

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** Brazil has still not ratified the WIPO Internet Treaties, leaving the country disconnected from the standard adopted by 103 countries worldwide, including almost all countries across the Americas, Europe and Asia-Pacific. While there have been signs of progress on enforcement, much more needs to be done, especially to curb access to illegal services; there are also a wide range of market access barriers for legitimate content. In 2019, Brazilian authorities showed a renewed interest in copyright matters, but also some surprising moves in the wake of the transfer of the Secretariat of Culture to the Ministry of Tourism. There were a number of positive developments on the enforcement front and the announcement of a public consultation to update the country's 1998 Copyright Law. IIPA respectfully requests USTR to continue to encourage Brazil to pursue policies and practices that enable a sustainable and thriving creative sector.

After a long period of disinterest in addressing the online piracy ecosystem, Brazilian authorities engaged in several enforcement actions in 2019 (following the success of previously reported *Operation Copyright* in January 2019). Throughout the year, São Paulo's Public Prosecutor cybercrime unit, CyberGaeco, shut down 100 infringing domains—accessed over 23.3 million times every month (an estimated 367 million yearly visits). In November, the Ministry of Justice's National Council to Fight Piracy (Conselho Nacional Contra a Pirataria, CNCP) and the Secretariat of Integrated Operations (Secretaria de Operações Integradas, SEOPI) coordinated *Operation 404*, which resulted in 30 search warrants aimed at online piracy in 12 different Brazilian States. The result: 210 infringing websites and 100 infringing apps taken down, and the delisting and profile removals of the sites and participants from social media platforms. Separately, the CNCP facilitated several promising agreements to prevent the availability of non-certified devices (including rogue IPTV and key sharing devices) in popular online marketplaces, and to stifle the advertising revenue of pirate sites. While these operations and agreements are commendable and encouraging, the scale of piracy in Brazil as well as the size of the country's territory, call for a more comprehensive, coordinated, sustained and well-funded enforcement strategy that includes training and information sharing among police, prosecutors and judges all over the country.

Between June and September 2019, the Secretariat on Authors Rights and Intellectual Property (SDAPI) of the Special Secretariat of Culture (former Ministry of Culture) held a public consultation to reform the country's 1998 copyright law in the face of new technologies and business models. This major legal reform of Brazil's copyright system is a top priority for the creative industries which will participate in and closely monitor all related public hearings and debates in 2020. It is essential for Brazil to finally join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) to ensure its legal framework is interpreted in line with the global standards. Brazil's new law should provide strong copyright protection in line with international best practices, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test.

---

<sup>1</sup>For more details on Brazil's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement**

- Put in place a clear structure, with a high degree of political backing and adequate funding to build on the success of *Operation Copyright*, domain disruption by Cyber Gaeco and *Operation 404*. Ensure that law enforcement agents all over the country are properly trained and coordinated in conducting complex online investigations and have access to the necessary legal tools and framework to launch effective criminal prosecutions against major online piracy operators.
- Ensure that CNCP continues to have the resources and political backing to engage in cross-industry efforts on Internet piracy and develop a national strategic plan to implement the MOU's signed in 2019.
- Implement a long-term national program to train judges and prosecutors on IPR law, the WIPO Internet Treaties, and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact. More awareness raising and training, and obviously, ratification of the treaties, are needed to improve the level of copyright protection and legal certainty in the Brazilian market.
- Implement better border controls against the importation of piracy devices (PDs), such as the HTV box, and video game counterfeit hardware.
- Ensure that the Ministry of Culture's Film Agency (ANCINE) and the Brazilian Regulatory Agency for Telecommunications (ANATEL) continue working to implement a system for administrative site blocking for pirate sites.
- Ensure the Brazilian Financial Intelligence Unit (COAF) will investigate suspicious financial transactions resulting from piracy commercialization and report their intelligence to competent enforcement authorities aiming at initiating actions against money laundering, organized crime and other financial crimes.

### **Legislation and Regulation**

- Accede to, ratify, and implement the WCT and WPPT.
- Ensure the new Copyright Law and/or any legislation on copyright (i) implements the WIPO Internet Treaties, in particular, the exclusive making available right without conflating it with communication to the public right ("public performance" right as it is described in current Brazilian law), the anticircumvention of technical protection measures (TPMs), and penalties for trafficking in circumvention devices; (ii) enables courts to issue orders to Internet service providers (ISPs) to block access to offshore websites dedicated to copyright infringement following a valid notice; (iii) covers intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites; (iv) provides criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and criminalizes signal theft in the home entertainment sector; (v) implements special cybercrime courts and prosecution units; (vi) penalizes repeat infringers; (vii) provides exceptions and limitations that comply with the three-step test; and (viii) ensures the availability of meaningful compensation for infringement commensurate with the harm suffered and at a level that will deter future infringements.
- Repeal the November 2019 *Medida Provisória #907*, a temporary order issued by the President, which would deprive music rights holders—composers, artists and sound recording producers—of their present legal entitlement to remuneration when their music is used in hotel rooms and cruise ship cabins.

### **Market Access**

- Further reduce high tariffs and taxes placed on video game products, as well as on general on-demand content, in order to enable industry growth.
- Mitigate imposition of the "VOD tax" on movies and TV programming delivered on demand; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt Over-the-Top (OTT) services from compliance with the existing Pay-TV Law.

## **THE COPYRIGHT MARKETPLACE IN BRAZIL**

**Online marketplace:** Internet access and demand for online content continue to grow in Brazil. At least 80 online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime the most recent entry in the market.<sup>2</sup> Most pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Recent reports estimate that by 2020 the local online content consumption will reach US\$451 million. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. According to music industry research, more than half of all music listening in Brazil now takes place through on-demand streaming services such as Spotify, YouTube, and Deezer. There are at least nine legal online music services competing to deliver recorded music to Brazilian listeners at compelling price points; many also offer a free, advertising-supported tier.<sup>3</sup>

Despite this abundance of legal offerings, the ubiquity, variety and adaptability of piracy distribution channels—including infringing sites, devices, hard goods and camcording—continue to inhibit the development of a healthy legitimate online marketplace in Brazil. In areas of the country with fast broadband internet, IPTV rogue devices, infringing streaming sites and apps tend to be most popular, while key sharing devices and signal theft prevail where internet speed is slow. The infringing marketplace in Brazil also offers different price points, from low cost hard media to sophisticated devices that can cost up to US\$200. The music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world's sixth largest music market. Since then, per capita music revenue in Brazil has fallen from US\$8.50 in 1997 to US\$1.41 in 2019 in large part due to the rise of online piracy. For 2019, the scale of the piracy landscape in Brazil remained critical and, despite shifts in distribution channels and some declines, largely unchanged.

**Infringing Linking Sites, Stream-Ripping Sites, Cyberlockers and BitTorrent:** There are three main types of distribution channels for infringing materials in Brazil: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites); (ii) file sharing via illicit peer-to-peer (P2P)<sup>4</sup> networks and indexing sites for torrent files; and (iii) stream-ripping sites which circumvent technological protection measures on licensed streaming sites such as YouTube.

Infringing linking sites dedicated to specific content, such as music or video games, remain among the most popular and damaging forms of piracy in Brazil. These websites rely on magnet torrent links and “sister domains”, i.e. sites that have the same look and feel as the original target site and are registered to the same operator but have no illegal content. “Sister domains” are increasingly used exclusively for payments which allows purveyors of illegal content to protect their revenue stream.

While cyberlockers and linking websites are nearly all hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many rely on social media profiles in Portuguese to promote user engagement, and appear to have local operators and intermediaries (such as advertising providers and payment processors) for monetization channels. The top 105 most active local infringing sites dedicated to music accounted for over 118 million visits in 2018. A study published in January 2016 found that almost 45 million Brazilians (nearly 41% of all those online) used the cyberlocker link site ecosystem to consume infringing audiovisual material.<sup>5</sup> Access to local or foreign linking and download websites also remains popular among Brazilian video game consumers. There has also been an increase in the number of websites, and an increase in visitors to such websites, that are structured

<sup>2</sup><https://videomind.com/ott-opportunity-in-brazil-grows-as-do-woes-for-pay-tv/>.

<sup>3</sup><http://www.pro-music.org/legal-music-services-latin-america.php>.

<sup>4</sup>See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://ipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”), documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

<sup>5</sup>NetNames Ltd., *South American Television Piracy Landscape for Alianza Contra La Piratería de Televisión Paga*, at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

as private forums for infringing links, as they are considered more “stable and safe” for sharing links. 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.

Stream-ripping websites continue to be a concern for the music industry. Such websites circumvent technological protection measures and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models and premium tiers of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. This form of digital piracy, generally monetized through advertising, is growing substantially in the Brazilian market. Brazilian Internet users also often turn to stream-ripping sites that have a localized version, but are hosted outside the country. While the closure of *YouTube-mp3* was a positive improvement, new stream-ripping sites have surfaced with notable audiences such as *Flvto*, *Y2Mate*, and *Yout*. In June 2019, there were more than 70 million visits to stream-ripping websites from Brazil.

With regards to video games, BitTorrent network activity declined by 30% in 2019 and visits to cyberlockers declined by 40%. As the piracy landscape in Brazil continues to evolve with new technologies, however, these declines are likely the result of an increase in the popularity of specialized linking sites, apps and other services. For the music industry, overall piracy rates appear to be declining according to an industry survey, but still almost half of internet users (44%) indicated they had downloaded pirated music in the previous month, one of the highest levels worldwide.

**Circumvention Devices:** An increasing number of Brazilian sites and online marketplaces, such as *Mercado Livre*, offer so-called video game copiers, controllers and other circumvention devices, aimed at nullifying access control technologies used by copyright owners. These devices enable the play of pirate video games on modified consoles, which are the great majority of game consoles in Brazil. These websites rely on non-responsive host and torrent link index sites to distribute illegal copies of video games.

**Piracy Devices (PDs) and Signal Theft:** Use of PDs continues to rise in Brazil, exemplified by the increased market penetration of IPTV boxes, and other piracy devices, such as the HTV model which offers a grid of 170+ live pay-TV channels and a VOD service that offers TV shows and motion pictures, many sourced through illegal camcording activity. These PDs are available at retail in Brazilian marketplaces, but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets. A significant amount of PDs are sold on the Internet, mainly in online marketplaces such as *Mercado Livre*. Brazil's economic crisis for the last years combined with the increased broadband availability across the entire country have set the stage for a likely spike in IPTV rogue devices and pirate live streaming of news and sports in coming years.

**Hard Goods Piracy:** Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies that can be accessed and enjoyed offline. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. The HTV box and other PDs have also entered the hard goods piracy market. In the case of video games, hard goods piracy takes several forms in both online and street markets: (i) Pre-loaded devices, discs, and memory cards that are locally burned and assembled with illegal copies of videogames; (ii) circumvention devices as mentioned above; (iii) modified consoles; and (iv) unauthorized digital goods, i.e., infringing versions of digital assets available within a video game environment, such as virtual currencies, digital accounts or “skins.” While some of this infringing product enters the Brazilian market through the nation's relatively porous borders and ports, it is becoming more common for content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes.<sup>6</sup> The lack of criminal investigations and effective action against repeat infringers enable these businesses to continue to thrive.

**Camcording:** Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem also takes the form of in-theater audio captures, after which

---

<sup>6</sup>See IIPA's 2018 Brazil country report for more details on the hard goods piracy in Brazil, <https://ipa.org/files/uploads/2018/02/2018SPEC301BRAZIL.pdf>.

the dubbed Portuguese soundtrack is combined with high-quality video illegally sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well as burned onto DVD-Rs and distributed to Brazil's many black markets. The camcording business has been linked to international criminal organizations. In 2019, a total of 19 camcords of MPA-member films were traced to Brazilian theaters, down from 32 during the previous year. Although this trend is encouraging, Brazil must strengthen its enforcement regime to combat this persistent problem. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films, negatively impacting investment in production and legitimate local distribution infrastructure, and hampering the establishment of legitimate online distribution platforms. These camcorded copies continue to feed illegal online sites and businesses, including the sale of streaming boxes with "subscriptions" and apps that provide access to illegal content.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

### **Enforcement Against Online Piracy**

In 2019, the Brazilian Government took a stronger approach to enforce IPR that included the following successful operations, promising resolutions and voluntary agreements:

**Operação 404:** In November, the Ministry of Justice's National Council to Fight Piracy (*Conselho Nacional Contra a Pirataria*, CNCP) and the Secretariat of Integrated Operations (*Secretaria de Operações Integradas*, SEOPI) coordinated Operation 404, which resulted in 30 search warrants in 12 different Brazilian States aimed at online piracy. The result: 210 infringing websites and 100 infringing apps taken down; the delisting and profile removals of the sites and participants from social media platforms and three people arrested in São Paulo. ANCINE fully supported Operation 404 and facilitated cooperation with rights holders. If this model is maintained and SEOPI continues to carry forward this type of operation, Brazil will likely reach a much higher standard in terms of IPR enforcement.

**Suspension and Cancellation of 106 Infringing Domains in São Paulo:** Based on the "In Our Sites" framework originally applied by the City of London Police Intellectual Property Crime Unit (PIPCU) and Europol, São Paulo's Public Prosecutor cybercrime unit, Cyber Gaeco, took action against 106 infringing music domains and requested a court to suspend 86 infringing domains throughout the year—another 20 domains shut down voluntarily. This was a leading case in Brazil using such type of procedure and legal remedies. Between the suspension request and final cancelation of each site, the prosecutor's office asked all site administrators to present the necessary authorizations for content distribution. A total of 106 infringing domains were shut down based on court orders served on eight registrars and 86 operators in Brazil. These domains and sites had over 23.3 million monthly visits (an estimated 367 million yearly visits).

**Operation Copyright:** In January 2019, a Brazilian federal police unit based in the city of Sorocaba executed nine coordinated raids in five Brazilian States to seize computers and hardware from the administrators of notorious infringing service Speedshare and private server service speedboxBR. As a result of the raids, both services were shut down and another seven infringing private torrent forum sites voluntarily ceased operations. Combined, these sites attracted over 104 million yearly visits and more than 400 thousand registered users. Criminal charges were presented against Speedshare operators in September 2019, totaling 21 individuals involved.

While these operations are commendable and encouraging, the scale of piracy in Brazil, as well as the size of the country's territory, call for a more comprehensive, coordinated and sustained enforcement strategy that should include training, dedication of resources, information sharing, and infusion of political will among police, prosecutors and judges all over the country. In 2020, Brazilian authorities could undertake several actions to continue to sharpen their enforcement efforts and include innovative approaches to effectively disrupt infringing services on a scale that impacts the illegal ecosystem. For instance, Customs and Federal Revenue should conduct more inspections and seizures of large amounts of rogue devices coming into Brazilian ports and borders. The Central Bank's Financial Intelligence Unit (UIF) should pursue "follow the money" actions involving pirate operations as they are usually linked

to criminal organizations involved in money laundering and supporting terrorism. Enforcement officials across Brazil need more integration and education on protocols and rules to address copyright infringement and contraband of rogue devices.

In addition to these enforcement operations, Brazil made progress by issuing the following resolution and facilitating the following MOUs:

**ANATEL Resolução 715:** This resolution, implemented by ANATEL in October 2019, enabled the Agency's officials to search and seize any non-certified devices within the country, including rogue IPTV and key sharing devices sold through e-commerce and marketplaces.

**CNPC MOUs:** Throughout the year, CNCP, part of the Ministry of Justice, held a number of roundtables and events with different stakeholders to reach better standards to address online piracy. In August, CNCP signed a MOU to contribute to WIPO's Building Respect for Intellectual Property (BRIP) database, a "follow the money" initiative to combat online piracy whereby WIPO Member States identify sites known to be infringers of copyrighted material to stem the flow of their advertising revenue. In September, CNCP and PIPCU signed a MOU for cooperation and mutual support on IPR enforcement in Brazil and the UK. In November, CNCP facilitated a MOU between ANCINE and online marketplace *Mercado Livre*, one of the most popular in Brazil, to prevent the availability of non-certified devices, including rogue set-top boxes and key sharing devices. In December, CNCP signed another MOU with the most important advertisement players in Brazil to build a compliance mechanism to prevent advertisement on pirate websites.

The CNCP should build on its work in 2019, develop a strategic plan to give top priority to combatting widespread online enterprises dedicated to copyright infringement, and engage all rights holders and other players in the Internet ecosystem (including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, etc.), to reach better standards and effective voluntary agreements to fight online piracy. IIPA urges the Brazilian Government to adequately fund the CNCP.

## Civil Enforcement and Case Developments

Civil enforcement should also be part of the solution to Brazil's piracy problem, including on the state and even city level. In a positive 2019 development, the Brazilian pay-TV Association (ABTA) filed a civil action for online copyright infringement against an HTV manufacturer in China (an IPTV rogue devices' manufacturer) before the State Court of São Paulo. The court issued several orders to local ISPs blocking IP addresses which created positive precedent in the fight against online piracy. ABTA also obtained blocking orders in another ongoing civil action filed on grounds of unfair competition. These cases show the great potential of injunctive relief in the fight against piracy, especially if orders can be obtained quickly.

While there is no dedicated procedure for blocking access to infringing websites, some rights holders have obtained site blocking injunctions and Brazilian ISPs are usually cooperative when it comes to complying with court-issued site blocking orders because many of them are also pay-tv distributors with an interest in supporting IPR enforcement. Unfortunately, backlogs and delays in the civil justice system routinely diminish the value of this preliminary relief, and the timeframe for actions and replies from local hosting ISPs is usually not ideal. To address this issue, ANATEL and ANCINE are currently discussing a normative instruction that would create language to enable administrative blocking of online infringement—which would be a more expedited process. This effort must be highly incentivized by the government, as ISPs usually do not comply with non-judicial blocking requests.

The video game industry is closely monitoring the Brazilian Federation of Associations for Information Technology Companies' constitutional challenge of Federal Decree 3.810/01, which requires US-based companies that maintain user communications data abroad to comply with Brazilian authorities' orders to release this data pursuant to the Marco Civil da Internet. The case, known as ADC-51 (*Ação Direta de Constitucionalidade Número 51*), is

currently pending before the Supreme Court (Supremo Tribunal Federal, STF). If the constitutional challenge succeeds, investigations of online crimes, including IPR violations, from local servers and sites may be blocked or delayed.

### **Enforcement Against Hard Goods Piracy**

During the first three quarters of 2019, Brazil's Federal Revenue and Customs conducted 3,746 inspections, monitoring and customs enforcement actions and seized R\$2,357,510,498.09 (approximately US\$550 million) in goods. Overall, 11.25% of the total amount of seized goods were electronic equipment, including rogue devices such as paid TV signal decoders, and 0.05% were hard media, including pirated DVDs.

ANATEL led 400 administrative inspection actions in 2019, seizing 11,196 non-certified devices and prohibiting the use and commercialization of an additional 89,105. ANATEL also conducted 20 inspections against e-commerce platforms selling non-certified equipment and took down 42 items from the Internet. ANATEL supported Customs and Brazilian Mail enforcement actions against the importation and contraband of non-certified equipment.

### **Enforcement Cooperation**

The copyright industries in general enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. The National Forum Against Piracy and Illegality (FNCP) has assisted authorities in raids and improved enforcement training efforts and results. The video game industry has provided training sessions to state prosecutors, police agents, and judges to share investigative best practices and to provide a detailed understanding on industry issues related to digital piracy. Some of those trainings also taught agents to better identify and investigate infringing sites, online marketplaces, and unauthorized digital goods (UDG's). During 2019, the video game industry provided training sessions focused on online piracy to state prosecutors in São Paulo and Brasilia and for the special cybercrime units, Cyber Gaeco and NCyber. IFPI and Pro-Música Brasil also engaged in a number of trainings for the Brazilian law enforcement and other government authorities, from multistakeholder and cross-industry seminars and congresses on IP protection and enforcement topics to tailor-made training sessions for specific groups of law enforcement agents. Some of these events were promoted and supported by foreign government agencies such as USPTO, UK DOJ, UKIPO and EUIPO, which also increased local authorities' interest and provided a high-level forum for exchange of expertise.

These cooperation and training programs increase the quality and the number of opportunities for Brazilian authorities to engage with foreign counterparts and industry experts to generate the necessary discussion on new approaches to addressing digital copyright piracy and other challenges around IP protection in a wide and diverse country such as Brazil. However, more needs to be done to tackle the larger, systemic problems that render Brazil's criminal justice system inadequate in deterring the hard goods piracy. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of "experts"; inadequately trained police, prosecutors and judges; lack of coordinated efforts amongst enforcement authorities; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.<sup>7</sup> Ultimately, too much of Brazil's judicial system lacks adequate understanding of intellectual property matters, though there are some exceptions (the specialized commercial courts in Rio de Janeiro). Brazil needs to modernize its police and courts to propagate best practices and to train judges and prosecutors.<sup>8</sup>

## **LEGISLATION AND REGULATION IN BRAZIL**

**Copyright Reform:** Between June and September 2019, the Secretariat on Authors Rights and Intellectual Property (SDAPI) of the Special Secretariat of Culture (former Ministry of Culture) held a public consultation to reform

---

<sup>7</sup>See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

<sup>8</sup>For instance, a few courts have taken steps to prevent the storage of vast quantities of seized pirate product from becoming an insurmountable impediment to prompt and cost-efficient prosecutions. IIPA hopes that this development is a harbinger of other steps the courts could take to expedite enforcement dockets, and to reform sentencing practices to deliver some measure of deterrence. For more details, see IIPA 2016 at pp. 71-72.

the country's 1998 copyright law in the face of new technologies and business models. Public hearings and debate involving civil society and the creative sector will take place during 2020.

This major legal reform of Brazil's copyright system is a top priority for the creative industries. It is essential for Brazil to join the WCT and WPPT to ensure a forward-looking legal framework that fosters a vibrant legitimate market for Brazilian and foreign content. Brazil's new law should provide strong copyright protection, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test.

More specifically, we make the following recommendations for the new law:

- **Amend Article 105** to confirm that: (1) injunctions, including catalogue-wide injunctions where applicable, are available against all types of copyright infringement, circumvention of TPMs and dealings in circumvention devices and/or components; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.
- **Amend Article 107**, which covers technical protection measures, to encompass all forms of access and copy control technologies as well as dealings in circumvention devices.
- **Amend Article 103** to expressly allow rights holders to choose the method for calculating damages, including actual damages, infringer's profits and reasonable royalties.
- **Provide a specific administrative procedure for blocking access to infringing websites** to ensure speed and fairness. Since many infringing websites are foreign operated, but clearly targeted at the Brazilian market, local website blocking orders would be helpful to improve online enforcement. The new law should not require that the operator of the site has the opportunity to take part in the proceeding because the identity and location of pirate site operators is often unknown. Brazilian authorities should also facilitate discussions between rights holders and ISPs to agree on a voluntary code to address website blocking.
- **Amend Articles 98 and 99**, which govern Brazil's collective management of broadcast and public performance rights for authors, performers and sound recording producers, to reflect international best practices. The law should, at a minimum, enable rights holders to: (1) determine how to license their rights individually and collectively; and (2) become direct members of the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella collective management organization (CMO), and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to reconsider ECAD's use of a single fee for the licensing of uses of multiple rights of different categories or rights holders—which results in producers receiving only 13.8% of total distributions despite their significant investments.
- **Clarify that interactive streaming involves acts that fall within the producers' exclusive distribution right.** As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi.FM* where the Superior Tribunal Court (STJ, Superior Tribunal de Justiça) erroneously ruled that both interactive and non-interactive streaming involved the public performance right and fell, therefore, under ECAD's collective management mandate. The new law should separately include sound recording producers' exclusive right of making available to the public as established in Article 14 of the WPPT. In the alternative, the new law should expressly indicate that interactive uses of sound recordings fall under Article 93(II) of the existing law rather than under the public performance right.

In light of the ongoing copyright review, it is possible that other bills, laws and regulations relevant to rights holders will be superseded. However, IIPA continues to monitor the following legislative and regulatory activity:

- **Camcording:** The Head of the Committee of Justice and Constitutional Affairs released bill 2714/2019, which appropriately removes the requirement to prove a profit motive. After obtaining unanimous approval from the Committee on Culture, the bill currently sits at the Committee on Constitutional Affairs. Both the committee head and the bill's rapporteur intend to put the bill to a vote in early 2020.
- **Site Blocking:** Bill 5204/16 amends the Marco Civil da Internet to expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to copyright

infringement, among other crimes, and provides a penalty of at least two years of imprisonment. In October 2019, House Rep. Gustavo Fruet, from the Committee on Science and Technology, reported favorably on this bill and later changed the report. Given the lack of consensus among the involved stakeholders, the bill is yet to be put to a committee vote. The bill will require further approval by the full House Science & Technology, the Constitutional Affairs Committee and the Senate. There is a similar site blocking bill in the Senate's Committee on Science, Technology, Innovation, Communications and IT. Originally authored by Senator Ciro Nogueira, PL169/2017 is now being reported by Senator Major Olimpio, who is very engaged in fighting organized crime.

- **Medida Provisoria 907:** Signed by the President on November 27, 2019 without consultation from rights holders, this temporary law would deprive rights holders of their existing legal entitlement to payment when their works are used in hotel rooms and cruise ships' cabins—effectively forcing the creative industries to subsidize hotels and cruise ships. If Congress does not approve this temporary law within 120 days of its signing, it will expire. The music industry is currently urging Congress to let this temporary law expire.
- **Online Advertising:** Bill 9744/2018 would impose civil liability on advertising networks involved with local pirate sites. It was introduced in the House and it currently awaits a report at the Committee on Justice and the Constitution. While this bill moves through the legislative process, IIPA members and key stakeholders in the advertisement industry continue to pursue voluntary agreements to address this issue. As mentioned above, the Ministry of Justice's National Council Against Piracy recently facilitated an MOU between industry stakeholders and the Federal Government.
- **Exceptions and Limitations:** House bill 2370/2019, authored by Congresswoman Jandira Feghali, broadens limitations and exceptions in the country's 1998 copyright law. The bill, which was not sufficiently discussed among Brazilian stakeholders, will be voted by the Commission on Culture in November and is subject to review by the Committees on Science, Technology, Innovation, Communications and IT; Finance and Tax; and, Justice and the Constitution.
- **General Data Protection Law:** Lei 13,709 was enacted on August 15, 2018 and will be fully implemented in August 2020, pursuant to Executive Act 869/2018. Heavily inspired by the European General Data Protection Regulation (GDPR), this law places Brazil on par with similar data protection laws around the world. Unfortunately, this new law impairs copyright enforcement efforts because it limits access to Whois data and other official sources that are useful for rights holders to verify contact information of infringing sites. This issue is a priority for some creative industries. We urge Brazil to ensure this new law does not curtail any tools that are necessary or helpful for copyright enforcement.

## **MARKET ACCESS AND RELATED ISSUES IN BRAZIL**

**High Tariffs, Taxes and Barriers on Entertainment Software:** Brazil's high tariffs and taxes on video game products have long plagued the entertainment software industry. They act as a significant barrier to legitimate market entry, as an incentive for the proliferation of infringing games, and as an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, deliver innovative content to fans and consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement. Under a 2013 interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game 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 pirate copies, whether smuggled across the border or burned within the country, are not subject to 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. IIPA urges that this interpretation be reconsidered. In addition, taxation on imported video game consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately, and has resulted in at least one major game publisher withdrawing from the Brazilian market. In a positive development, in August 2019, Presidential Decree 9971 reduced the IPI (tax over manufactured imports) for consoles (from 50% to 40%), controllers and other accessories (from 40% to 32%), and portable devices (from 20% to 16%). We encourage government agencies to engage in a collaborative process to reduce the tax burden on the video game to stimulate the development of local talent and creativity.

**Television Content Quotas:** Effective September 2011, Law 12.485/2011 imposes local content quotas for pay-TV, requiring every qualified channel (those airing films, series and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime. It also requires that half of the content originate from independent local producers and that one-third of all qualified channels included in any pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. Lawsuits challenging the constitutionality of these local content quotas, and the powers granted to ANCINE are pending before Brazil's Supreme Court.

**Screen Quotas:** The most recent Presidential Decree on Screen Quotas, released in January 2020, imposed quotas for 2020 that are similar to prior years, requiring varying days of screening depending on the number of screens in an exhibitor group. For example. An exhibitor group with 201 or more screens is required to meet a 57 day quota, and all the screens in the exhibitor group's complexes must individually meet this quota. Brazil's screen quota is facing a constitutional challenge at the Supreme Court and competing legislative proposals have been introduced that would either loosen or tighten the restrictions. The MPA opposes local content quotas, which limit consumer choice and can push consumers toward illegitimate content sources.

**Video on Demand (VOD) Tax:** For six years, Brazilian leaders have contemplated how to capture tax revenues from the fast-growing VOD marketplace. Brazil's existing tax model for audiovisual works is the Condecine, which is levied per title every five years on theatrical, pay-TV and home entertainment releases, and levied annually on audiovisual ads. ANCINE sought to extend Condecine to VOD through a 2012 normative ruling, which ANCINE intends to start enforcing. Condecine would be burdensome if levied over VOD services, especially when charged on a per-title basis as prescribed in the current ANCINE regulation and would limit the choices available to Brazilian consumers in the online content market. A coalition of industry stakeholders has filed a request to annul the 2012 Normative Ruling and have warned against protectionist regulatory models that would impede local market development and investment. Currently, the Executive branch is developing a regulatory proposal through the Superior Council of Cinema, while two draft bills on VOD regulation are under discussion in the legislature.

**Media Cross-Ownership and OTT Regulation:** Brazil's regulators and legislators are examining two significant questions: 1) whether the 2011 Pay-TV Law should be interpreted to prohibit cross-ownership between programmers/producers and operators of pay-TV content, and 2) whether direct-to-consumer offers by OTT platforms of live and/or linear audiovisual content should be regulated under the Pay-TV Law. Lifting the current Pay-TV Law's restriction on media cross-ownership would enable market verticalization, which would boost investment and allow businesses to innovate and freely compete. On the other hand, if a programming company that distributes linear or live content on the Internet (OTT) is considered by ANATEL to be a telecom service, and then subjected to the Pay-TV Law, those OTT direct-to-consumer services would face severe regulatory burdens, including local content quotas, oversight by ANATEL, and additional tax that would be passed on to programmers. Final administrative decisions from ANATEL are expected in early 2020 on both topics, while numerous related legislative proposals are under consideration, addressing both media cross-ownership and OTT distribution.

**Collective Management Organizations (CMOs):** Brazil's then Ministry of Culture, which was moved from the Ministry of Citizenship to the Ministry of Tourism in 2019, had granted the accreditation of three CMOs prior to its abolition. These entities, representing directors, screenwriters and artists of audiovisual works, will collect remuneration for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, pay-TV and digital distribution, provided that the rights that originate such collection have not been assigned to the work's producer. Such accreditation, which MPA and other national and international industry stakeholders have appealed, was granted despite the fact that Brazilian law does not afford such rights to any of the mentioned rights holders. Although the concrete effects of these accreditations on U.S. industry are unclear, it is important that a final decision by the Special Secretary of Culture (now within the Ministry of Culture) clearly recognizes the absence of underlying legal rights to any collection claim, therefore revoking the accreditation.