

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Brazil's long overdue adherence to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties) is one of the main concerns for IIPA members in Latin America, as Brazil is one of the largest markets in the region for all creative industries. No executive action has taken place to ratify the WIPO Internet Treaties in over a year since the country's announcement it would do so. It is essential for Brazil to join the WIPO Internet Treaties to ensure its legal framework is interpreted in line with global standards.

There were positive enforcement developments in 2020, despite setbacks brought about by the COVID-19 pandemic. For instance, a second edition of *Operation 404* took down online piracy platforms in ten different Brazilian states, through site-blocking criminal injunctions—enforcement authorities also led search and seizure raids against major pirate targets as part of the operation. São Paulo's Public Prosecutor cybercrime unit, *CyberGaeco*, shut down 13 important infringing domains (accessed over 19 million times yearly) and secured an order requiring Internet service providers (ISPs) to block 15 infringing foreign stream-ripping sites responsible for 37 million monthly visits. Separately, the National Cinema Agency (ANCINE), in partnership with Brazilian Customs, seized 259,000 illegal devices (TV Boxes) between September and October 2020. Brazil officially initiated the accession and ratification procedure to join the Budapest Convention on Cybercrimes.

On the legislative and policy fronts, the Brazilian Ministry of Economy launched a public consultation in August on a National Intellectual Property Strategy (ENPI). The reform of the country's Copyright Act is one of ENPI's goals and will be based on the public consultation held in 2019 by the Secretariat on Authors Rights and Intellectual Property (SDAPI) of the Special Secretariat of Culture (former Ministry of Culture). We urge Brazil to draft a new Copyright Act that provides 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. Separately, a temporary executive order was passed last year to exempt hotels and cruise ships from paying public performance royalties for uses of sound recordings and musical works in rooms and cabins. Although not passed into law permanently, an older bill was re-introduced in Congress in 2020 that threatened to undermine copyright protection by exempting activities such as governmental and philanthropic entities from their obligation to pay royalties for the use of music in their events, and included new provisions from the temporary order on hotels and cruise ships. This bill should not be passed.

Regarding market access barriers, IIPA commends the Government of Brazil's 2020 reduction of the industrial product tax (IPI) for video game consoles and accessories. Given that the tax burden on these products remains significant, we encourage Brazil to further reduce or eliminate this and other taxes. Concerns over film and television quotas continue.

IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies and practices that enable a sustainable and thriving creative sector.

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<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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement**

- Put in place a clear structure, with a high degree of political backing and adequate funding, to build on the success of *Operation 404*, *CyberGaeco*'s actions and similar operations. Ensure that law enforcement agents all over the country are properly trained and coordinated to conduct complex online investigations and have access to the necessary legal tools to launch effective criminal prosecutions against major online piracy operators.
- Ensure that the *Conselho Nacional Contra a Pirataria* (CNCP) continues to have the resources and political backing to engage in cross-industry efforts against online piracy and develop a national strategic plan to implement the MOUs and Guidelines signed in 2019 and 2020.
- Implement a long-term national program to train judges and prosecutors on IPR law, the WIPO Internet Treaties, and enforcement measures, including procedures on site-blocking legal actions; adopt judicial policies that expedite criminal copyright investigations across state jurisdictions; and reform sentencing practices to achieve deterrent impact.
- Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles and circumvention devices.
- Ensure the film, television, sound recording and publishing industries urge Brazil to ensure that ANCINE and the Brazilian Regulatory Agency for Telecommunications (ANATEL) continue working to implement a system for administrative and judicial site-blocking for pirate sites.
- Ensure the Brazilian Financial Intelligence Unit (COAF) will investigate suspicious financial transactions resulting from piracy commercialization and report its intelligence to competent enforcement authorities tasked with initiating actions against money laundering and organized crime.

### **Legislation and Regulation**

- Accede to, ratify, and implement the WIPO Internet Treaties.
- Ensure the Copyright Law, currently under review, 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) and clarifying that interactive streaming services are outside of the Central Bureau for Collection and Distribution's (ECAD's) statutory default mandate; the anticircumvention of technological protection measures (TPMs), and penalties for trafficking in circumvention devices and software; (ii) provides express legal basis and a streamlined process for civil and criminal courts to continue issuing orders to ISPs to block access to websites dedicated to copyright infringement; (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) ensures that any exceptions and limitations 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.
- Immediately accede to and ratify the Budapest Convention on Cybercrime.
- Withdraw Bill #PL-3968/97 resubmitted "with urgency" to Congress at the beginning of August 2020 by a group of pro-government legislators, which would deprive music rights holders, composers, artists and sound recording producers of their present legal entitlement to be paid when their music is used in governmental or philanthropic events, among other new detrimental exceptions, as well as in hotel rooms and cruise ship cabins. Because of the emergency situation created by the pandemic, there is a serious risk that the initiative could be scheduled for an emergency vote at any moment.
- Ensure that implementation of the Marco Civil Internet law and related decrees and legislation does not interfere with voluntary notice and takedown efforts or other cooperative agreements to combat online piracy.

## 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.
- Reject attempts from Collective Management Organizations (CMO) of collecting royalties (already collected and paid) derived from audiovisual works’ public performance.

## 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, for 2019, streaming revenues made over 75% of the entire recorded music revenue in Brazil.<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. Studies carried out in 2019 indicate that 73 million people aged 11+ in Brazil have used pirate sources to access audiovisual content, consuming 1.7 billion pirated full-length movies and TV show episodes in a given three-month period. The infringing marketplace in Brazil 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, Stream Manipulation Sites, Cyberlockers and BitTorrent:** There are four main types of online 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; (iii) stream-ripping sites which circumvent technological protection measures on licensed streaming sites such as YouTube; and (iv) Internet streaming devices (ISDs), which use some of the previously listed pirate technologies to deliver non-authorized content to households where they are set up.

Online piracy based on linking sites remains dominant. Infringing sites dedicated to one specific content, such as those solely dedicated to video games, tend to attract audiences faster and remain popular. 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. Overall, the infringement ecosystem is now fragmented with multiple small new infringing sites competing for the Brazilian audience. In particular, the number of infringing video games linking sites increased over 30% in 2020. Online piracy likewise continues to plague

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

<sup>3</sup>International Federation of the Phonographic Industry, *Latin America: Major Markets*, Global Music Report 2020 Data and Analysis for 2019, 98 (2020).

<sup>4</sup>See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://iipa.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.

the publishing industry. Among the several sites trafficking in infringing copies of books, Mercado Livre (*mercadolivre.com.br*) remains the most problematic for publishers.

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. Special mentions to video games on social media sites, such as on YouTube channels and Twitch, are very popular. 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> 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 continues to be a concern for the music industry and is the most prominent form of piracy in Brazil. The most popular stream-ripping site is *Savefrom.net*, which received more than 32.6 million visits from Brazil alone during the third quarter of 2020, according to SimilarWeb. During the same time-period, other widely used sites in Brazil included *flvto.biz* (27.2 million visits); *y2mate.com* (23.8 million visits) and *2conv.com* (12.9 million). *Savefrom* and *y2mate* received more visits from Brazil than any other country worldwide. Such websites circumvent TPMs 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.

However, in October 2020 the Criminal Justice Tribunal of the State of Sao Paulo (following an application filed by CyberGaeco, the Prosecutor's Office of the State of Sao Paulo (DEIC) and APDIF DO BRASIL (the recording industry anti-piracy association)), ordered all ISPs in Brazil to block access to 15 very popular foreign stream-ripping sites for 180 days. The court found that the sites were infringing copyright and blocking was an effective and necessary measure to curb the criminal conduct and safeguard the rights of the victims. The sites had received 384.4 million visits from Brazil in the year ending in September 2020, according to SimilarWeb.

Stream manipulation services create, by human or non-human means, online or offline plays on audio and audio-visual streaming services where those plays do not represent genuine listening. Stream manipulation may be undertaken in respect of individual or groups of recordings to artificially improve chart positioning, increase market share, increase royalty payments, or for other dishonest purposes. Stream manipulation is a serious and increasing problem because it can undermine the accuracy of charts and, ultimately, the accuracy of royalty payments from streaming services to music creators. It has the potential not only to cause economic harm to streaming service providers, rights holders, artists, and advertisers, but also to distort the media's and fans' impressions and understanding of the popularity of particular recordings and harm consumers' use and enjoyment of streaming services by influencing algorithmic playback results.

With regards to video games, BitTorrent network activity declined by 20% in the past two years and visits to cyberlockers declined by 27%. 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

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

of Internet users (44%) indicated they had downloaded pirated music in the previous month, one of the highest levels worldwide.<sup>6</sup>

**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. ESA members identify Brazil as having the highest number of listings of circumvention devices and modified consoles via *mercadolivre.com.br* when compared to other Latin American countries. The positive news is that compliance has improved in 2020 (90%+), but there is a continued need for platforms to place more pressure on repeat sellers of infringing listings. These devices enable the play of pirate video games—often supplied by infringing torrent link sites—on modified consoles, which are the great majority of game consoles in Brazil. ESA members have recently recommended circumvention site *r4ds.com.br* in the 2020 Notorious Markets report, and despite a C&D issued to the site, the operator domain moved to the new domain, <https://loja.gameflip.com.br>, and continues to sell infringing goods. Likewise, the operator provides a list of modification and installation services to hack video game consoles.

**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 Video-on-Demand (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, especially considering the COVID-19 pandemic in 2020. The enforcement against ISDs increased during 2020, including multiple actions led by ANCINE and Brazilian Customs, which interrupted the contraband of more than 300,000 ISD units entering Brazil.

**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 video games; (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. The lack of criminal investigations and effective action against repeat infringers enable these businesses to continue to thrive.

**Camcording:** Camcording piracy, while a persistent problem in Brazil, is trending in the right direction. In 2019, 19 camcords of MPA-member films were traced to Brazilian theaters, down from 32 during the previous year. The COVID-19 pandemic, which caused the widespread closure of cinemas in Brazil for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume.

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<sup>6</sup>IFPI Music Consumer Study 2019, <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf> (examining the ways in which music consumers aged 16 – 64 engage with recorded music across 21 countries).

## Piracy Challenges During the COVID-19 Pandemic

The COVID-19 pandemic has exacerbated and created new forms of infringing activity in Brazil. For instance, the mandated lockdowns have led to an across-the-board increase in the consumption of illegal online content. Monitoring of a database of two thousand online film piracy platforms showed a 15% to 20% increase of Brazilian users' access between February and April. The pandemic emergency also had a large impact on law enforcement actions against online targets once the judiciary was shut down for a few weeks' time and then on remote and limited activity.

As a result of the social distancing measures, Brazilian movie theaters closed in March 2020 and remained inoperable throughout most of the year, which restricted the use of camcording as a means of piracy. Nevertheless, a surge of drive-in movie theaters was seen across Brazil, in many cases connected to illegal activities such as the showing of movies not previously licensed for public performance. Enforcement actions against these unauthorized operations were left to the rights holders as a result of government authorities' lack of engagement.

Much influenced by the COVID-19 pandemic shutdown that commenced in Brazil in March and has since remained in place for most of the country, the number of online marketplaces product/listings for circumvention devices and unauthorized digital goods (UDGs)<sup>7</sup> are now an immediate alternative to local street market vendors and booths. It is estimated that the number of online UDG listings available increased by 71% from March to October 2020. As e-commerce became a necessity for sales by small businesses during the pandemic through marketplaces and other platforms, the number of online e-shops selling infringing or illegal video game-related products has increased significantly.

## COPYRIGHT ENFORCEMENT IN BRAZIL

### Enforcement Against Online Piracy

Despite challenges brought about by the lockdowns implemented to contain the spread of COVID-19, the Brazilian government undertook the following enforcement actions:

**Operation 404, part 2:** In November, as a continuation of last year's enforcement operation under the same name, the Ministry of Justice's National Council to Fight Piracy (CNCP), the Secretariat of Integrated Operations (*Secretaria de Operações Integradas*, SEOPI) and local police in ten different Brazilian states executed 25 search, seizure and site-blocking orders against 252 streaming sites, 65 applications and their operators. Five people were arrested. The sites were removed from search results and their profiles were removed from social media platforms. In addition to copyright infringement, the operators were charged with money laundering and criminal organizing. ANCINE and CNCP cooperated in the operation, as well as the U.S. Department of Justice, the U.S. and the U.K. embassies.

**Cyber Gaeco's Disruptive Actions:** Continuing its disruptive actions against infringing online operations started in 2019, São Paulo's Public Prosecutor cybercrime unit, Cyber Gaeco, removed and confiscated 13 domains, accumulating over 19 million visits in the last twelve months. As referenced above, Cyber Gaeco—together with *Associação Protetora de Direitos Intelectuais Fonográficos do Brasil* (ADPIF do Brasil)—also obtained the first site-blocking order from a criminal court against 15 major foreign stream-ripping sites popular in Brazil.

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<sup>7</sup>UDGs are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

**Shutdown of various streaming manipulation services:** In December 2019, Pro-Música Brasil and APDIF Do Brasil filed a criminal complaint with the Federal Police in Sorocaba in Sao Paulo against the popular streaming manipulation service *Turbosocial*. As a result of police investigation and interviews with the site's operators, all services offering to create artificial 'plays' on digital music streaming sites were removed and a formal commitment to cease and desist was entered into with APDIF Do Brasil. Also, several affiliated sites have stopped offering music streaming manipulation services: *social10.com.br*; *paineldecortidas.com.br*; *instaautomatico.com.br*; *curtidasface.com.br*; and *instaautomatico.com.br*. Six additional sites withdrew their music streaming manipulation services after receiving cease and desist letters from Pro-Música Brasil and APDIF Do Brasil, including *Shop Music Marketing*, *Infinity Grow Marketing*, *IGMidias*, *GramSocial* and *Impulsioneme*. A seventh site voluntarily removed these services.

**Budapest Convention on Cybercrime:** In July 2020, Brazil officially initiated the accession and ratification procedure to join the Budapest Convention on Cybercrimes. In doing this, Brazil joins a framework for international cooperation with over 60 countries.

These enforcement actions speak to Brazil's improvements in the past two years.<sup>8</sup> However, more needs to be done to tackle the larger, systemic problems that render Brazil's criminal justice system inadequate in deterring piracy. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of "experts"; inadequately trained police, prosecutors and judges; lack of coordinated efforts among enforcement authorities; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.<sup>9</sup> Ultimately, too much of Brazil's judicial system continues to lack adequate understanding of intellectual property matters, though there are some exceptions, such as the specialized commercial courts in Rio de Janeiro. We urge Brazil to commit sufficient resources and political will to train its police, judges and prosecutors in best practices to effectively address the country's rampant piracy problem.<sup>10</sup>

In addition to these enforcement operations, Brazil's CNCP facilitated promising public-private agreements to tackle online piracy through a MOU and the release of two best practices guidelines. The MOU was signed in February by the Administration and several third parties (including IIPA member MPA, and associations representing advertisers). In this agreement, ANCINE committed to representing the audiovisual sector to provide information about infringing websites to the World Intellectual Property Organization (WIPO) Building Respect for IP (BRIP) Database Project, 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. On the e-commerce front, one set of guidelines aims to prevent the availability of non-certified devices (including rogue IPTV and key sharing devices) in popular online marketplaces. The second set of guidelines, to which the MPA formally adhered in August 2020, aims to stifle the cash income of pirate sites through Payment Service Processors (PSPs).

We encourage CNCP to build on its 2020 work, 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. To do all this, 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.

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<sup>8</sup>See IIPA 2020 report, at p. 120, <https://www.iipa.org/files/uploads/2020/02/2020SPEC301REPORT.pdf> ("IIPA 2020").

<sup>9</sup>See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

<sup>10</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.

Administrative site-blocking would be another helpful tool in the fight against Brazil's rampant piracy. Backlogs and delays in the civil justice system routinely diminish the value of court-mandated site-blocking orders, and the timeframe for actions and replies from local hosting ISPs is usually not ideal. To address this issue, ANCINE and ANATEL (Agência Nacional de Telecomunicações) initiated discussions to come up with a normative instruction that would create language to enable *administrative* blocking of sites that make available infringing audiovisual content until the infringement activity ceases. However, discussions have been halted momentarily due to ANATEL's internal agenda priorities and the legal opinion issued by ANATEL's Attorney General's Office against the agency's authority on the matter. Notwithstanding, ANCINE is moving forward with initiatives on the judicial site-blocking front. A public consultation was launched in December 2020.

IIPA continues to closely monitor the Brazilian Federation of Associations for Information Technology Companies' constitutional challenge of Federal Decree 3.810/01, which requires U.S.-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**

Two operations headed by ANCINE, in partnership with Brazilian Customs, for the inspection of incoming cargo at ports located in the states of Rio de Janeiro and Pará, led to the seizure of more than 75,000 illegal TV Boxes verified to enable copyright infringement of content from both VOD and pay-TV channels. A similar operation seized 187,000 TV Boxes in the cities of Resende and Itaguaí (Rio de Janeiro), with an estimated R\$100 million in losses. ANCINE has confirmed that the total sum of TV boxes seized by Customs between September and October 2020 reached 259,000 illegal devices.

### **Enforcement Cooperation**

The copyright industries continue to enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. Given the COVID-19 social distancing measures, ESA provided one virtual training session to the Sao Paulo State Prosecutors Office in September to share investigative best practices and provide a detailed insight into industry issues related to digital piracy. The training aimed to help agents better identify and investigate infringing sites, online marketplaces, and UDGs and also to discuss potential effective strategies to address each case scenario.

## **LEGISLATION AND REGULATION IN BRAZIL**

**National Intellectual Property Strategy:** In July 2020, Brazil's Economy Ministry launched a new consultation period to seek input to their proposal for a National Intellectual Property Strategy (NIPS), which was developed by the Interministerial IP Group (GIPI) (presided by the Economy Ministry) in the previous six months. One of the strategy's goals is to draft a bill to reform the Copyright Law (LDA) taking into account new technologies and business models on the Internet. In parallel, further developments are still awaited concerning the comments received during the 2019 consultation conducted by the SDAPI of the Special Secretariat of Culture (former Ministry of Culture).

As part of any changes to the country's copyright law, 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. Although Brazil announced over a year ago it would join the WIPO Internet Treaties, no executive action has been taken to complete the ratification process. The creative sector in Brazil and around the world is waiting for the Government of Brazil to fulfill its promise.

In addition to ratifying the WIPO Internet Treaties, 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, IIPA makes 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, circumvention software and/or components including installation and modification; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.
- **Amend Article 107**, which covers TPMs, to encompass all forms of access and copy control technologies as well as dealing 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** that ensures 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 the operator of the site to have the opportunity to take part in the proceeding where the identity and location of the pirate site operator is unknown, as it is often the case. Brazilian authorities should also facilitate discussions between rights holders and ISPs to agree on a voluntary code to address website blocking. Please note that the video game industry does not take a position regarding site-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 whether to license their rights individually or collectively, which should be a voluntary decision; and (2) if they so choose, become direct members of the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella 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—this practice dramatically impacts the financial return for producers on their investments. For example, music producers receive only 13.8% of total distributions despite their significant investments.
- **Clarify that interactive streaming involves acts that fall within producers' exclusive distribution right, including the making available right arising from the WCT and WPPT.** 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 include sound recording producers' separate, 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. Finally, the exclusive right of making available should be enshrined in Brazil's copyright law, for both sound recordings and audiovisual works, consistent with obligations under both WCT and WPPT.

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 activities:

- **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 and within 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 Committee, 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. Analyses of each bill have been stalled due to the COVID-19 pandemic and will likely resume in the first quarter of 2021.

- **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. While the pandemic has stalled further work on the bill, Brazil's legislature should resume consideration of this measure in 2021, particularly as movie theaters regain attendance, enabling camcording activity to resume.
- **Music royalty exemption for government and philanthropic events:** PL 3968/1997, a 1997 bill that exempts government and philanthropic entities from paying royalties for the use of musical and literary-musical works in their events, was revived in Brazil's Chamber of Deputies in August when Congressman Cardoso Junior asked for this bill to be "urgently" considered. MPA, several music and video game industry organizations have signed a letter opposing the bill. After the proposal to give the Bill "urgency" treatment passed, the Bill is now ready for a vote at a plenary session in Congress with no necessity for further analysis nor opinions. These proposals were defeated during previous attempts as they were included as part of Temporary Measures supported by the Presidency.
- **Music royalty exemption for hotel and cruise ship operators:** Introduced in the Chamber of Deputies by Rep. Zuliani, PL 3392/2020 exempts cruise ship and hotel rooms from paying music royalties for music played in the rooms of individual guests. Music is a valuable commercial input for hotel and cruise ship operators that use IIPA members' music to elevate their consumer offerings. Despite the commercial value of recorded music to these businesses, the actual sums being paid by an individual hotel or cruise ship to use recorded music comprise a very small fraction of their overall costs. Yet the order would reduce payments to right holders even further, effectively forcing the music industry to subsidize the much larger hotel and cruise ship industries.
- **General Data Protection Law:** Law 13,709 was enacted on August 15, 2018 and was 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. On the positive side, the law allows controllers to access and use personal data as part of the normal course of business, including situations where the provision of personal data is required to render services or provide a specific product. The law also allows for the regulation of access to personal data via contractual arrangements. Unfortunately, however, this new law impairs copyright enforcement efforts because it limits access to Whols 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 are a long-standing concern, where some progress has been made but more progress is needed. 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. After seven years, IIPA urges the reconsideration of this interpretation. While the overall tax burden for video game products remains high, IIPA commends Brazil's October 2020 reduction of the federal industrial product tax (IPI) for video game consoles and

accessories. IIPA encourages Brazil to continue efforts to further reduce or eliminate the federal-level IPI, as well as the state-level (ICMS) and municipal-level (ISS) taxes, on video game consoles and accessories.

**Pay-TV 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 three and one-half hours per week of Brazilian programming during prime time. 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. These quotas are set to expire in September 2023 and may be renewed. 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. These quotas are set to expire in September 2021 and may be renewed. For 2021, ANCINE has just decided to postpone the fixation of any criteria until March 2021, at which time the Special Secretary for Culture will issue an official decision via Presidential Decree. 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. Local content quotas limit consumer choice and can push consumers toward illegitimate content sources.

**Video-on-Demand (VOD) Tax and Regulatory Framework:** For six years, Brazilian leaders have contemplated how to both regulate and capture tax revenues from the fast-growing VOD marketplace. As of December 2020, on-demand platforms are not required to comply with any regulation. However, ANCINE's 2012 normative ruling allegedly extends to VOD services the existing tax model for audiovisual works (Condecine), which is levied per title every five years on theatrical, pay-TV, and home entertainment releases, and levied annually on audiovisual ads. Condecine would be burdensome if levied over VOD services, especially when charged on a per-title basis as prescribed in the current ANCINE ruling, and would limit the choices available to Brazilian consumers in the online content market. In 2019, a coalition of industry stakeholders filed a request before ANCINE to annul the 2012 Normative Ruling and warned against protectionist regulatory models that would impede local market development and investment. ANCINE has yet to reach a decision and has recently issued a public consultation.

**Media Cross-Ownership / OTT Regulation / Tax Discussions:** Brazil's legislature is about to examine policies of significant consequence to online audiovisual (A/V) platforms: 1) potential change to the 2011 pay-TV Law that would lift restrictions on cross-ownership between programmers/producers and operators of pay-TV content; 2) discussions on regulatory and fiscal asymmetries between OTT and pay-TV services; and 3) taxation over the digital space. First, 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. ANATEL (Brazil's telecom regulator) and ANCINE (cinema regulator) have already decided favorably on the media cross-ownership issue and both suggest an amendment to the law, to be scrutinized by the Congress. On the second point, if a programming company that distributes linear or live content on the Internet (OTT) were to be classified as a telecom service and then subjected to the pay-TV Law, such OTT direct-to-consumer service would face severe regulatory burdens, including local content quotas, oversight by ANATEL, and additional tax that would be passed on to programmers. Helpfully, ANATEL rendered a decision in September 2020 that OTT services are value added services and therefore not subject to the pay-TV regulatory framework; ANCINE, under its jurisdiction, decided likewise. The Supreme Court is also reviewing the matter. In parallel, tax reform discussions are gaining traction in Brazil, which may impact the digital space, including legislative bills that would impose taxes on OTT services. We urge USTR to support Brazil's legislative attempts to modernize the pay-TV Law and encourage a prompt passage of the required reforms, and to discourage additional taxation and regulation that would hamper the growth of the OTT market in Brazil.

**Collective Management Organizations (CMOs):** In late 2018, prior to its abolition, Brazil's then Ministry of Culture, granted the accreditation of three CMOs that represent directors, screenwriters and performers in audiovisual works. These entities sought to collect royalties on their behalf for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, pay-TV and digital distribution. Nevertheless, the CMOs have not taken a position as to whether they are only entitled to collect royalties if the rights that originate such collection have not been assigned to the audiovisual work's producer, which means the CMOs may still try to collect for previously assigned rights. This is patently incorrect because Brazil's copyright law establishes a voluntary collective rights management regime, which means CMOs must affirmatively prove representation of the rights holders they claim to represent rather than act based on a presumption of representation. The motion picture industry urges the Brazilian government to clarify that CMOs can assert rights to collect royalties for acts of communication to the public only for authors and performers in audiovisual works that have specifically mandated these CMOs to do so and only where relevant rights have not been assigned to producers of audiovisual works. This clarification is necessary to ensure the CMOs only assert properly authorized claims and to protect rights of freedom of contract for all stakeholders.