

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2014.¹

Executive Summary: The explosive growth of broadband access in Brazil has accelerated the migration to the Internet of pervasive piracy of all kinds of copyright works. Many notorious sites targeting the Brazilian market provide links to offshore pirate repositories; illicit peer-to-peer (P2P) services continue to thrive; and Internet-based sales of unlicensed software are increasing. Criminal enforcement against online piracy has stalled, and the informal cooperation of other players in the Internet ecosystem, which is currently limited, may be further threatened by pending “Marco Civil” legislation. In this environment, it is difficult for services that legitimately deliver copyright works online to gain traction. Hard-goods piracy remains a serious problem, and progress against it was mixed last year. São Paulo’s abandonment of the successful “City Free of Piracy” initiative partly overshadowed steady progress in some other regions. Systemic bottlenecks persist in investigation, prosecution and the criminal courts, although the picture is brighter for civil enforcement against enterprises using unlicensed business software.

Legislatively, the Marco Civil da Internet, or “law of the Internet” bill, took center stage after the President invoked expedited “constitutional urgency” procedures. Although the measure still ignores the role of copyright protection in delivering a healthy and viable Internet marketplace, recent proposed amendments at least preserve the possibility of establishing an effective online copyright regime, including efficient notice and takedown procedures. It is critical that these amendments be included in any enacted version of this landmark legislation. Progress continues on important but modest legislative reforms to streamline criminal copyright prosecutions; some aspects of criminal code reform, however, could weaken penalties and otherwise impede enforcement. Brazil’s copyright law still needs modernization, but draft amendments remain in limbo. Besides dealing effectively with online infringement and resisting excessively broad exceptions and limitations to copyright protection, copyright reform must fix the deficient laws against circumvention of technological measures used by copyright owners to restrict access and copying. This inadequacy, coupled with exorbitant taxes and escalating duties on legitimate imported games and consoles, has stunted the development of a legitimate market for videogames in Brazil. Meanwhile, new market access barriers threatened the copyright industries in 2013, including a “VOD tax” on films and TV programs delivered on demand; procurement policies that discriminate against foreign software and service providers; and a government-backed threat on patenting of software-related inventions.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

- Ensure that the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has the resources and political backing to ramp up its efforts against hard-goods piracy, including continued expansion of the “City Free of Piracy” initiative, and to revive that program’s coordinated attacks on retail piracy and distribution chains in the nation’s largest city, São Paulo.
- Bring CNCP resources to bear on encouraging cross-industry efforts to combat Internet piracy.
- Launch criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- Effectively enforce the current Penal Code to address illicit camcording in theaters.

¹For more details on Brazil’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Brazil’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- 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 reform sentencing practices to achieve deterrent impact.

Legislation and Regulation

- Ensure that the “Marco Civil” Internet bill reflects the critical role of copyright protection in promoting the healthy growth of e-commerce, and that its provisions do not undermine voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Enact pending legislation to streamline copyright prosecutions and to clarify criminal remedies.
- Ensure that amendments to the Criminal Code preserve the ability to enforce against criminal copyright infringement, and provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit.
- Reduce high tariffs and taxes placed on videogame products, and mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand.
- Avoid data localization requirements, and government procurement policies that discriminate against foreign software producers.
- Ensure continued eligibility for patentability of software-implemented solutions.

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 music, movies, TV programming and videogames, but also devices that circumvent access controls on videogame consoles – continues to be a key concern for most copyright sectors. The software industry continues to combat high rates of end-user piracy by corporations and other enterprises. The book publishing industry still confronts widespread unauthorized photocopying of educational materials.

IIPA’s 2013 Special 301 report on Brazil² summarized extensive studies that quantified, as of 2011, the economic impact of piracy in Brazil on the audiovisual sector,³ and the piracy rate and commercial value of unlicensed software on personal computers (PCs).⁴ The audiovisual study estimated that this illegal activity cost R\$1 billion (US\$570 million) in foregone tax revenues, and accounted for 92,000 jobs lost or not created. The software study estimated the commercial value of unlicensed software installed on PCs in 2011 at more than US\$2.8 billion. A May 2013 study from the international business school INSEAD estimated that each increase of 1% in the use of licensed software in Brazil would contribute about US\$1.4 billion to national production, twice as much as would be gained by the same increase in the use of unlicensed software.⁵ These studies show that piracy of all kinds of copyrighted materials continues to inflict significant damage on Brazil’s economy and to suppress job growth in its creative industries.

Internet Piracy: Internet access continues its explosive growth in Brazil. A survey by the Brazilian Telecommunications Association (Telebrasil) counted 126.6 million broadband connections across the country, an astonishing 46% increase from the previous year.⁶ Brazil has the fastest broadband growth rate in Latin America,

² See <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> (hereafter cited as IIPA 2013).

³ “Economic Consequences of Movie Piracy: Brazil,” January 2011 (on file with IIPA). See IIPA 2013 at 106.

⁴ Data for software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assessed piracy rates and the commercial value of unlicensed software installed on personal computers in 2011 in more than 100 markets. The study includes a detailed discussion on the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁵ See http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy_en.pdf. An earlier IDC study found that decreasing Brazil’s software piracy rate by ten points over a two-year period would yield over US\$5.2 billion in added GDP and nearly US\$1.2 billion in new tax revenues. See IIPA 2013 at 106.

⁶ See <http://www.telecompaper.com/news/brazil-ends-november-with-1266-mln-broadband-connections--988303>.

and ranks in the top ten worldwide for the size of its broadband base.⁷ Especially notable is the 51% annual growth in mobile broadband access.⁸ 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. IIPA reported last year on a study conducted for the Brazilian Government that 81% of Brazilians who download music or films from the Internet, including individuals from all economic classes, regions, age brackets, and levels of education, do so exclusively from illegal sources.⁹ The Internet certainly remains Brazil's fastest-growing forum for copyright piracy, and the primary piracy challenge for most industry sectors.

Internet piracy problems in Brazil feature two main distribution channels. The first 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 over 60% of online music piracy, and at least that proportion of the Internet piracy cases involving audiovisual works like movies and TV programs. Sites such as *baixedetudo.net* (which translates to “download everything”) attract high volumes of visitors by aggregating links to pirate movies (including via streaming) and music, with this site also engaged in distributing hacked or cracked software codes or programs. One very popular site in this category, *degracaemaisgostoso.org* (“free is much better”), reaches 1.5 million unique users each month, while *MusicasparaBaixar.org* (“music for download”) has 900,000 unique users monthly. The files to which such sites link are generally stored on offshore hosting sites such as 4Shared and Bitshare. But the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively. Other linking sites to infringement hubs that specifically cater to the Brazilian market include *teleona.org* (which features camcorderd first run motion pictures, with Portuguese audio captured from a local theatre or with Portuguese subtitles added); *Megafilmeshd.net*, which provides links to streams of thousands of films, TV series, and concerts, much of it in Portuguese; and *Filmesonlinegratis.net*. The latter two sites attract nearly seven million unique visitors per month. Such links also continue to be propagated massively through social networking communities. Some Brazilian linking sites, such as *Clubedownload.info* and *Baixandolegal.org*, and some unlicensed online streaming sites, like *Some13.com.br*, specialize in infringing music. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

The second channel for Internet piracy is file sharing via illicit P2P networks, which stands out as a growing threat for the entertainment software industry in particular, making pirated games widely available. In 2013, for the third straight year, 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. Brazilian IP addresses accounted for more than 12% of the global volume of detected infringements occurring on such networks. Notably, Brazil ranked first in the world in P2P-based infringement of console-based games.

Another form of networked dissemination of pirate product in Brazil is sales of unlicensed software over the Internet. BSA reports that this form of piracy, marked by online advertising for illegal copies, is increasing rapidly in Brazil. Online auction sites are also used to sell circumvention devices, such as game copiers, as well as copies of pirate games. Compliance with requests for the removal of such auctions remains inconsistent.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyrighted works in Brazil. For example, legitimate online audiovisual services have increased in recent years, but still suffer from the pervasive availability of illicit, advertising-supported services that are free to the consumer.¹⁰ Similarly, while online music industry revenues topped 30% of total sales in Brazil in

⁷See <http://www.nearshoreamericas.com/broadband-connections-brazils-surpasses-110-million/>.

⁸See <http://www.telecompaper.com/news/brazil-ends-november-with-1266-mln-broadband-connections--988303>.

⁹See Comunicado do Ipea - 2012 - Maio - nº 147, “Download de músicas e filmes no Brasil: Um perfil dos piratas online”, at http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=14071 (unofficial translation on file with IIPA), summarized in IIPA 2013 at 106.

¹⁰The uncertainties regarding the new video on demand tax, and other market access barriers discussed in this submission, also play a role in retarding the growth of the legitimate online audiovisual market.

2012 for the first time, demonstrating robust growth of the legitimate market for online music, the fact remains that this marketplace is dominated by illegal sources, with only a small minority of Brazilian online consumers patronizing authorized services.

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 software.

Brazil's largest city, São Paulo, is also a key hub of these national piracy networks. Not only are pirate products widely sold in the city, but distributors based there supply many similar retail operations in other parts of the country. Thus, the pressure applied against the pirate market in São Paulo in recent years, especially since the initiation of the "City Free of Piracy" project in 2011, had a positive ripple effect. Frequent raids in São Paulo diminished the supply of pirate videogames and circumvention devices in markets such as Feira dos Importados (also known as Feira do Paraguai) in Brasilia. Conversely, the retrenchment of enforcement efforts in São Paulo under the new municipal administration, described below, has had negative impacts in other cities as well. In 2014, not only are piracy-friendly shopping complexes such as Galeria Page thriving in São Paulo, with levels of pirate product not seen for several years, but street vendors are also returning to high-profile areas in that city, such as the Avenida Paulista and Faria Lima. In other major cities, big outdoor markets such as the Camelodromo Uruguaiana in Rio de Janeiro, and the Feira dos Importados in Brasilia, are epicenters for the trade in pirate videogames and audiovisual products. Minas Gerais and Pernambuco are other cities with serious hard goods piracy problems.

These piracy problems are particularly acute for the audiovisual and entertainment software industries. Even though Internet piracy is clearly growing faster than physical piracy for films, TV programming and videogames, these products demand high bandwidth, and access to reliable broadband connections remains spotty in certain regions of the country and, where available, too expensive to supplant the attractiveness of disc-based products, although pirate discs may well be sourced from downloaded copies of films or games. In the case of videogames, pirate titles even for platforms like the Nintendo DS and DSi are often sold in disc format. Piracy of entertainment software through the sale of pen drives loaded with huge quantities of pirate games is also becoming more common, especially in the specialized pirate videogame markets such as Santa Ifigenia Street in São Paulo. Much of this pirate product enters the Brazilian market through the nation's relatively porous borders, not only with Paraguay (around Ciudad del Este and Foz de Iguacu) but also through ports of entry such as Guaira, Ponta Porã and Corumbá. Blank media are imported via the same routes, and are loaded with pirate games in small, decentralized burner facilities, often located in private homes.

Finally, a major feature of the piracy landscape for videogames in Brazil is the prevalence of so-called game copiers and other circumvention devices aimed at nullifying access control technologies used by copyright owners, thus enabling the play of pirate games on modified consoles (the great majority of videogame consoles in the country have been so modified). Santa Ifigenia Street is a leading venue for sales of these circumvention devices, targeting consoles such as PS2, Wii, 3DS and Xbox, and R4 devices and other game copiers, at prices as low as US\$39-59. Typically, sellers of the game copiers also include a memory card with 50-150 game titles that were illegally downloaded from the Internet. These circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software. Most game copiers and mod chips are produced in Asia and flown into Brazil or delivered through the same channel as for modified game consoles.

Software Piracy: BSA reports that while the overall software piracy situation has improved somewhat, high levels of software piracy persist. In 2011, the software piracy rate stood at 53%.¹¹ Along with unlicensed software use

¹¹See footnote 4.

by enterprises, the Brazilian market is characterized by 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.

Camcord Piracy: Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem typically takes the form of in-theater audio captures, after which the dubbed Portuguese soundtrack is married with high-quality video captures sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well being burned onto DVD-Rs and then distributed to Brazil's many black markets. The Motion Picture Association of America (MPAA) identified 47 member company films stolen in this way from Brazilian theaters in 2013, a 7% increase from 2012. While one enforcement action was brought in 2010, MPAA is not aware of any such actions since then. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings.¹² For 2013, a mixed picture emerges. In the struggle against hard goods piracy, our past submissions have applauded the successes of the "City Free of Piracy" initiative, launched in São Paulo in 2011, and since extended to a number of other Brazilian cities. While this expansion continued in 2013, and other signs of progress are noted below, the flagship "City Free of Piracy" initiative suffered a disappointing and problematic reversal last year in its city of origin. Moreover, little progress was made on systematic obstacles to effective copyright enforcement, including the lack of law enforcement resources; staggering court backlogs; and the failure to impose more deterrent penalties. Moreover, the lack of effective enforcement against the pervasive menace of online piracy continues to cloud the future prospects for robust e-commerce marketplaces in Brazil for copyright materials of all kinds.

The CNCP, the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign, is led by a committed and energetic team. While its reorganization in 2012 sparked concerns about whether the CNCP would maintain the high level of participation and cooperation with industry groups that has been its hallmark, its track record in 2013 helped to put many of those doubts to rest. It remains critical for the Ministry of Justice to take the necessary steps to ensure that the reorganized CNCP continues to work closely with industry, that it is adequately resourced, and that it follows up vigorously on its initial steps to expand its work beyond its traditional focus on physical piracy.

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

Throughout 2011 and 2012, the "City Free of Piracy" initiative, fostered by the CNCP, had pirates in Brazil's largest city on the defensive. Through the coordinated efforts of municipal, state and federal law enforcement, huge seizures of pirate product were made, pirate vendors largely vanished from São Paulo's streets, and shopping centers that had turned a blind eye to rampant retail piracy among their tenants came under severe pressure to clean up their marketplaces. All of this came to a sudden halt in early 2013, when a new municipal administration took power. Raids on shopping centers ended abruptly, and the inter-agency task forces were disbanded. The practical impacts of this policy reversal were quickly evident: not only within the shopping centers, but also back on the streets from which it had been largely cleansed, retail hard goods piracy re-emerged. Because illicit distribution channels based in São Paulo were also able to regain their footing, the adverse effects were felt also in markets in other cities across the country, whose pirate vendors depend on supply chains originating in São Paulo. Thanks to unflagging

¹²See, e.g., IIPA 2013 at 109-112.

efforts of local business groups, the São Paulo municipal government began to reassert its enforcement efforts late in 2013; but considerable damage was done during the enforcement hiatus.

News from other fronts in the struggle against hard goods piracy was more positive. The “City Free of Piracy” model proliferated to more Brazilian cities, now 11 in all, with Porto Alegre the most recent addition. It is critical that these coordinated campaigns be sustained and expanded, and that the active participation of city authorities in improved enforcement be encouraged. Some enforcement agencies, such as the Federal Highway Patrol, stepped up their enforcement efforts for the first time. Customs increased its activities against piratical imports at several ports. Special IP enforcement units of Civil Police were established at the state level, such as in Pernambuco and the Distrito Federal, and these have already made a difference (ESA reports, for example, that the number of booths selling counterfeit games in the markets of Brasilia has sharply decreased). On the municipal level, civil police in Manaus, Cuiaba, and Salvador also increased their effectiveness. On the other hand, the Special IP unit in Rio de Janeiro has reportedly become less proactive in recent months.

However, even though the copyright industries in general enjoy good (in some cases, excellent) working relationships with enforcement agencies, and even though there have been a number of instances of constructive cooperation (with the notable recent exception of São Paulo), little has been done to tackle the larger, systemic problems that render Brazil’s copyright enforcement system far less effective than it needs to be. The main deficiencies have been described in detail in past IIPA reports. They include:

- Prolonged and inefficient police investigations, sometimes taking years, during which right holders must 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, there are too few experts in the country, and there are no standard criteria for expert analysis of and reporting on seized materials. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint experts and specialized IPR experts should be appointed at the “*Instituto de Criminalística*” (CSI Institute of Brazil).
- Prosecutors and judges lack specialized training in IPR cases, and, although some training has been provided to municipalities participating with CNCP in “Cities Free of Piracy,” there is no effective national program.¹³ Although currently most training for judges, prosecutors and police officers is organized and financially supported by the affected industries, CNCP has actively stimulated, promoted and participated in such events at the national, regional, and state levels; but these efforts must be expanded considerably.
- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and São Paulo, would improve judicial expertise and help expedite case processing. The 1997 Industrial Property Law authorized the judiciary to create specialized IPR courts, and such courts exist for patent and trademark matters, 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 other prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, sometimes conditioned on the defendant agreeing to provide minimal monetary compensation to the victim. All this contributes to a culture of impunity for copyright violations.

In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system still does not adequately deter copyright piracy. There have been, however, some improvements in the civil judicial system, on which BSA relies extensively to combat unlicensed use of software by enterprises. BSA sent 1700 cease and desist

¹³In a positive development, 200 judges attended a seminar in December 2013 on copyright enforcement in the digital environment at the State of São Paulo school for judges, with industry sponsorship.

letters and filed 455 civil lawsuits against enterprise end-users in 2013. BSA reports that 30 civil court experts received industry-sponsored training on software licensing issues. While civil cases continue to encounter court backlogs, judges in several major jurisdictions are responding well to requests for trials. Notably, the Superior Court of Justice has reaffirmed earlier rulings that it is not sufficient simply to 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. Instead, fines of multiple times the market value of the unlicensed software are increasingly being imposed. This provides greater deterrence in those cases that proceed to final judgment, but also sends a message to companies that they should not wait to be sued before legalizing their software use. While these are positive trends, more needs to be done to overcome long docket backlogs, and to ensure that more judges are adequately trained.

Internet Enforcement: Cooperation and Government Action Needed

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among rights holders and ISPs. This cooperation is forthcoming in some areas. Purely on an informal basis, a number of ISPs are responsive in a reasonably prompt fashion to requests from rights holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;¹⁴ to delete advertisements for infringing copies; and even to shut down blogs, forums and social networking communities that are dedicated to disseminating pirate product. 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. Furthermore, this cooperation does not extend to working together to fight the pervasive piracy 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, many ISPs do nothing, and this channel for piracy proliferates unchecked.

Clearly, active government involvement could help to bring ISPs and rights 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 2008-09, the CNCP identified as a priority for its future activities the area of “Partnerships and Cooperation with Internet Service Providers,” and has made intermittent efforts since then to bring ISPs to the table for discussions, but without any success (in part, because of past opposition from other government agencies). Reports that CNCP is developing a project to engage with payment processors to discourage use of their services by sites dedicated to piracy provides some hope that the needed government encouragement for inter-industry cooperation might finally be forthcoming. IIPA urges the Brazilian Government to advance such initiatives, in order to 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.

The situation is different with regard to criminal enforcement against serious online copyright crimes. Existing legislation provides a framework for this, and some Brazilian enforcement authorities have considerable experience in investigating other types of cybercrimes. But, in contrast with the progress being made on enforcement against offline piracy, Brazilian authorities continue to take virtually no enforcement actions in Brazil’s fastest growing marketplace for copyright piracy – the Internet. In view of the significant damage that pirates inflict on Brazil’s economy and culture, authorities must accord a much higher priority to criminal investigations of online piracy.

LEGISLATION AND REGULATION IN BRAZIL

“Marco Civil da Internet” Internet Legal Framework: This proposal, to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil,” was the focus of considerable attention in Brazil’s Congress over the past year, following its designation by President Rousseff in October 2013 as a matter of

¹⁴For instance, MPAA reports that notices to ISPs about hosted infringing material lead to takedowns about 90% of the time. However, as noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there, and cooperation is much less frequent with regard to links to off-shore hosted material and other forms of online infringement.

“constitutional urgency,” giving it priority over all other legislation. IIPA remains concerned, as it has since the inception of the “Marco Civil” project in 2010, that the proposal seems to lack any recognition of the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. The concrete concern, which has been the subject of legislative debate, is whether Article 15 of the introduced bill, which provides blanket immunity to all “providers of Internet applications” unless they disobey a specific takedown order issued by a court, would eliminate voluntary notice and takedown activities, such as those engaged in by many ISPs with regard to hosted infringing content today. Such an interpretation could render moot all efforts to promote the inter-industry cooperation against online infringement that is so essential to tackling pervasive online piracy. It is encouraging that the most recently released draft of the bill, in which the notice and takedown provisions are found in Article 20, makes such an interpretation much less likely. In this draft, Article 20 now provides that the blanket immunity applies “except as otherwise established by law”; and, more specifically, a new paragraph 2 authorizes “specific statutory regulation” dealing with notice and takedown procedures for violations of copyright or related rights. This would be the first recognition in the Marco Civil bill of the importance of copyright protection, and would at least provide space for specific notice and takedown provisions in copyright legislation that could supersede the general requirement for a court order. This amendment would be a significant improvement to the legislation, preserving Brazil’s ability to design an effective and flexible legal regime for dealing with online copyright theft. While IIPA remains concerned about a number of other aspects of Marco Civil,¹⁵ it is essential that the exemption reflected in the proposed amendment to Article 20 be preserved as the legislation moves through the expedited consideration demanded by the President. Especially in view of Brazil’s increasingly prominent role in global discussions about Internet governance,¹⁶ its handling of this critical issue in its national law will be viewed widely as a litmus test of its appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace.

Other aspects of the Marco Civil bill raise significant concerns for the software industry. Specifically, Articles 11 and 12 include provisions that impose restrictions on cross-border data flows and could impose requirements to locate servers in Brazil. This represents a significant threat to the development and introduction of innovative software services, including cloud computing, in Brazil. If adopted, these proposals will harm consumers and businesses in Brazil by reducing the availability and increasing the costs of such services.

Proposed Legislation Related to Enforcement: A plethora of bills to improve copyright enforcement in Brazil have been presented to the legislature, but few have progressed. One important exception is Bill 2729/03, which is a product of cooperative efforts between the copyright industries and the CNCP. It includes a few vital reforms that would address some of the systemic enforcement impediments identified above. For instance, the bill would allow expert reports in infringement cases to be based on a sampling of the goods seized, and would authorize the destruction of all pirate product seized in a criminal case. Bill 2729/03 was approved by the House of Deputies in 2012, and was sent to the Senate (now labeled Bill 63/2012), where it recently received committee approval and now awaits action by the full Senate. Once enacted, this bill will streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA commends legislators for advancing this legislation, and urges its passage as soon as possible. We would then encourage Brazilian legislators, with the leadership of the large, multi-party Parliamentary Front against Piracy (also known as the Congressional Anti-Piracy Caucus), to turn to other long-overdue and critical enforcement reforms, including some that had to be jettisoned from Bill 2729/03 to expedite its passage.¹⁷

In December 2013, a committee of the Senate approved amendments to the Criminal Code that would have significant impacts on criminal copyright enforcement. Many of these impacts could be negative, including repeal of

¹⁵For instance, the blanket immunity from all liability remains in the legislation (Art. 19 of the current draft) for “providers of Internet connections services,” even if a court order requires them to block access to specified content. The bill could benefit from other improvements to reflect 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.

¹⁶See, e.g., the Global Multistakeholder Meeting on the Future of the Internet Governance, which the Brazilian Government is hosting (<http://netmundial.br>).

¹⁷Among other improvements, various pending bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; 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; and facilitate removal of infringing material from Internet sites.

the catch-all provision in the chapeau of Article 184, providing a penalty for criminal copyright violations that are not otherwise specified; elimination of *ex officio* criminal actions; and reducing penalties for some basic copyright violations, including unauthorized reproduction for profit and infringement on the Internet. The latter changes would send precisely the wrong message to a Brazilian society that already deprecates the significance of copyright infringement, and to a legal system that in practice provides impunity from criminal penalties in most cases. The Criminal Code reform bill (PLS 236/12) still must be considered by another Senate committee, but this debate bears close watching so that the negative impacts can be minimized or avoided. We urge lawmakers instead to seek ways to support Brazil's creative economy by strengthening effective copyright enforcement, such as the inclusion of specific measures providing criminal penalties for camcording without a requirement of proof of an intent to profit.¹⁸

Copyright Law Reform: Brazil's 1998 copyright law needs updating to reflect today's copyright protection and enforcement challenges. The most recent official draft amendments were released by the Ministry of Culture in March 2011. IIPA submitted detailed comments on the draft, which are summarized in previous IIPA submissions.¹⁹ However, although a bill largely embodying the 2011 draft remains pending before Brazil's House of Deputies,²⁰ the draft itself, after undergoing further changes, was returned for review by the new Minister of Culture in mid-2012, and no subsequent drafts have been publicly released.

The 2011 draft contained a number of positive features, including the establishment of 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. The need for a meaningful and effective notice and takedown provision in the copyright law will take on added importance if and when the Marco Civil bill is enacted. A comprehensive update of Brazilian copyright law will also need to address a number of other issues. The complete lack of effective legal prohibitions against trafficking in devices and services aimed at circumventing technological protection measures (TPMs) used by copyright owners to control access to their works has acted as an insurmountable obstacle to the healthy growth of a legitimate videogame marketplace in Brazil. This big gap in Brazilian law must be filled by legislation that brings the law into alignment with global norms under the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), and which promotes legitimate digital commerce by protecting TPMs. Additionally, any copyright law reform must avoid the addition of broad or vaguely worded exceptions to copyright protection (a pitfall to which the 2011 draft succumbed). IIPA urges the U.S. Government to continue to engage with Brazilian authorities to encourage copyright reform 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 rights holders to enforce their rights.

MARKET ACCESS AND RELATED ISSUES

High Tariffs and Barriers on Entertainment Software: Brazil's high tariffs and taxes on videogame products, which have long plagued the entertainment software industry by serving as a significant barrier to legitimate market entry and as a spur to the pirate market, became worse in 2013. Under a new interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a videogame title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since, of course, pirate copies, whether smuggled across the border or burned within the country, do not pay these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. We urge that this new interpretation be reconsidered. In addition, taxation

¹⁸Among other legislative developments, the music industry commends the Senate's approval in September 2013 of a constitutional amendment to ease tax burdens on the sale of recordings that include Brazilian artists, and calls for careful monitoring of implementation of Law 12.853, enacted in August 2013, that imposes a new supervision regime on collecting societies (including ECAD, which administers performance rights in sound recordings), to ensure that the goal of improving transparency and accountability is not overwhelmed by onerous new requirements and cumbersome procedures.

¹⁹See, e.g., IIPA 2013, at 112-13.

²⁰See PL 3133/2012, introduced by Rep. Fonteles.

on imported videogame consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector (Law 12.485): This law 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. Under the implementing regulations, only works in which local producers own the majority share of intellectual property rights are included as Brazilian works; co-productions between Brazilian and foreign producers are excluded if they fail to meet this criterion. This exacerbates the harm inflicted on the Brazilian pay television market. Lawsuits challenging the constitutionality of the quotas and powers granted to ANCINE remain pending before Brazil's Supreme Court.

Video on Demand (VOD) Tax: Another feature of Law 12.485 has been interpreted by ANCINE to require tax payments of US\$1500 per feature film, and US\$375 per TV series episode, released in Brazil through on demand services. The VOD tax, part of a broader tax regime on film and television content called CONDECINE, is a unique and serious threat to the growth of the VOD market there. The tax is assessed per title, is payable every five years that a title remains in the VOD window, and if a title is licensed to multiple VOD outlets, each of them must pay the tax. CONDECINE is burdensome, amounting to as much as \$25 million in charges in the case of large collections of VOD titles, and will limit the choices available to Brazilian consumers in the nascent online content market and through other VOD services. We understand that ANCINE has acknowledged the threat this tax poses to the VOD market and is engaging in discussions with industry stakeholders on possible changes to its approach. We encourage ANCINE to continue these efforts and to seek a reasonable solution that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers.

Software Procurement Preferences: As flagged in last year's submission, the Brazilian Government's new CERTICs program (the Certification of National Technology Software and Related Services) carries a significant risk of discriminating against foreign providers of software and other IT goods in Brazil's US\$9 billion market for government procurement of software. On January 17, 2014, the government published, with immediate effect, a decree (8.168/2014) which set a price preference of 18 percent for software that is certified as domestically produced, based on the lowest price offered by a foreign service provider. In the government's revised framework for implementation, issued in June 2013, the methodology for assessing whether a company satisfies the domestic development requirement to be eligible for the preference is burdensome, containing more than 150 technical items that all businesses seeking certification must submit. The methodology's criteria are unclear, and it lacks checks for conflicts of interest and adequate safeguards for trade secrets. At this point it is not clear whether companies will subject their software products to this certification process. Careful monitoring of the implementation of this program is essential.

A new procurement issue demanding attention arises from a Presidential Decree (8.135/2013) issued in November 2013. Asserting national security interests, Article 2 of the Decree immediately waives the requirement for public sector bidding for data communications and IT services. Article 1, slated to enter into force in March 2014, instructs Federal agencies to conduct all data communications (other than personal mobile and fixed telephone services) through government controlled networks, including email services. It also subjects all equipment and software used by federal agencies for these services to audit requirements, purportedly to ensure the availability, integrity, confidentiality and authenticity of information. The audit requirement threatens to expose proprietary source code to a large number of Brazilian Government auditors, and also risks the creation of back doors or other means for unauthorized access. Implementation of this requirement must be monitored carefully to assess its impact on U.S. equipment and software providers, and to consider whether the audit function could more fairly be carried out by an independent, qualified auditor with global recognition and offering security guarantees.

Software-Related Patents: On October 10, 2013, Brazil's Congress released a study that questions the value of software patents and calls for suspending the issuance of new ones pending a further study by Brazil's patent office, INPI. Government representatives supported the study's conclusions and characterized the current patent law as a violation of national sovereignty and an obstruction to innovation. Legislation embodying many of the report's recommendations (PL 5402/2013) was introduced in the Congress. Although the bill does not single out patents for software implemented solutions, there is a real risk that the government will not wait for the result of the INPI study, but instead move unilaterally to issue binding guidelines to INPI that will complicate or even prevent the issuance of any further computer-implemented patents. It is important to continue to encourage Brazil to avoid unwarranted changes to its patent system that could be inconsistent with its current patent law and international commitments.

Patent Pendency: Brazil's patent pendency problem undermines IP protection and market access for both foreign and Brazilian software and other innovations in the Brazilian market. There is at least a ten-year backlog for computer implemented patent applications, partly because there are so few patent examiners (only 12 examiners in INPI's ICT division, and up to half of them are scheduled to retire within a year). Besides adequate staffing, INPI needs greater regulatory flexibility to implement novel solutions to reduce the patent backlog without additional funding, such as queue swapping, techniques to encourage abandonments, or using positive patent examinations from other jurisdictions to permit work sharing in Brazil. The Brazilian Government's initiative to support a significant increase in the number of examiners for INPI is a positive step on which it should be encouraged to build.