil’s civil judicial system, on which BSA relies extensively. BSA’s enforcement campaign is based on a cease and desist letter procedure aimed at legalizing use of business software, escalating to the filing of civil lawsuits against specific companies that will not agree to purchase required licenses. BSA initiated 291 civil actions in 2011. While this enforcement campaign is effective in its overall goal – to encourage businesses to legalize their software use – its effectiveness is significantly undermined by the protracted nature of civil litigation in Brazil, which BSA identifies as its primary enforcement bottleneck. Due to court backlogs, it can take up to four years for a civil case to come to trial in the first instance, and up to 15 years to reach a final decision in a civil infringement case, due to repetitive appeals. Furthermore, far too many judges lack adequate training and experience to handle copyright infringement cases. It is not surprising that the regions of the country where the end-user software problem is most acute – notably the north and northeastern regions – also lack a solid cadre of well-trained judges and law enforcement officials.

Brazilian courts continue to require extremely high fees for forensic experts who conduct searches and seizures in civil cases and analyze the results, and for bonds. On average, BSA has paid up to US\$5,000 for experts’ fees and up to US\$25,000 as bonds, but in some cases, courts have demanded multiples of these sums, and BSA has had no option but to terminate the cases. This situation has remained unchanged since 2005. BSA supports legislative reform to permit sampling and private sector assistance in the forensic work.

For cases that succeed in running this gauntlet, satisfactory judgments can be obtained; but often courts simply order companies to pay the license fee they would have had to pay in the first place for the software they have been using without authorization, without any additional penalty. This lacks any deterrence and encourages companies to wait until they are sued before legalizing their software use.

BSA recommends that authorities make more use of the “fiscal crime” provision in the 1998 Software Law. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independent of BSA’s civil actions against software piracy. Such tax evasion cases would have the potential for a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies.

⁹In 2011, several industry associations collaborated with CNCP on a major training “Road Show” for enforcement agents, visiting 5 cities and training over 1800 officers. ABES also participated in a CNCP-sponsored international seminar for judges and prosecutors in Foz de Iguacu. Major educational efforts separate from CNCP include an ongoing Legal School Program, sponsored by the American Chamber of Commerce, that works with thousands of students from public and private schools across the country, to explain the concepts of content protection and its importance for Brazilian society. BSA counsel also participated in a number of training course organized by bar and bench organizations in Rio de Janeiro and in Mato Grosso State.

¹⁰ The software industry faces a similar problem. Because the minimum penalty under Brazil’s separate software law is only one year, criminal infringement cases brought by the software industry are subject to automatic suspension of prosecution under Law 9099.95. Increasing the minimum penalty would eliminate this automatic suspension and ensure that more software piracy cases are actually prosecuted.

Internet Enforcement

In contrast with the progress being made on enforcement against offline piracy, Brazilian authorities continue to take virtually no enforcement actions in the fastest growing marketplace for copyright piracy in Brazil – the Internet – even though the police have by now developed considerable experience in investigating other aspects of Internet crime.

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among right holders and Internet service providers (ISPs). This cooperation is forthcoming in some areas. Purely on an informal basis, some ISPs are responsive in a reasonably prompt fashion to requests from right holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;¹¹ and to delete advertisements for infringing copies. But clearly this piecemeal and passive response is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials, as outlined above. Furthermore, this cooperation does not extend to working together to fight the pervasive piracy of all forms of copyright material carried out via P2P services. Brazilian laws and regulations provide no incentive for ISPs to pass on notices to their subscribers who misuse their access to engage in P2P piracy, nor to effectively deal with repeat infringers. Consequently, ISPs do nothing, and this channel for piracy proliferates unchecked.

Clearly, the missing piece of this puzzle is active government involvement to bring ISPs and right holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. As long ago as 2008-9, the CNCP identified as a priority for its future activities the area of Partnerships and Cooperation with Internet Service Providers. The goal was to create mechanisms with the ISPs to prevent the distribution of pirate products over the Internet. Unfortunately, there has been no real progress to report on this important project; indeed, some other government agencies have impeded the search for cooperation.¹² The uncertain status of legislation on Brazil's proposed Internet regulation may also provide a rationalization for government inaction on this priority. In 2010, a legislative draft for Internet regulation (discussed below) seemed to discourage or even prohibit the limited voluntary actions ISPs are now taking to remove access to pirated hosted content after right holder complaints. Whatever the explanation, it is clear that the mandate to convene an inter-industry roundtable is a major piece of unfinished business for whatever government entity is in the best position to provide incentives for the partnership and cooperation that is needed to effectively combat online piracy. IIPA hopes the Brazilian Government will revive this initiative, and send a clear signal that effective cooperation against the piracy that now blights the online marketplace is in the best interests of Brazil's economic, technological and cultural development. Of course, the prospects for success ultimately may depend on positive changes in the legislative environment, as discussed below.

The situation should be different with regard to criminal enforcement against serious online copyright crimes. Legislation on the books today would provide a framework for this, and Brazilian enforcement authorities have considerable experience in investigating online crimes in other areas. In the past, some criminal cases were pursued against Internet pirates selling pirated DVDs and those offering the sale of pirated movies via social networks such as ORKUT. However, progress in this area has essentially halted. In view of the significant damage that pirates inflict on Brazil's economy and culture, police authorities must accord a much higher priority to criminal investigations of online piracy. In particular, authorities should take *ex officio* actions against facilities that knowingly offer public access to unauthorized peer-to-peer programs, or that clearly and intentionally build their business on providing links to clearly infringing materials.

¹¹As noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there.

¹²In 2009, when the Ministry of Justice asked several agencies for comments on a proposal for a "warning system" through ISPs to customers whose IP addresses were identified by rights holders as "heavy uploaders" of film and music content, the consumer protection agency (DPDC) opposed it on the stated grounds that an ISP sending warnings to their customers at a third party's request would violate the subscriber's right to privacy, and the proposal was derailed. At the Ministry of Justice's request, the DPDC (which reports to Justice) was asked to reconsider its position, but to date its opinion remains unchanged.

LEGISLATION AND REGULATION IN BRAZIL

Copyright Law Reform. In March 2011, a revised version of draft Copyright Law reforms was released by the Ministry of Culture for public comment. IIPA submitted detailed comments on this proposal on May 27, 2011, which welcomed Brazil's efforts to modernize its copyright law. The revised draft contained a number of improvements over the earlier version. It narrows some of the excessively broad proposed exceptions to copyright protection; and it clearly establishes a liability regime applicable to the online hosting of infringing content, which would increase the incentives for providers of such services to cooperate with right holders, such as through a notice and takedown system. However, a number of significant problems remain unresolved. Some of the more important include:

- The draft proposal fails to close significant gaps in Brazilian law's safeguards for **technological protection measures** (TPMs) used by copyright owners to control access to or copying of their works. As noted above, the shortfalls in Brazilian law on this topic have led to a virtually unregulated market in game copiers, mod chips and other circumvention technologies. Since most videogame consoles now in use in Brazil have been modified with such devices, the videogame market is completely dominated by pirate product, which can be played on these modified consoles. In order to bring its law up to global minimum norms, Brazilian law should protect both access controls and copy controls; should prohibit not only the act of circumvention of TPMs, but also trafficking in circumvention devices and services; and should include criminal remedies for making or distributing circumvention technologies. The draft law would worsen the situation, by weakening even the inadequate laws currently on the books with a broad exception for any act of circumvention carried out for the purpose of exercising any limitation on copyright (the uncertain scope of several of these limitations exacerbates this problem). The draft law would also impose a new tort liability on right holders if the TPMs they use are later found to inhibit the use of such limitations. While the revised draft provides an exception to the latter liability for TPMs that are "essential to the purchase or licensing of works in digital media," that exception is not specific enough to ameliorate the crippling level of uncertainty that the liability provisions would impose on the decision to employ TPMs. Brazil's aspirations to grow digital commerce are not well-served by laws that are hostile to TPMs usage.
- Several of the **exceptions to copyright protection** in the revised draft bill remain so broad, or so vaguely defined, as to run afoul of international norms to which Brazil has agreed. In particular, the broadly worded exception for "portability or interoperability" (proposed Article 46(II)); the numerous undefined terms in the exception for facilitating access by the disabled (proposed Article 46(IX)); and the "catch-all" exception that now appears in proposed Article 46, paragraph 2, should all be re-examined to ensure they will meet global standards and avoid unnecessary harm to legitimate licensing markets. Additionally, it should be clarified that Brazil's Software Law still governs the issue of limitations and exceptions to copyright protection for computer programs.
- The exclusive "**making available**" **right for sound recordings** should be explicitly recognized in Brazil's copyright law, rather than simply being inferrable from a general "use" right. "Making available" on an interactive basis is the 21st century equivalent of distribution, and the rights of producers and performers to control this central aspect of digital commerce should be spelled out.
- The revised draft's provisions on **online piracy**, while taking an important first step toward encouraging cooperation with respect to hosted content, fail to tackle other critical aspects of the pervasive and growing online infringement problem in Brazil, in which, as noted above, domestically hosted infringing content plays a relatively minor role. So long as a comprehensive legislative response to this problem is not undertaken, one that addresses online theft through linking and P2P services as well as through domestic hosting, the healthy growth of the online marketplace for copyrighted works will continue to be stunted in Brazil. A key element of the comprehensive approach that is needed is dismantling of any legal impediments to voluntary cooperative arrangements among right holders and service providers that would provide more effective and comprehensive tools for dealing with online infringement. The notice-and-takedown system proposed in the revised draft's Article 105-A, while welcomed, also needs improvement to meet global best practices,

notably to incorporate the requirement that a provider implement policies to prevent abuse of its services by repeat infringers, as a condition for claiming limitations on liability.

The next steps toward copyright law reform and modernization in Brazil are somewhat unclear. Press reports indicate that following some further revisions to the draft law, it has been forwarded to the President for a final analysis, and is expected to be presented to Congress soon. IIPA urges USG to continue to engage with Brazilian authorities to encourage the enactment of a law that enhances the protection of copyright and neighboring rights, and thus promotes production of new original works, in the face of technological developments that have effectively eroded the ability of right holders to enforce their rights.

“Marco Civil” Internet Legal Framework. This proposal, to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil,” moved forward in 2011. In August 2011, it was formally submitted, in a revised form, to the Congress (Draft Law 2126/2011), where it is now under study by a special committee of the House of Deputies. From IIPA’s perspective, the revised version retains the fundamental flaw of the earlier draft we reviewed in 2010: it omits any recognition of the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. While this omission is troubling on a number of grounds, it raises specific questions about whether enforcement against online piracy under Brazilian Copyright Law, (either in its current form or as it may be amended) would be trumped by the broad standards in the Internet law, or whether the adoption of the latter law would be without prejudice to enforcement of the current or amended copyright law. The Internet bill draft presented to Congress compounds the problem, by eliminating the provision in the earlier draft that contemplated a notice-and-takedown system, at least for infringing hosted content. In its current form, Art. 15 of the Internet bill provides blanket immunity to all “providers of Internet applications” unless they disobey a specific takedown order issued by a court; and Article 14 immunizes all “providers of Internet connections services” even in that circumstance. Such immunities are far more sweeping than can be justified in the case of online content that infringes copyright, especially since they lack any conditions to cooperate in dealing with those who employ Internet access to commit copyright theft.

As noted elsewhere in this submission, the release of the draft Internet legal framework bill was perceived in many quarters as a statement discouraging voluntary cooperative anti-piracy measures, and thus cast a pall over efforts for candid discussion of such voluntary measures. IIPA is quite concerned that further action on the draft Internet bill, without substantial amendment, would create serious impediments to effective copyright enforcement in Brazil’s Internet marketplace. The Brazilian government should be urged to develop a more balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element.

University Administrative Rules Impacting Publishers. Academic publishers in Brazil remain concerned over the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP). This rule allows (1) reprographic copying of portions of books by commercial, for-profit copy centers, and (2) copying of foreign works that are “not available in the Brazilian market” without a license. “Not available in the Brazilian market” is not defined, but reports indicate that this criterion has been interpreted to mean 1) where a book is not written in Portuguese, and 2) is not for sale in the nearest bookstore. In practice, it has allowed the copying of a work or book in its entirety – a practice that exceeds what is allowable under international norms. Several years ago, publishers presented a formal request for revocation of this rule to USP, but were rebuffed, the argument apparently being that the rule is “constitutional” as it grants access to education and knowledge. The rule established a terrible precedent and should be revoked, or at a minimum, revised to conform to international standards.

Proposed legislation related to enforcement. For the past several years, copyright industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement. The launching of the Congressional Anti-Piracy Caucus in the Brazilian legislature in June 2011 is a positive step for these efforts. The Caucus’ 249 members represent nearly half the entire Congress. IIPA commends

their initiative and urges them to press for enactment of long-overdue enforcement reforms as soon as possible. The details of several pending proposals were outlined in IIPA's 2010 Brazil report.¹³ We understand that some or all of these various bills may have been consolidated, which would mark an important step forward toward effective legislation.¹⁴

MARKET ACCESS AND RELATED ISSUES

High tariffs and barriers on entertainment software: Brazil's high tariffs and taxes on videogame products continue to plague the entertainment software industry and serve as a significant barrier to market entry and as a spur to the pirate market. Cumulatively, tariffs and taxes can nearly triple the price of a legitimate copy of videogame software, compared to a smuggled copy that reaches the consumer without paying these fees.

Foreign ownership restrictions and content quotas bills on the audiovisual sector (PLS 210/07 and PL 29/07-PLS 116/10): The recently enacted Law 12.485 has some positive features (it opens up the Pay TV market to telephone companies, thus expanding the number of platforms on which consumers can enjoy legitimate content); but it also contains a number of harmful elements. It imposes local content quotas for pay television to be enforced by ANCINE, the national film agency, and it delegates to ANCINE unprecedented powers to limit advertising and to direct business activities. MPAA is concerned that local content quotas will limit what consumers experience and push consumers towards illegitimate sources of content. Two lawsuits have been filed challenging the constitutionality of the law. The law is in effect, and implementing regulations prepared by ANCINE and ANATEL (the national telecommunications agency) are in public consultation. Careful scrutiny is required to minimize this law's adverse impacts.

Government software asset management: The Brazilian Government should be encouraged to continue its efforts to implement effective software asset management practices in its public ministries and agencies. Good software asset management practices can best be achieved through active public-private sector partnership.

¹³They included Bill 5057/2009 on forensic and destruction of illegal products; Bill 8052/11, authorizing the destruction of seized pirate product, rather than requiring all of it to be stored until the case concludes; and Draft law 2729/03, which aggregates many needed improvements through amendments to five different statutes.

¹⁴Taken together the various bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; authorize an expert report to be based on sampling of the goods seized; authorize the destruction of seized pirate product and forfeiture of equipment used to produce it, eliminating the requirement that all seized goods be stored throughout the pendency of a case; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; increase the minimum penalties for IPR infringements to avoid automatic suspension of prosecutions under the Software Law; and provide prosecutors with the authority to pursue criminal actions in the absence of a rights holder action.