

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

BRAZIL

Special 301 Recommendation: IIPA recommends, for the second year in a row, that Brazil be removed from the Priority Watch List and placed on the Special 301 Watch List in 2007.

EXECUTIVE SUMMARY

The copyright industries' overarching goals in Brazil, one of the largest commercial markets for copyrighted materials, remain: (1) reducing copyright piracy and (2) generating effective criminal enforcement. Achieving these twin goals will increase the sales of legitimate product and significantly increase the output of Brazil's cultural, educational and technical products. Notwithstanding greatly enhanced government efforts, piracy for U.S. copyright materials remains very serious in Brazil, and the problems of successfully prosecuting and concluding criminal copyright infringement cases remains difficult. Despite the laudable progress made by the Government of Brazil in organizing itself to fight piracy nationally, as well as the significant number of raids and seizures of pirated product, the fact remains that piracy for most industries is not being reduced (the recording industry has seen a reduction in physical piracy but a significant increase in Internet piracy) and commercial interests of both Brazilian and U.S. companies continue to be injured.

PRIORITY ACTIONS IN 2007

Enforcement

- Achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process, including: (1) increase anti-piracy raids in well-known marketplaces; (2) encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces which focus on priority locations; (3) take enforcement actions on the Brazil-Paraguay border; (4) enhance deterrence through criminal prosecutions and the application of deterrent penalties; (5) continue work to implement the action items in the national plan developed by the National Council to Combat Piracy and Intellectual Property Crimes (CNCP); (6) pursue educational and media anti-piracy campaigns sponsored by the federal government, working with the private sector to raise public awareness of the anti-piracy fight; and (7) continue working with the industry through the CNCP.
- Establish more IP task forces, both at the state level and via the CNCP.
- Conduct *ex officio* actions on facilities that knowingly offer public access to unauthorized peer-to-peer programs and in particular with respect to those locations that facilitate or enable unauthorized transactions by providing the materials required for downloads—e.g. blank CD-Rs.
- Conduct effective enforcement against copyshops, located both inside and outside university campuses, that make illegal copies of books and related teachers' notes that go beyond the bounds of the law, and engage university administrations in efforts to encourage use of legitimate materials on campuses.
- Improve cooperation between the states and the municipalities on anti-piracy actions.
- Continue CNCP efforts to instigate and support raids and seizures of piratical goods at the borders.
- Encourage authorities to take more prosecutions, including and especially, against recidivists.
- Create specialized IPR courts with copyright jurisdiction.
- Establish a reference price for imported blank media.
- Establish a national program to train judges, prosecutors and police officers on IPR.

Legislation

- Support pending legislation (Bill 3.965/2004) to amend the Software Law (Law No. 9.609/98) to extend the minimal prison punishment for two years since nowadays the minimal penalty (one year) gives the judge the option to issue suspensions instead of jail terms.
- Support pending legislation (Bill No. 3.964/2004) to amend penalties in the criminal code to increase penalties for piracy to remove alternative and lower sanctions, such as community service.
- Support the initiative drafted by CNCP and supported by copyright industries (and approved by Minister of Justice in November 2006) that will be presented by Government to the Congress in the first half of 2007, containing the following points:
 - Allow criminal judges to appoint private sector experts.
 - Allow the destruction of infringing products before a final decision.
 - Facilitate forensic review of suspected infringing products seized so as to permit sampling instead of reviewing each copy seized.
- Halt legislative efforts to amend the copyright law that would grant overbroad privileges to university students.
- Remove market access barriers, including taxes placed on computer and entertainment software, and impose no new barriers (such as a theatrical window or onerous video quotas) on films.
- Work with the State of São Paulo University to reverse its administrative rule which allows widespread reprographic copying of portions of books by commercial, for-profit copy centers.

BRAZIL										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2002-2006¹										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Sound Recordings & Music Compositions	176.5	40%	334.5	52%	343.5	52%	338.7	52%	320.4	53%
Business Software ²	497.0	62%	383.0	64%	359.0	64%	309.0	61%	260.8	55%
Motion Pictures ³	NA	NA	101.0	22%	120.0	30%	120.0	30%	120.0	35%
Entertainment Software ⁴	159.3	88%	120.8	77%	120.4	74%	125.7	56%	NA	NA
Books	18.0	NA	18.0	NA	18.0	NA	14.0	NA	14.0	NA
TOTALS	850.8		957.3		960.9		907.4		715.2	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Brazil under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Brazil, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

On January 13, 2006, with the support of IIPA and its members, USTR terminated the five-year review of Brazil's copyright regime under the U.S. government Generalized System of Preferences (GSP).⁵ That review was based on a petition filed by the IIPA in August 2000, and three special out-of-cycle GSP reviews were held between 2004 and 2005. USTR's decision to end the GSP IPR investigation was based on progress made by Brazilian authorities, and their commitment to work through the U.S.-Brazil Bilateral Consultative Mechanism to address copyright piracy and enforcement problems in Brazil (see discussion below).⁶

COPYRIGHT INITIATIVES UNDER THE BILATERAL CONSULTATIVE MECHANISM

Brazil is one of the most important markets for the U.S. copyright industries. Its tremendous market potential is undermined by one of the highest piracy rates in the region. The year 2005 was a turning point in a positive direction, where the government showed major shifts in energizing political willingness and taking large-scale anti-piracy actions. These two shifts continued in 2006, even though there were some delays in actions, likely due to the elections. With new leadership in the CNCP, the industries hope that continued progress will be made in 2007.

IIPA and its member associations in the recording, music, film, computer software, entertainment software, and book publishing industries salute the progress made in Brazil, especially regarding the cooperation between the copyright private sector groups and the National Council to Combat Piracy and Intellectual Property Crimes (CNCP). The CNCP resulted from a two year legislative process,⁷ and was officially launched in March 2005. Membership in the CNCP involves a growing number of Brazilian government agencies and also includes the private sector. The CNCP has promulgated a comprehensive, multi-point action plan, and has held numerous meetings and has established a methodology to implement these actions by creating thematic working groups (Enforcement, Economic, Educational, Legislative and Institutional) and breaking down the actions into short-, medium- and long-term categories.

The Brazilian and U.S. Governments have identified seven areas of action to be reviewed in the context of the Bilateral Consultative Mechanism. Many of the seven items are already included in the CNCP action plan, and all seven have the support of the copyright-based industries. IIPA's overarching goals consistently have been, and remain, reducing copyright piracy and generating effective criminal enforcement in Brazil. Achieving these goals will result in the increase in the sales of legitimate product and a significant increase in Brazil's cultural, educational and technical output. In fact, over the years, IIPA has identified a series of specific goals that largely overlap with and refine the bilateral goals.⁸ To

⁵ USTR's notice terminating the Brazil's GSP investigation did not identify the seven factors which will be monitored under the Bilateral Consultative Mechanisms; see 71 Fed. Reg. 2292 (Jan. 13, 2006) at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-368.pdf>. These factors were provided to IIPA by U.S. government sources. See IIPA's Press Release on the Brazil GSP IPR review, at <http://www.iipa.com/pdf/IIPA%20BRAZIL%20GSP%20case%20terminated%20Press%20Release%2001132006.pdf>. (issued Jan. 13, 2006).

⁶ In 2005, \$3.6 billion worth of goods from Brazil entered the United States under the duty-free GSP code, accounting for 14.9% of its total exports to the U.S. During the first 11 months of 2006, \$3.5 billion worth of Brazilian goods (or 14.2% of Brazil's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 3.4% increase over the same period in 2005.

⁷ In late May 2003, the Brazilian Chamber of Deputies convened a parliamentary commission to analyze the adverse economic impact of copyright piracy, smuggling and tax evasion. Starting in mid-June 2003, the Commission on Parliamentary Inquiry (CPI) held hearings, and many IIPA member associations and their local representatives testified. The CPI, originally set to end its investigation at the end of September 2003, extended its efforts until June 2004. In August 2004, it released its comprehensive report, which included descriptions of the scope of piracy, problems related to enforcement, policy and legislative recommendations, and the lack of national leadership and coordination. The CPI recommended the creation of a National Plan to Combat Piracy. Shortly thereafter, the federal government announced the formation of the "National Council to Combat Piracy and Protect Intellectual Property," and regulations establishing this entity were published in October 2004. The new National Council to Combat Piracy and Organized Crime held two preparatory meetings in Brasilia in late 2004, and its official launch was in March 2005.

⁸ For example, IIPA and its members' specific action plans have been outlined in prior IIPA 301 submissions on Brazil.

this end, IIPA and its members have added our comments to the seven BCM measures on copyright and enforcement below:

(1) Increase anti-piracy raids in well-known marketplaces;

- IIPA and its members have shared (and published in prior 301 reports) lists of locations of well-known marketplaces, all of which require no investigation by the authorities. In fact, a national list with specific locations has been established and raids are conducted regularly, at least in São Paulo. The problem is authorities have to identify recidivist violators and find a way to shut them down, either by using municipal codes against piracy or following the tax evasion route. Street or "blankets" hawkers are not arrested; the only other way to discourage them is to take away all the components of their trade, for example, their stands, speakers and other accessories that may attract buyers. The police currently do not do this, at least not in São Paulo or Rio.
- Raids should be done more frequently, on weekends and between the hours of 5:00-7:00 pm daily, when the pedestrian traffic increases in the pirate markets.
- The underground metro in São Paulo over the past year has become a more attractive selling point since police rarely disturb the pirates at these locations.
- The Military Police should be involved in anti-piracy operations/ patrols. Right now you can walk through São Paulo and see pirates selling their goods, with military policemen just ten to twenty feet away and oblivious to the violations taking place right in front of them. There is no known mandate from the Military Police Hierarchy for the street patrolman to disband or chase away pirates.
- Target major markets also known as "Camelodromos" outside São Paulo City such as in Campinas, Riberão Preto and Pinheiros.
- Expand the campaign to cover the growing internet piracy problem affecting the recording and audio-visual industries. This part of the campaigns should address illegal downloads by individuals, websites and cybercafés.

(2) Encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces which focus on priority locations;

- The industries are not aware of any visibly active IPR task forces that include state and locals. In contrast, the federal authorities do work together with La Receita, the National Federal police and the Federal highway patrol.
- The federal authorities are hesitant to exchange information with state and local enforcement officials.

Several copyright sectors met with the Executive Secretary of the Anti-piracy Commission for the State of São Paulo to discuss the establishment of these task forces. He stated that nothing would happen on this level until after the elections in October 2006, and to date, there are no updates to report on this initiative.

(3) Take enforcement actions at the Brazil-Paraguay border;

- Several raids have taken place but more focus is needed on the *sacoli* traffic getting around the Federal Highway Police dragnet by utilizing state roads off the interstate BR-277.
- La Receita has become more aggressive but they lack sufficient personnel in contentious areas such as Foz de Iguaçu. This same observation applies to the Federal Police in Foz.
- Dry land crossing between Paraguay and Brazil needs 7 day/24 hours-a-day coverage.
- There is a need to establish links between Financiers in major cities and *sacoli* networks in order to dismantle the organized crime behind the smuggling organizations.
- The "dirty money" from the banking institutions and money exchange houses in the tri-border area needs to be tracked. The Brazilian Federal Police and La Receita have this capability.
- There is a need to conduct river operations involving at least sufficient boats and personnel to discourage smuggling across the Parana River.

(4) Enhance deterrence through criminal prosecutions and the application of deterrent penalties;

- More long term investigations are needed utilizing the "Quadrilla" concept of prosecution for major crime organizations by utilizing collateral statutes such as tax evasion, money laundering, fraud and customs violations.
- Pursue major recidivists establishing a Priority Prosecution List or Priority Targeting list.

(5) Continue work to complete the action items in the national plan developed by the National Council to Combat Piracy and Intellectual Property Crimes (CNCP);

- Added to this list of action items should be "that the Brazilian Federal Police take the lead in multi-jurisdictional IPR investigations."

(6) Pursue educational and media anti-piracy campaigns sponsored by the federal government, working with the private sector to raise public awareness of the anti-piracy fight;

- The copyright industries have participated and supported this public awareness effort.
- Include education on intellectual property and the harms that intellectual property crimes causes authors and other creators in school curricula, particularly for younger school-aged children.

(7) Continue working with the industry through the CNCP.

- The copyright industries believe that strong leadership of the CNCP is necessary in order to continue, and improve, on concerted and concrete actions which are aimed at deterring piracy in Brazil.
- CNCP should establish timetables for implementation of different actions under the action plan, as well as specific objectives to measure the impact and effectiveness of these actions on the level of piracy.

COPYRIGHT PIRACY IN BRAZIL

Most of the industries continue to place estimated piracy levels at or above 50% of the market, meaning that more than half of each market in Brazil is composed of pirate products which are generally available at a fraction of the price of legitimate product. The recording industry is extremely pleased to report, for the first time in many years, the piracy rate for recorded music has dropped below 50%. Unfortunately, a tremendous increase in the availability of unauthorized recordings on the internet has meant that this decrease in the physical piracy rate has not resulted in increased legitimate sales. This disconnect highlights the fact that in addition to more traditional forms of piracy which the industries have been fighting for decades, piracy involving the Internet and other digital media present more enforcement challenges that need to be addressed in order to expand opportunities for creators, whether Brazilian or foreign.

Optical Media Piracy: Replication of pirate optical discs in Brazil, whether on a large- or small-scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. In addition to a large amount of pirate material, millions of blank media (CD-Rs and DVD-Rs) enter Brazil each year, either from the border with Paraguay (one conservative estimate is more than 300 million units in 2006) or from the main ports like Santos, Paranagua, Vitoria, Itajai and others. Paraguay continues to be a major concern for the recording industry in Brazil not only due to the massive importation of blank media manufactured in southeast Asia and entering via the free border area but also because the increased manufacturing capacity of this country. The Minister of Industry and Commerce in Paraguay recently authorized four new industrial CD-Rs and DVD-Rs plants with an output capacity of 100 million per year.

Reports indicate that Brazil has as many as 13 optical disc plants, with 84 production lines and an output capacity of close to 300 million units. Most of these plants are believed to be operating legitimately and are not a significant source of pirated optical disc product. Growing numbers of small duplication facilities can produce a significant amount of pirate CDs each day. Unfortunately, many of these smaller facilities have been emboldened by the fact that, even when the authorities have caught large-scale replication facilities in the act of pirating content on optical discs, there have been no meaningful prosecutions or actions.⁹ A related, and continuing, problem is the large-scale distribution networks in Brazil, whether these involve thousands of street vendors and established facilities (such as gas stations) which blanket the major highways in Brazil, or the non-established facilities in *camelodromos* (flea markets), or on the streets. Information indicates that the tri-border area with Paraguay and Argentina is controlled by Arab and Chinese gangs, where the first control the distribution of piracy and the latter the imports of blank media. Also in São Paulo, several raids point to Chinese groups in connection with piracy activities.

Internet Piracy in Brazil: The audiovisual, business software, music, recording and entertainment software industries all report positive responses to their campaigns to take down websites and web pages in Brazil which offer piratical copyright content.

In 2006, Brazilian recording industry continued its efforts to combat Internet Piracy which is damaging the new business development in the sector and keeping consumers out of the record stores. A market survey conducted by IPSOS revealed that in 2006 an estimate of over one billion songs were illegally downloaded from the Internet, using personal computers or public access on Internet cafes and other public facilities. The campaign conducted by the local anti piracy association (APDIF DO BRASIL) produced the following results: A total of 10.802 illegal web pages were removed by notice and take down procedures, including 239 pages with pre-release content. 937 virtual auction users were removed, including 135 virtual auctions of illegal master tones. On October 16, authorities executed the largest operation against web piracy in Brazil. The operation named “I-commerce” with the participation of 350 federal police officers, conducted 79 search warrants in 14 different locations around the country and shut down 81 web sites dedicated to offer CD-Rs and DVD-Rs compilations for home delivery. As a result of the operation 43 individuals were arrested and 5 were accused. More than 24,000 recorded CD-Rs and DVD-Rs were seized, along with 152 CD-Rs and DVD-Rs burners.

Also, in 2006, the Brazilian recording industry participated in the “Hubcap” litigation campaign against P2P users filing 20 civil actions with an average per user of 3,600 illegal music files. Although these cases are still been processed in the judicial system, the industry is planning to bring more high profile litigation cases in the near future. Unfortunately, the head of the CNCP has expressed publicly his disagreement with the campaign, which has had a detrimental effect on judges evaluating the cases and diluted the needed deterrent effect that the announcement might have had on the general public.

Finally, eight operations against “Cyber Cafes” were conducted in São Paulo and Rio, as part of the regional campaign to combat the illegal downloading of music and audiovisual files on this type of commercial places. As a result of this raid, four individuals were indicted for copyright piracy.

With respect to videogames, the domestic enforcement program of the Entertainment Software Association (ESA) continues to take action against local websites and auction listings. In 2006, 264 websites and some 28,841 auction listings for pirated entertainment software products were taken down. The stepped-up local enforcement efforts against online piracy and increased cooperation from the operators of the domestic auction sites have resulted in a decrease in the monthly volume of auction listings of pirated games.

⁹ For example, in April 2005, a factory located in the state of São Paulo was raided by the police and found to be engaged in the pirate replication of entertainment software and music products, with a significant number of pirated products seized. Since that time, there has been no meaningful progress in the prosecution of the owner/operator of this facility.

Piracy of sound recordings and musical compositions: Piracy of music and sound recordings represents 40% of all CD sales in Brazil. The latest piracy survey shows a total number of 32 million pirate CDs being duplicated, which translates to trade losses that exceed \$176.5 million. Despite a decrease in the number of physical pirate goods being sold, the legitimate market suffered a significant decrease during 2006 of 24.8 percent in units and 25.5 percent in local currency sales. This decrease is attributable to the still high piracy levels in Brazil and a higher volume of illicit files being traded on the Internet that are estimated to exceed one billion tracks. Nevertheless, the industry continues to release low priced product to attract more consumers from various income levels. As a result, average record prices in Brazil are among the lowest in the world. Most of the pirate audio products are burned CD-Rs. While a small amount of finished product may be imported from Paraguay or elsewhere, the great preponderance is locally reproduced in hundreds of facilities spread out around the country. These CD burning facilities range from large operations in commercial warehouses with over 100 burners, to small outfits operating out of residential houses producing only a small amount of product. The original source of the blank CD-Rs continues to be Southeast Asia, primarily Taiwan and China.

Entertainment software piracy: The entertainment software industry reported no change in the state of piracy of its products during 2006. Pirated game product in Brazil continues to arrive from a multitude of sources. Despite increased focus on border enforcement, there is still Asian-manufactured product flowing into Brazil from abroad, particularly Nintendo cartridges and high-end counterfeit game discs. In fact, Nintendo of America, Inc. reports that counterfeit cartridge games continue to flood the Brazilian market but, in contrast, no Customs seizures occurred in all of 2006. Local sources include a multitude of small disc-burning operations that source their “masters” (from which they burn copies) either from the aforementioned counterfeit imports or more frequently downloads of pirate game versions from the Internet. These labs are then plugged into distribution networks that channel the illegal product into the major shopping centers and the street vendors that populate many of the major cities in Brazil. The frustration is that despite the enforcement actions that are taken against retail hot spots in São Paulo and Rio de Janeiro, the level of piracy in these locations continues unabated, primarily because vendors do not fear any material consequence from their illegal activities other than the seizure or loss of their illegal products, which has simply become a potential cost of doing business in these venues. The World Wide Web and online auction sites are increasingly becoming a source of local product for consumers, especially as broadband penetration in Brazil continues to grow. Internet cafés are also of concern, as of the 2,000 cafés in the country, only 20% are licensed to offer entertainment software products. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Brazilian marketplace was \$159.3 million in 2006, with a 88% piracy rate.

Unauthorized photocopying and book piracy: The publishing industry reports that very little about the book piracy situation in Brazil changed in 2006. Unauthorized photocopying of entire textbooks as well as study materials, individual lessons and chapters from textbooks continues to be the major form of book piracy. The Association of American Publishers (AAP) estimates losses to its members of \$18 million in 2006, and those losses multiply sharply for local Brazilian publishers. 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 in translation. Some estimate that the annual number of unauthorized photocopies ranges from 3 to 5 billion pages. Universities must take a role in fighting these illegal activities in and around their campuses. The Ministry of Education should engage on this issue during 2006 as well.

Among the most disturbing developments in 2006 was the issuance and implementation of Resolution No. 5213/2005, an administrative rule 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 (or perhaps all works not in Portuguese) that are “not available in the Brazilian market” without a license. The latter provision applies even to copying of 100% of a work. This ruling presents several problems under international norms and must be revoked. For-profit entities should not be given carte blanche to copy works outside the normal bounds of international fair use.

Furthermore, “not available in the Brazilian market” has not been defined, and industry reports that in practice this provision is being used to copy en masse *all* foreign works. State and national authorities (including the Ministry of Education) should step in to revoke this rule, or at a minimum revise it to comport with Brazil’s international obligations under TRIPs and Berne.

Even apart from the USP situation, illegal copying flourishes in commercial establishments adjacent to most institutions of higher learning. Illegal photocopying of academic materials costs both domestic and foreign publishers millions of dollars and costs the Brazilian Government thousands of jobs and millions in tax revenues, but the government response is practically nonexistent. The Ministry of Education and the administrative bodies of universities and colleges should work with the enforcement authorities to make sure that a clear message is sent to those engaged in illegal photocopying, both on and off campus, that this activity will not be tolerated. The Associação Brasileira de Direitos Reprograficos (ABDR) has been working with authorities to conduct enforcement actions and plan for future endeavors. AAP will be monitoring closely the degree of cooperation the ABDR receives from authorities.

Business software piracy: The Business Software Alliance (BSA) reports no significant improvement in the business software piracy situation in Brazil. Piracy continues to include illegal reproduction/duplication of software programs both for commercial and non-commercial ends, illegal use by end-users, hard-disk loading of illegal software by computer resellers, and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience, and for the unauthorized electronic distribution of illegal software. With respect to end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against companies, which has had some impact on the level of piracy. However, there still exists a considerable business segment in Brazil that is far from having legalized. In civil infringement cases, where the business software industry has achieved some success, Brazilian courts continue to require extremely high expert fees and bond requirements, and there are lengthy delays. BSA continues to engage in civil judicial actions (search and seizure) against end users promoted by the local industry association, ABES. BSA, however, brought only civil actions in 2006, where police are generally not needed, rather than criminal actions. ABES did pursue some criminal actions against distributors, but not end users. Court appoints experts who search premises and seize eventual illegal material. Authorities are taking *ex officio* actions through the CNCP. BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Parana, São Paulo, Rio de Janeiro, Minas Gerais, Espirito Santo, Bahia, Pernambuco, Ceara, Goias, Mato Grosso do Sul, and the Federal District of Brasilia. BSA reports that preliminary estimated trade losses due to software piracy have risen to \$497 million, while the estimated piracy rate dropped slightly to 62%.

Audiovisual piracy: The Brazilian home entertainment market is reaching maturity and the theatrical market has suffered more and more with piracy. MPA and its member companies report several forms of piracy harming its commercial businesses in Brazil: (1) optical disc piracy, (2) Internet piracy, (3) retail piracy, and (4) inadequate border measures to halt imports of infringing digital product. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs. As with CD-Rs, the vast majority of pirate DVD-Rs are locally reproduced in hundreds of facilities of varying sizes spread out around the country. Internet hard goods sales of pirate optical discs are increasing more rapidly than any other form of digital piracy in Brazil. With the rapid increase of broadband access, illegal download sites are also beginning to appear. MPA has tracked a steady increase in the incidence of Internet sites for hard goods sales. Auction websites have been particularly helpful in dismissing the pirate offers. There are more offers of downloads, hard goods and even subtitles and dubbing through relationships with groups such as ORKUT (a social online network). Retail video store piracy continues to be of concern because of the continuing importance of video store revenue for local home entertainment operations. Video rental stores are struggling to survive due to the expressive growth of street vendors with pirate DVDs. Every day MPA, MPA member companies, the local Home Video Association (UBV) or the

Union of Video clubs (SINDEMVIDEO) receive calls or emails of videoclubs complaining about a street vendor in front of his door with titles recently released in the U.S. The ability of pirates to supply the market with theatrical releases that are not yet available for legal rental in DVD format is extremely disturbing, and can undermine the entire distribution plans for legislative release of that file. New releases (and not only blockbusters movies) can be found in the streets, in the fanciest areas such as Avenida Paulista or Faria Lima in São Paulo, day and day with the U.S. theatrical release dates, and again before local theatrical release.

COPYRIGHT ENFORCEMENT IN BRAZIL

The copyright industries note that tangible progress on improving copyright enforcement was made in 2006. The Brazilian Government has conducted numerous enforcement operations, especially on the border between Brazil and Paraguay, at Foz de Iguacu, by the federal, state and military police. These actions, including the public destruction of pirated products, have been widely publicized in the media. Specific units have been created to fight piracy within the Federal Police Department and the Internal Revenue Department. Police raids have been moderately successful (depending on the jurisdiction), but these result in few prosecutions and fewer criminal convictions. While raiding continued to be significant, the major criminal enforcement problem continues to be the failure of Brazilian authorities to emphasize serious prosecution and deterrent sentencing. Meanwhile, the civil system has offered some relief in some cases involving computer software.

At the federal level, cooperation with the CNCP is excellent. Industry groups also maintain good contacts with the Federal Police Cyber Crime division. In addition, the special anti-piracy units in São Paulo and Rio are quite good, even though they have limited resources for all their activities. The relationships with State civil and military police vary. For example, in São Paulo State, the military police offers very weak support for enforcement activities. Customs at the border with Paraguay has played a very important role in the past two years. Finally, a broader observation must be made and that is the problem of corruption, especially as piracy becomes more entrenched with organized crime. This shows up particularly in leaks of information, low levels of law enforcement support, and the continuing lack of intelligence gathered on major pirate groups and importers/smugglers of blank media.

Actions at the State and local levels: The level of governmental anti-piracy attention varies throughout Brazil. The industries strongly support efforts by the CNCP and other government agencies to create task forces to focus on copyright anti-piracy efforts. For example:

- In January 2006, the Governor of the State of São Paulo signed a decree creating an inter-secretarial committee to fight piracy. The committee includes the following agencies: Casa Civil, Segurança Pública, Justiça e Defesa da Cidadania, Fazenda, Cultura, Emprego e Relações do Trabalho, Tecnologia e Desenvolvimento Econômico e a Procuradoria Geral.
- The State of Rio de Janeiro created a special anti-piracy task force in mid-2002, and its Special Anti-Piracy “Delegacia” (Precinct) has been quite active. Nevertheless, this task force (which notably is state-funded and not a federal effort) is a small operation with human and financial resources far below the need shown by the private sector, both copyright and trademark.
- A few years ago, the state government of São Paulo created a specialized police unit for piracy cases, the DEIC, which is part of the Organized Crime Office. Unfortunately, the participation of DEIC in the combat of piracy has been far below the level expected by the industries, particularly in the second half of 2006, when this office’s willingness to pursue enforcement actions against vendors in local retail hot spots in São Paulo dropped to almost zero. As the

state of São Paulo represents about 50% of the Brazilian market for most of IIPA members' products, the inactivity of this office has spurred a rise in the level of piracy throughout the state.

- The municipality of Porto Alegre in Rio Grande do Sul has established a municipal effort to fight piracy.
- Other state-level anti-piracy efforts have arisen on an *ad hoc* basis, including police task forces in Goiás, Pernambuco and Minas Gerais.
- The industries have identified the need to have anti-piracy task forces in additional cities/states such as Belo Horizonte, Salvador, and Fortaleza e Curitiba.

Police raids: While isolated police raids have been moderately successful, the actions they take rarely produce results in the courts. There is still a lack of clear and direct instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Policia Federal, Policia Civil, Policia Militar, Policia Fazendaria, Alfandega) to act in cases of copyright infringement. The level of police attention to piracy varies throughout the country. Certain industries are able to achieve adequate cooperation with police officials, often depending on the region and on personal contacts. Most enforcement efforts in Brazil are commenced by investigations conducted by the copyright industries themselves, and are usually not the result of any major Brazilian Government or law enforcement initiatives. Because Brazil has many different police corps, the rivalry among them, with some few exceptions, negatively impacts their ability to conduct effective and efficient raids. Federal police officials have jurisdiction over the types of crimes that are generally viewed as producing large-scale corruption (such as tax evasion, drug trafficking and money-laundering).

The recording industry continues to work with Brazilian authorities on anti-piracy actions. For example, in gearing up for the end-of-2006 holidays, an investigation into a “*sacoli*ero network” specializing in computer and technology-related products was busted when its delivery of pirate-related products to a secluded warehouse outside Fox de Iguazu was detected. In mid-December 2006, a co-called “tourist bus” was seized near the “BOM JESUS” control point outside the city of Santa Elena. This bus contained 220 CD-R burners, 310 DVD-R burners, 300,000 labels, 24 printers, 35,000 recorded DVD-Rs and 25,000 recorded CD-Rs, 110,000 blank DVD-RS and 195,000 blank CD-Rs. Twelve people were arrested and the bus was seized; the investigation to identify the financial backers of these goods and this operation remains underway. Also, on January 24, 2007, the Specialized Anti-Piracy Unit of the State of Rio de Janeiro (DRCPIN) conducted a major operation in an open-air market (a camelodromo) the city of Campos de Goytacazes, located about 200 kilometers from Rio de Janeiro. Campos is the fourth largest city in the state and considered a major distribution point for pirate product in the state. Authorities seized over half a million units of optical discs (303,627 recorded CD-Rs and 229,226 recorded DVD-Rs), 68 burners, 18,000 videogames, and 14 computers. More than 200 police officers were deployed and 80 individuals were arrested. On February 2, 2007, Brazilian police in Rondonia state in northern Brazil arrested 14 people in “Parallel 5 Operation,” which resulted in the seizure of 20,000 pirated CDs, DVDs and computer hardware. The authorities said that this gang would buy blank CDs and DVDs in Bolivia and burn copyrighted content in Brazil.

The motion picture industry reports that its best case in 2006 involved an e-commerce action conducted by the Federal Police. Even though there is not yet a formal Cyber Crime division in the Federal Police, MPA and other IPR industries, have seek support from the federal police to conduct important investigations against intellectual property theft in the net. After a six-month investigation, “Operation I-commerce” resulted in 79 search warrants issued in 17 States and the arrests of 20 people, in the largest ever operation of that kind in Brazil. The case was largely publicized in the local media. Furthermore, MPA highlights the improvement in the Brazilian customs work at the border with Paraguay. Finally, in the Northeast there has been growing support from State Prosecutors there.

The local software anti-piracy organization, ABES, established an important partnership with the CNCP in 2006 and more enforcement effort is expected in 2007. BSA and ABES report that, in 2005, a total of 1.7 million counterfeit CDs (both business applications and entertainment titles) were

apprehended in more than 656 search and seizure raids staged over the course of the year throughout the country. This led to the closure of 19 counterfeiting laboratories and to 57 arrests of people caught in the act of committing crimes. Under the 2005 campaign, 99 lawsuits were filed against companies using pirate software. Fines imposed, which can reach as much as three thousand times the value of each software application used, totaled US\$1.55 million. The cases were executed in São Paulo, Rio de Janeiro, Minas Gerais, Goiás, Bahia, the Federal District, Paraná and Rio Grande do Sul. In 2005, 3,036 cease and desist notices were sent out as a result of anonymous complaints, surpassing the 2,063 complaints registered in 2004. Because of this, companies in violation which acquired licenses to legalize their situation made payments totaling US\$4.9 million. 540 websites selling counterfeit programs were taken down, in addition to 44,400 online ads dedicated to publicizing this service. Data for 2006 were not available at the time this report was filed.

ESA and its partner association ABES undertook a number of efforts in 2006 to support the work of local enforcement authorities in going after game software piracy in Brazil. Most of these efforts have been focused on major shopping centers in São Paulo and Rio de Janeiro, as well as the burning labs and storehouses that are sources of supply for such shopping centers. For example, from January—September 2006, ESA reports numerous actions involving entertainment software, including: (a) eight actions against labs in Osasco City, Bras de Pina, Brasília, Criciúma, Ribeirão Preto and Dois Córregos; (b) five actions against storehouses in São Paulo, Santo Amaro, and Madureira; (c) 11 actions against major shopping centers in São Paulo, Brasília, Rio de Janeiro; (d) continuous actions against street vendors in São Paulo and Rio de Janeiro; and (e) numerous seizures of products from smugglers in the State of Parana. These actions resulted in the seizures of approximately 575,000 game software products, including PC games, Nintendo cartridges and Game Cube games (though not many of the latter), PlayStation2 games and Xbox games. Despite all of this enforcement activity, none of these enforcement actions have resulted in any prosecution of those found to be engaging in the infringing activity involving pirate video game software products. As a result, sales of pirate software persist in many sectors, including major shopping centers. A prominent example of the problem in Brazil is the case of a factory outside São Paulo (as noted above).

BRAZIL
COMPILATION OF CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS
 AS REPORTED BY THE MEMBERS OF THE
 INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
 2002 – 2006

ACTIONS	RECORDING INDUSTRY	MOTION PICTURE INDUSTRY	BUSINESS SOFTWARE & GAME SOFTWARE INDUSTRIES	TOTAL
	-2002- *2003* 2004 (2005) -2006-	-2002- *2003* 2004 (2005) -2006-	-2002- *2003* 2004 (2005) -2006-	-2002- *2003* 2004 (2005) -2006-
NUMBER OF COMPLAINTS FILED WITH POLICE	-206- *190* 113 (86) -279-	-1,825- *2,995* 3,361 (3,045) -NA-	-253- *351* 668 (656) -NA-	-2,284- *3,536* 4,142 (3,787) -NA-
NUMBER OF RAIDS CONDUCTED	-870- *1,018* 936 (1,457) -2,257-	-1,640- *2,995* 1,829 (2,552) -NA-	-253- *175* 626 (656) -NA-	-2,763- *4,188* 3,391 (4,665) -INCOMPLETE-

NUMBER OF PIRATE COPIES OR MATERIALS SEIZED	-3.78 million- *5,686,253* 5.6 million CD-R/CD; 11.4 million blank CD-R (6 million CDRs/DVDRs 31.7 million blank CD-Rs and DVD-Rs) -6.1 million recorded CD-Rs, 2.7 million recorded DVD-Rs 23.7 million blank CD-Rs, 14.7 million DVD-Rs-	-253,805 VHS, 56,037 blank OD- *254,230 VHS and 134,417 CD-R* 254,996 VHS; 139,741 CD-R; 229,001 DVD; 9,134,880 blank OD (154,407 VHS; 315,447 CD-R; 1,139,978 DVD; 17,640,383 Blank OD) -NA-	-355,156- *Business software- 574,341 Game software- 845,977* Business software 352,457; Game software- 861,637 (Business Software 493,147 Game Software 1,224,190) -NA-	-4.4 million- *7.5 million* 28.0 million (58.7 million) -NA-
NUMBER OF CASES SUSPENDED OR DISMISSED	-40- *29* 96 (5) -5-	-144- *23* 766 (1,259) -NA-	-0- *0* 15 (NA) -NA-	-184- *52* 862 (+ 1,264) -NA-
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	-11- *8* 17 (21) -100-	-13- *14* 15 (14) -NA-	-0- *0* 1 (NA) -NA-	-24- *22* 32 (+ 35) -NA-
CRIMINAL SENTENCE ISSUED	-Ranging from: 1-year community service; 2 years community service and fines; 2 years in jail plus small fine; 6 years in jail plus 20 days' fine- *Minimal fines* Minimal fines (Community Service and minimal fines) -community service and criminal fines-	-Community service, probation- *Minimum 1-year, maximum 18-months, all suspended* Minimum 1 year, maximum 18 months, all suspended (Ranging from 1 year of community services to 2 years of community services plus 10 to 20 days' fine)	-None- *None* Commuted sentences (NA) -NA-	-Minimal- *Minimal* Minimal (Minimal) -NA-
RATIO OF CONVICTIONS TO THE NUMBER OF RAIDS CONDUCTED	-1.26%- *0.79%* 1.82% (1.4%) -NA-	-0.79%- *0.47%* 0.8% (0.54%) -NA-	-0%- *0%* 0% (NA) -NA-	-0.87%- *0.53%* 0.9% (~ 0.7 %) -NA-
ACTIONS	RECORDING INDUSTRY -2002- *2003* 2004 (2005) -2006-	MOTION PICTURE INDUSTRY -2002- *2003* 2004 (2005) -2006-	BUSINESS SOFTWARE & GAME SOFTWARE INDUSTRIES -2002- *2003* 2004 (2005) -2006-	TOTAL -2002- *2003* 2004 (2005) -2006-

Note about this chart: Statistics for this enforcement chart are provided by IFPI Latin America (IFPI), the Motion Picture Association (MPA), the Business Software Alliance (BSA) and the Entertainment Software Association (ESA). The suspensions or dismissals cited above are the result of judicial decisions under Law 9099-95, which permits judges to sentence first-time offenders with up to two years' probation and monetary damages. In 2003-2004, BSA and ESA undertook concurrent local anti-piracy actions in Brazil, and the only difference between the two industries' reports involves the amount of software products seized.
NA = Not Available

Brazilian prosecutors pursued very few criminal cases. Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. There copyright prosecution actions tend to concentrate in Rio de Janeiro and São Paulo, where there are specialized IP units. However, the real problem is in the entire judicial system. Between 2002-2005, the ratio of convictions for copyright infringement to the number of raids run each year have never exceeded 1% (see chart, below; full 2006 data is not yet available). Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence.

Non-deterrent penalties continue to be issued by the courts. In those very few criminal copyright cases that do reach judgment, the sentences are primarily small fines, probation and community service. Between 1995 and 2005, most of the cases resulted in suspensions or dismissals under Law 9099-95, a law which permits judges to sentence first-time offenders with up to two years' probation and monetary damages. The Brazilian criminal code was amended in 2003 to clarify and strengthen certain procedures and penalties which had hobbled effective enforcement throughout the 1990s (see discussion, below). Since the 2003 amendments, it appears that judges are now more likely to authorize the destruction of seized pirated products even before the final resolution of the case. However, suspensions remain the norm. The recording industry obtained a significant increase in the number of convictions in 2006 (from 21 to 100). The number of suspensions has been decreasing since 2005, mainly because judges and prosecutors are better enforcing the 2003 reform. However, all of the defendants are getting benefits such as community services and minor fines and no effective jail-time convictions were issued. Furthermore, the Brazilian authorities have not placed any attention on key cases involving organized reproduction and distribution, nor on cases involving recidivists. MPA reports there are about 350 recidivist cases still pending.

Delays by police, prosecutors and judges in criminal cases. Industries report that it still takes a long time for a criminal case to wind its way through the Brazilian courts, and no improvement was noted in 2006. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case. One major problem has been the lack of manpower and resources in the police expert facilities that must examine the illegal products seized in raids and verify the illegality of the seized product before the case can advance. As most pirated products in Brazil are low-quality copies, the process of identifying and verifying the vast majority of these seized products as illegal is not difficult and does not require highly trained experts. Thus, a fairly low cost solution in increasing the manpower of these facilities would do much to clear out this bottleneck. Delays in criminal copyright infringement cases can extend as long as two to three years in the courts of first instance, and usually longer. (The April 2005 factory case referred to previously on page 5 is a classic example of the lack of progress on infringement cases, even against a major pirate.) As a result, there is a tremendous backlog of cases in the Brazilian courts. MPA reports that it has currently more than 8,200 pending cases of audiovisual copyright piracy in Brazil. One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters (see discussion, below). The recording industry has more than a thousand police "inqueritos" pending for prosecution. In one of the most important criminal cases, followed against two industrial CD plants, the inquerito policial (police investigation file) has been delayed by the Police "delegacia" for more than five years with no prosecution at all. One major problem in the anti-piracy actions in Brazil is that police authorities have no term and/or dateline to finish their investigations and deliver the file to the prosecutor. The result is that police "Delegacias" can retain complex files for years.

BSA reports that the Brazilian Government has recently enacted three pieces of legislation since the broader judicial reform project was approved in December 2004. It is hoped that these new efforts will help make the judicial process more efficient. The three changes included: (1) Binding Superior Decisions (Súmula Vinculante) – the Supreme Federal Court will organize the activity and put an end to thousands of identical actions. Courts will no longer discuss issues that were previously and repeatedly examined and decided; (2) Extraordinary appeals (*recursos extraordinários*) will be filtered in order to allow only cases which are considered important to the development of the country. The system currently has approximately 100,000 extraordinary appeals per year, causing a huge backlog of cases for the Supreme Federal Court to analyze; and (3) Electronic courts – bureaucracy is a big bottleneck in Brazilian litigation. The target is to abolish paper and physical files, which should be available for consultation by all interested parties. It is still early to see if this trio of systemic reforms will reduce the courts' backlog.

Enforcement Statistics: Brazilian authorities seized 47.4 million pirated music CDs, video DVDs and CD recorders in 2006, up 57% from the prior year. There were 29.9 million CDs and 17.4 million DVDs seized, along with 43,900 CD-recorders. Local authorities conducted 1,890 ant-piracy operations in 2006, and about 100 people were sentenced for piracy. Southern Parana state had the largest number seized piratical items, followed by Santa Catarina, southeastern São Paulo, central-western Mato Grosso and southeastern Rio de Janeiro. Below is the chart IIPA members and local associates have been using to track their specific actions. The recording industry confirms that 100 convictions were issued in piracy cases in 2006.

Border Enforcement: During 2006, the Brazilian Government improved its efforts to combat the importation of piratical and counterfeit materials. Customs authorities have been very active not only at the border of Paraguay where the seizures of blank optical discs increased significantly, but also in ports like Santos and Paranaguá. Various agencies have been involved in intercepting and seizing shipments full of pirated and counterfeit product. For years, the copyright industries have recommended that controls at the major transshipment points be strengthened, and we are pleased that improvement is underway. Border enforcement will continue to be enhanced if Brazilian authorities can better coordinate with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. Although much of the music and audiovisual piracy has turned to domestic production, infringing copies of entertainment software (both in silver disc and cartridge format), and mis-declared and infringing blank CD-Rs, continue to enter as infringing imports. Estimates from some commercial agencies show that over 400 million units of blank media entered Brazil in 2006. The main port of entry was Vitoria. As noted previously, Nintendo did not see much improvement at the Customs level; counterfeit cartridge games continue to flood the country, yet no border seizures occurred in 2006.

- In Fall 2004, the Federal Highway Police began to enforce federal highway regulations against contraband trafficking, usually involving buses transporting contraband merchants (*sacoleiros*) from Paraguay. Heavy fines and/or seizure of the bus can result. There were numerous actions by the highway police in 2005 to intercept buses transporting pirated materials. The recording industry reports that at least 44 buses were confiscated during 2006 and approximately (a) 900,000 recorded CD-Rs and DVD-Rs, (b) 2.1 million blank CD-Rs and DVD-Rs and (c) 4,000 burners seized as part of this program
- The software industry continues to be concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice. This was still true in 2005. Specific action is needed on this issue, focused on hardware parts and components.

- The ESA reports some positive developments on border enforcement, with reports received from the enforcement authorities in Parana of large volume seizures in 2006. Unfortunately, these seizures alone have failed to stem the flow of illegal game product across the border as the operators of these smuggling operations have continued to escape without suffering any threat of criminal sanction.
- The recording industry reports some successful border actions in November 2006 which involved cooperation of industry with both Brazilian and Paraguayan officials. Industry investigators identified a large shipment of blank optical media being moved by a local distributor in Ciudad del Este, Paraguay. Along the route the delivery personnel added boxes of suspected burners to the existing shipment. With the vehicle heading for Brazil over the "Friendship Bridge" the investigators notified Brazilian Customs of the situation. Based on that information, authorities seized the shipment several miles inside the border city of Foz de Iguacu. The shipment contained 475,000 blank CD-Rs/DVD-Rs, 20,000 recorded CD-Rs, 35,000 MP3 / CD-Rs, 38,000 film DVD-Rs, 10 printers, 250 CD Burners, 300 DVD burners and more than 100,000 Inlay cards. Investigations continue in Paraguay.

Civil Damages, Delays and High Bonds: The Brazilian copyright law contains a pre-established damage provision which is among the highest in the Americas. In recent years, the level of damages awarded in these software cases is unprecedented worldwide with respect to software copyright infringement suits. In 2006, the business software industry continued to bring civil search and seizure actions, usually followed up with the filing of civil damages suits. BSA's program in Brazil includes sending cease and desist letters and bringing civil actions only. In 2006, 2,774 such letters were sent, generating US\$8.6 million in legal software purchases. BSA did not receive significant damages in civil judgments in 2006.

The civil court system in Brazil, like the criminal system, is inefficient and slow. Cases usually take from 18 months to 4 years to come to trial. Due in large part to these unacceptable delays and the lack of attention of judges to copyright protection, BSA currently reports that more than 250 civil cases are awaiting judgment. Some ESA companies also undertake civil actions rather than criminal actions in Brazil. However, these civil cases remain unresolved for long periods of time. For example, Nintendo of America is awaiting resolution of some cases that have been pending for at least five years.

Finally, Brazilian courts also continue to require extremely high expert fees and bond requirements. In some BSA cases bonds of US\$50,000 to US\$100,000 have been required, and BSA had no option but to terminate the cases. On average, BSA has paid up to US\$5,000 for experts' fees and up to US\$25,000 as bonds. This situation has remained unchanged since 2005.

COPYRIGHT LAW IN BRAZIL

1998 Copyright Law and 1998 Software Law: The Brazilian Government unfortunately continues to refuse to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, despite the fact that its copyright law is quite comprehensive and the Brazilian creative community relies on copyright protection to reach the global market.¹⁰ As a statutory matter, Brazil has already implemented its substantive copyright obligations compliant with, and even beyond, those required by the TRIPS Agreement. These include protection for temporary copies, and pre-established statutory

¹⁰ Brazil also has implemented at least some of the provisions of the two WIPO Internet treaties, such as civil sanctions against circumvention of technological protection measures and removal or alteration of electronic rights management information. On the other hand, Brazilian law does not establish ISP liability and notice and takedown procedures, and criminal sanctions for circumvention of technological protection measures and removal or alteration of electronic rights management information. The Copyright Law also needs to be amended to provide a comprehensive right of making available.

damages. Brazil already affords a term of life plus 70 years for works and 70 years following first publication for sound recordings and audiovisual works.

Copyright bill regarding student copying: Bill No. 131/06 was presented in the Senate and would establish that a copy of any work by a student has to be limited to 25% of that work. It is currently under review by the Constitutional Commission of the Senate. Separately, Bill No. 5046/2005 would modify Article 46 of the copyright law. This bill, which seems to grant overbroad privileges to university students to make copies of entire works as long as those copies are not directly for commercial use, is currently under review by the Constitutional Commission of the House of Representatives. Brazil should stop the progress of these bills, as their passage would no doubt place Brazil in violation of international copyright mandates.

Criminal Code amendments 2003 and mixed results: On July 1, 2003, the Brazilian criminal code was amended to increase criminal sanctions for copyright infringement and amend certain procedures. Effective August 1, 2003, Law 10695 amended Article 184 of the Criminal Code by raising the minimum penalty from one year to two years in prison for persons convicted of illegally reproducing, distributing, renting, selling, acquiring, smuggling into the country, or storing protected copyright works with the intent to profit from reproductions. A fine will also apply in addition to the prison sentence.¹¹ The maximum penalty of four years' imprisonment will apply if the violation involves supplying unauthorized works to the public via cable, optic fiber, satellite, airwaves or any other method of transmission for a profit. Those persons infringing copyright without intent to profit are subject to detention of three months to one year or a fine. These amendments were significant because penalties of one year or less of jail time, at the state level, could be commuted to a fine, or a judge could suspend a case indefinitely (Law 9099.95). The 2003 amendments also codify procedures to seize and destroy contraband and provide judges the authority to dispose of seized equipment in a way that ensures it will not be used for commercial purposes. The amendment affecting experts' determinations is also positive in that it allows a single private party with technical knowledge to make a determination; such a determination, therefore, could be made by an industry expert.¹² However, effectiveness of the amendment in practice has been diluted because defendants always gets alternative sanctions such as community service and minor fines instead of jail-time convictions. This is mainly due to a lack of attention from prosecutors and criminal judges to the piracy problem.

The business and entertainment software industries remain very concerned that these 2003 criminal code amendments fail to increase sanctions for the infringement of computer programs; the one-year sanction for computer software infringement still appears in the separate 1998 Software Law, unchanged by the amendments to the criminal code. The software industry can only use the criminal code amendments to the extent those sections do not conflict with existing law. This means that the procedural provisions regarding the expert reports and the custodial aspects of evidence in the criminal code can be used by the software industry. However, because the minimum penalty of the separate software law (one year) has remained unchanged, criminal infringement cases brought by the software industry will still be subject to automatic suspension under Law 9099.95. Hence there is a need for a legislative fix (see Bill Number 3.965, below).

¹¹ The law changes the "unit" of fines and bonds from "daily salary" units to "monthly minimum wage" units. In other words, the minimum fine or bond is now 240 Reais (US\$114) instead of 1/30th of that amount. The judge sets the fine/bond, not the law. The maximum penalty continues to be four years in jail.

¹² The 2003 amendment is helpful in three additional ways: (1) It requires the judge to assign custody of the evidence to the injured party—in the past, judges have turned evidence over to suspects who have in turn altered the evidence in ways prejudicial to copyright owners' cases; (2) police are more inclined to view piracy as a serious crime worth their time; and (3) suspects apprehended by police are now held until released by a judge, costing the suspect at least time, a bond and perhaps attorney fees.

Pending anti-piracy legislation: There are several anti-piracy bills pending in the Congress, all of which are important to the copyright industries.

- **Increase penalties for copyright piracy:** Bill Number 3964/2004 proposes to amend Articles 184 and 186 of the Criminal Code (as well as corresponding provisions to the Criminal Procedure Code) and the first and third paragraphs of the Law No. 9609/98, in order to increase impossible sentences for piracy, and also some provisions of the criminal procedure code which would increase sentencing from a minimum of two years, to two years and two months. This change is significant because the higher jail time sanction will remove alternative and lesser sanctions such as community service. This bill was in the House of Deputies in 2004 and since then it has been in the Constitutionality Commission. Recently, the commission released its report for this bill, and it is expected this bill will be filed with the new legislature in early 2007.
- **Increase penalties for software infringement:** Bill Number 3.965/2004 proposes to increase the penalties in the Software Law from confinement from one to four years and fine to confinement from two years and two months to four years and a fine. This bill also details additional actions involving computer programs which would subject defendants to sanctions. Amendments introduced in the lower house of Congress in June 2004 now await a committee ruling to determine their constitutionality. The bill was before the Committee of Constitution and Justice, the first sub-committee of the Brazilian House of Representatives.
- **Private sector experts:** Support pending legislation which would allow judges to appoint private sector experts.
- **Destruction of infringing materials:** Support pending legislation which would allow the destruction of infringing products before a final decision.
- **Forensic review:** Support pending legislation which would ease forensic review of all suspected infringing products seized so as to permit sampling.
- **A comprehensive package with CNCP support:** In early 2006, the CNCP's Legislative Working Group was preparing a new substitution bill that will gather all ongoing anti-piracy bills (such as those listed above) and new legislative amendments in order to enhance intellectual property protection in Brazil. Unfortunately, it appeared that provisions on anti-camcording and protection against the circumvention of technological protection measures were not included in this package, at the request of representatives from the Ministry of Culture. This package will likely be presented by the Government to the Congress in the first half of 2007.

Tax Evasion: A "fiscal crime" provision was inserted, with the approval of the software industry, 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, independently of BSA's civil actions against software piracy. BSA was hopeful that this type of tax evasion case would have a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies. No improvements were reported in 2006. It seems clear that the Receita Federal and the respective state tax authorities are dedicating no resources to pursuing these tax evasion cases.

ADDITIONAL ISSUES

Specialized IPR courts with copyright jurisdiction: The CNCP has been holding meetings with judges to discuss the creation of specialized IP courts. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare

for the formation of these courts, which would significantly improve intellectual property rights enforcement. However, no specific action has yet been taken to create these courts. Consideration of this remedy to help ameliorate the sorry state of anti-piracy enforcement would be welcomed.

Declared prices on blank media: To make it easier to intercept mislabeled blank media imports—a key raw material for the manufacture of pirate products—it is critical that the Brazilian Government adopt a minimum declared price for blank media that corresponds to its real market price. Despite many efforts by the recording industry that include providing reference prices from other countries—including Paraguay, which has adopted a minimum declared price for blank media, and minimum manufacturing costs for CD-Rs—Brazilian authorities have not yet established such a minimum price. This issue is not included in the CNCP Action Plan.

Government software management: The Brazilian Government should be encouraged to continue its efforts to implement effective software asset management practices in its public ministries and agencies. This will allow it not only to ensure all of its software is licensed, and also help it make the most of its investments in information technology. Good software asset management practices can best be achieved through active public-private sector partnership. The Government should work closely with the private sector in this regard.

Non-tariff barriers— Remittances, computer software and tax barriers: Several barriers have been identified in prior IIPA 301 reports, and no progress has been made in 2006. First, although Brazil has eliminated most of the non-tariff barriers that afflict the computer software industry, several issues still remain. These non-tariff market access barriers, if corrected, could attract additional foreign investments in the technology sector and help further develop the technology industry in Brazil. One of the main issues deals with a law passed by the previous administration. Law 10.332 imposes an additional 10% tax called “CIDE” (*Contribuição de Intervenção no Domínio Econômico*) on international payments for technology and royalties of any nature. CIDE essentially raises taxes on foreign remittances of royalties, etc., to 25%, as there is currently a withholding tax of 15% on the remittance of payments related to software licenses. The constitutionality of CIDE is also questionable; it is currently being challenged in court by several Brazilian and international software companies, based upon the argument that CIDE was enacted under the wrong procedure. Second, the Central Bank requires (per Circular No. 2685 of May 1996) that an agreement duly registered with the Ministry of Science and Technology (including the registration certificate) be presented to the financial institution conducting the currency exchange operation as a prerequisite to remitting overseas payments. The Central Bank of Brazil currently requires all documentation listed in Circular No. 2682 of May 1996 of the Central Bank.

Third, high tariffs and taxes plague the entertainment software industry and serve as a significant barrier to market entry as these additional costs translate to higher prices for legitimate goods in the market. Nintendo of America Inc. (NOA) reports that tariffs range from 17.5% to 20% on video game products and video game software. Additional taxes are also imposed on entertainment software products, and include: (1) a federal industrial products tax of 50% of the value (i.e., cost, insurance and freight [CFI]) of the article; (2) a miscellaneous tax of 1%; (3) so-called social security taxes at a combined percentage of 9.25%; and 4) a value-added tax of 17% or 18% imposed by state governments. These tariffs and taxes are imposed cumulatively, and as such, the actual cost to the consumer for a legitimate entertainment software product is three times the cost of a counterfeit product. Obviously, these costs are not borne by pirate operations that smuggle counterfeit and pirated products into the country. Brazil’s taxes on videogame products are the highest in the hemisphere, and serve as an impediment to the ability of legitimate companies to develop a market presence and provide consumers with reasonably priced legitimate products, and thereby be able to compete against pirates. The high tariffs and taxes have contributed to the slow entry of console manufacturers into the market, and also contribute to the flood of grey market, pre-modified consoles and pirated software into Brazil. This matter needs to be adequately addressed by the Brazilian Government so that the purveyors of pirated products do not continue to thrive at the expense of legitimate businesses.

Possible “theatrical window”: ANCINE, the Brazilian National Film Agency, has stated that it is likely to issue regulations on release windows, specifically on the period of time between theatrical and home entertainment release. MPA strongly opposes this measure which, if implemented, would limit the ability of audiovisual businesses, including MPA member companies, to make business decisions based on market conditions. In general, MPA opposes any kind of windows regulations and defends the distributors’ right to freely determine release dates, especially in the face of high levels of piracy and technological advances offering alternative delivery platforms to the public.

Possible regulation of the already existing video quota: A video quota was initially passed in January 1992 and is now part of the current Film Law (TM 2228-1/01). This quota dictates that distributors of home entertainment product must release a percentage of national titles. This law was published in 2001 and has never been implemented. However, ANCINE has been in contact with home entertainment distributors asking for their suggestions on the quota level to be set. Although MPA is undertaking efforts to avoid imposition of the quota, the video quota is expected to be regulated in 2007.

Digital TV: In 2006, Brazil chose the ISDB-T standard for the Brazilian digital terrestrial TV system. However, Brazil has not yet announced which system will adopt to protect digital TV content. MPA calls the attention to the need to select a method of protection against unauthorized re-distribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

IPR TRAINING AND PUBLIC AWARENESS

There have been extensive copyright- and enforcement-related trainings in Brazil. The copyright industries (primarily the film, music and recording, business software, entertainment software and book publishing groups), on their own initiative as well as working with the CNCP and other business groups, conduct numerous trainings, seminars and workshops with Brazilian enforcement officials, at the national, regional and state levels. During 2006, U.S. Government agencies supported a series of Training Events in Brazil. There was a three-day event, which for the first time, was targeted for plural law enforcement audiences, and managed to create synergy and cooperation from law enforcement from different States and units. The first Event was held in Brasilia (March 2006) followed by Porto Alegre (May 2006), Recife (July 2006) and Belo Horizonte (September 2006). In each training session there were representatives of Federal, Civil and Military police, customs, municipal authorities, and prosecutors, among others. Also MPA had other smaller local training sessions in several cities, in conjunction with other IPR Industries, primarily music and software. ESA and its local partner ABES were also active on the training front, and as noted, joined with MPA on some of those trainings. Additional training by ESA-ABES was also conducted in São Paulo, Rio de Janeiro, Curitiba, Santos and Campinas. The recording industry reports two training sessions with the state police and highway patrol in Riberão Preto (São Paulo State) and one seminar for the cyber crimes units of the Federal Police.