

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2022.¹

Executive Summary: While IIPA members commend Brazil's excellent progress with a number of enforcement actions against online piracy, several long-standing normative and legislative concerns warrant keeping Brazil on the Watch List. For the creative industries, Brazil is a top priority market in Latin America. As such, the country's long overdue adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) is a major concern for IIPA members. More than two years ago, the Government of Brazil announced that the country would ratify the WIPO Internet Treaties. Unfortunately, no executive action has been taken in that regard. It is essential for Brazil to join and implement the WIPO Internet Treaties to ensure that its legal framework is consistent with global standards.

Notwithstanding setbacks related to the COVID-19 pandemic, Brazil continued to provide positive anti-piracy enforcement developments in 2021. For instance, enforcement authorities initiated a third wave of Operation 404 that took down online piracy platforms in nine different Brazilian states through site-blocking criminal injunctions, in addition to leading search and seizure raids against major pirate targets. *CyberGaeco*, São Paulo's Public Prosecutor cybercrime unit, developed and implemented a consistent judicial site-blocking framework, which has already successfully addressed 39 major stream-ripping sites. These domains were accessed more than 620 million times. The Brazilian Regulatory Agency for Telecommunications (ANATEL), the Brazilian Audio-Visual Agency (ANCINE), and Brazilian customs inspected and seized more than 1.5 million illicit streaming devices (ISDs) entering Brazilian ports.

On the legislative and policy fronts, the National Intellectual Property Strategy (ENPI) has been approved and serves as general guidance for all public initiatives concerning intellectual property (IP). Additionally, the National Council Against Piracy passed a New Plan to Combat Piracy, in the end of 2021, as part of the above-mentioned ENPI. IIPA urges Brazil to focus on WIPO Internet Treaties ratification and the implementation of a site-blocking system. Both ANATEL and ANCINE should fast-track discussions to implement an effective system to tackle online piracy.

Also, a new Copyright Act, if one is to be developed, 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. Similarly, other legislation, such as the pending artificial intelligence (AI) bill for example, should not be used to create new exceptions to copyright.

Regarding market access barriers, IIPA commends the Government of Brazil's August 2021 reduction of the industrial product tax (IPI) for video game consoles and accessories. However, the tax burden on these products remains significant, and we encourage Brazil to further reduce or eliminate IPI and other taxes. IIPA continues to be deeply concerned over film, streaming, and television quotas. Discussions about over-the-top (OTT) regulation and taxation, as well as digital services taxes (DSTs), are also of great concern. IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies, and practices that enable a sustainable and thriving creative sector.

¹For 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 2022

Enforcement

- Establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves, *CyberGaeco's* actions, and similar operations. Ensure that law enforcement agents and prosecutors 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, including technical training on technological protection measures (TPMs) and anti-circumvention.
- Ensure ANATEL, ANCINE, and Brazilian Customs continue to have the resources and political backing to block the flow of ISDs into Brazil, as well as to have ANATEL as a consenting body at the Brazilian Foreign Trade System (SISCOMEX).
- Ensure that ANCINE and ANATEL continue working to implement a system for administrative and judicial site-blocking for pirate sites.
- Ensure that the *Conselho Nacional de Combate à Pirataria* (CNCP) continues to have the resources and political support to engage in cross-industry efforts against online piracy and develop its proposed New Plan to Combat Piracy. Considering the growing success of the CNCP, it needs to have more human resources and structure to address the increasing volume of projects and cases.
- Implement a long-term national program to train judges and prosecutors on IP law, the WIPO Internet Treaties, and enforcement measures, including procedures on site-blocking legal actions as well as technical training on TPMs and anti-circumvention; 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 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 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 Internet service providers (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 pay-tv and OTT sectors; (v) implements special cybercrime courts and prosecution units; (vi) penalizes repeat infringers, including those identified on online platforms and Internet applications, and have ISPs define clear and effective policies to deal with such matters; (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.
- Approve draft legislation aimed at criminalizing camcording activity in movie theaters.
- Approve draft bills intending to implement a judicial site-blocking system.
- Ensure that implementation of the Internet Civil Act, related decrees, such as the one on content moderation,

and legislation does not interfere with voluntary notice and takedown efforts or other cooperative agreements to combat online piracy.

- Ensure that the proposal to introduce an overbroad exception for the use of certain copyright material for training AI systems without adequate delineations to limit its scope (which is contained in a bill on AI currently progressing through the Brazilian legislature (PL 21/2021)) is withdrawn to avoid serious harm to right holders.

Market Access

- Enable industry growth by further reducing high tariffs and taxes placed on video game products, as well as on general on-demand content.
- Mitigate imposition of the “video-on-demand (VOD) tax,” DST, or similar tax, on movies and TV programming delivered either on demand or on a non-linear basis; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt OTT services from compliance with the existing Pay-TV Law; refrain from increasing tax and regulatory burdens towards either service to correct perceived asymmetries.
- Reject attempts by Collective Management Organizations (CMO) to collect royalties (already collected and paid) derived from audiovisual works’ public performance.
- Extend discussion on the technological and financial feasibility of mandating OTT platforms to offer accessibility functionalities. (Continue to engage private sector stakeholders and refrain from passing any mandates until a best practice is established.)
- Ensure that any accessibility-related mandate—deployed in both movie theaters and OTT space—is implemented with a technological solution that is secure, efficient, ensures fair competition, and is consistent with global best practices.

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. Most pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. According to music industry research, Brazil added US\$20.1 million in revenue from ad-supported audio streaming in 2020 after growth of 92.8% versus the previous year² and had US\$164.7 million in revenue from subscription audio streams in 2020³ for a total increase in streaming, including subscription streaming, ad-supported streaming, and video streaming, of 37.1% over 2019.⁴

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\$1.44 in 2020 in large part due to the rise of online piracy.⁵ For 2021, the scale of the piracy landscape in Brazil remained critical and, despite shifts in distribution channels and some declines, largely unchanged.

²International Federation of the Phonographic Industry (IFPI) Global Music Report 2021, p. 104.

³*Id.*

⁴*Id.*

⁵*Id.* at 156.

Infringing Linking Sites, Stream-Ripping Sites, Stream-Manipulation Sites, Cyberlockers, and BitTorrent: The four most popular types of online distribution channels for infringing materials in Brazil are: (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)⁶ networks and indexing sites for torrent files; (iii) stream-ripping sites that circumvent TPMs on licensed streaming sites, such as YouTube; and (iv) 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 type of content, such as those sites solely dedicated to video games, tend to attract audiences faster and remain popular. This includes the highly popular Portuguese site, *yuzuroms.ml*, for infringing Nintendo Switch titles. These websites rely on magnet torrent links and “sister domains” (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 that allow 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 the publishing industry. Among the several sites trafficking in infringing copies of books, *MercadoLivre* (*mercadolivre.com.br*) remains the most problematic for publishers.

While most cyberlockers and linking websites are 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. 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.

According to the International Federation of the Phonographic Industry’s (IFPI) 2021 Music Consumer Study, the music piracy rate in Brazil stood at 50% of all internet users in 2021—one of the highest in the world. Forty-six percent of users engaged in stream-ripping use websites or mobile apps (60% of 16- to 24-year-olds) while 23% used cyberlockers or BitTorrent sites to download pirated music. As the survey data demonstrates, the most prominent form of piracy in Brazil is stream-ripping. The most popular stream-ripping site is *snappea.com*, which received more than 50 million visits from Brazil alone in July 2021, according to SimilarWeb. Other widely used sites in Brazil include *savefrom.net* (9.4 million visits from Brazil in July 2021), *yt1s.com* (5.9 million visits), and *yout.com* (1.6 million visits).

Based on IFPI’s 2021 Music Consumer Study, BitTorrent also remains popular in Brazil. Brazilian site *viatorrents.com* had 4.5 million visits from Brazil in the second quarter of 2021 while *The Pirate Bay* received 5.2 million visits. Cyberlockers such as *4Shared* and *Zippyshare* (5.4 and 5.5 million visits from Brazil respectively in the second quarter of 2021) are also well-known destinations in Brazil for pirated music.

Stream manipulation services create 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.

⁶See 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 video game industry reports that Brazil ranks 3rd globally in P2P piracy. One problem the industry faces is unauthorized digital goods⁷ (infringing versions of digital assets available within a video game environment, such as virtual currencies, digital accounts, or “skins”). Although some ESA members continued to see an increase in BitTorrent network activity when it comes to certain popular game titles over the past year, BitTorrent network activity for video games 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.

Circumvention Devices: An increasing number of Brazilian sites and online marketplaces, such as MercadoLivre, offer 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, and since January 1, 2021, the video game industry has had an approximate 93% successful removal rate of infringing video games from *mercadolivre.com.br* and a 70% compliance rate for *Shopee.com.br*, another top site for infringing game products. However, there is a continued need for platforms to place more pressure on repeat sellers of infringing listings. These devices enable the play of pirate videogames—often supplied by infringing torrent link sites—on modified consoles, which are the great majority of game consoles in Brazil.

Piracy Devices (PDs) and Signal Theft: Brazil continued to see an increase of online piracy, piracy apps, and ISD piracy hurting the local audiovisual market during 2021. Signal theft remains an issue in Brazil and is used as a source of premium live content for online piracy and ISDs’ businesses. Brazilian enforcement authorities deployed robust efforts to properly tackle these issues in 2021, but the high level of audiovisual piracy in the country is an obstacle to these actions resulting in a substantial impact in the number of infractions. A significant amount of piracy devices are sold on the Internet, mainly in online marketplaces such as MercadoLivre. Brazil’s economic crisis of recent years combined with the increased broadband availability across the country and the COVID-19 pandemic have set the stage for a likely spike in Internet protocol television (IPTV) rogue devices and pirate live-streaming of news and sports in coming years. The enforcement against ISDs increased during 2021, including multiple actions led by ANATEL, ANCINE, and Brazilian Customs, which interrupted the contraband of more than 1 million ISD units entering Brazil. In 2021 ANATEL also raided MercadoLivre’s warehouses in Brazil aiming at identifying non-certified telecom devices in transit to final customers—these actions had grounds on a recent legal opinion issued by ANATEL’s Attorney General who understands that intermediaries can be jointly liable for the trade of telecom equipment that does not comply with the Agency’s regulations (ISDs included). This raid resulted in several equipment seizures, including ISDs.

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 piracy devices 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 (e.g., hard drives), discs, and memory cards that are locally burned and assembled with illegal copies of video games; (ii) circumvention devices as mentioned above; and (iii) modified consoles. 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,

⁷Unauthorized Digital Goods (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 UDGs 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.

often located in private homes. The lack of criminal investigations and effective action for seizures of modified consoles or circumvention devices or against repeat infringers enable these businesses to continue to thrive.

Camcording: Theatrical 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, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume and probably increase, given potential new releases models.

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. The pandemic emergency also had a significant impact on law enforcement actions against online targets once the judiciary was shut down for a few weeks' time and then transitioned to remote and limited activity.

While movie theaters had been closed for some time because of the social distancing measures, which restricted the use of camcording as a means of piracy, a surge of drive-in movie theaters was seen across Brazil. In many cases, these theaters were 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 because of government authorities' lack of engagement.

Influenced by the COVID-19 pandemic shutdown in Brazil, circumvention devices and unauthorized digital goods (UDGs) increased significantly. In the case of circumvention devices, the online marketplaces have now become an alternative to local street market vendors and booths. The fragmentation trend noted in the previous year remained during 2021 and resulted in an increase of 70% more entertainment software targets being monitored for online game infringements in Brazil. For linking sites dedicated to the unauthorized download of game titles, there was an overall increase of 64% in the number of illegal sites while there was a 78% increase in targets for e-shops selling UDGs. According to SimilarWeb, during that same period, the combined audience for those sites increased year-on-year by 35%, with the most significant increase noted for the infringing linking sites, with 50% growth.

This type of commercial online game piracy on multiple online marketplaces in the country also increased during the past year, with new platforms arriving in the local market with a fast-growing audience, such as Shoppe, with a 330% increase in the last 12 months. The volume of infringing game title and product listings available on marketplaces has also increased. Data gathered from SimilarWeb and Google searches indicate that at least 14% of all searches related to these marketplaces and platforms are related to video game products, and the volume of sellers (users of online marketplaces posting listings) offering game products on the major platforms increased by 15% in the last year. However, the volume of infringing game-related listings (UDGs) per user/seller has decreased, indicating a fragmentation on the part of repeat infringers to protect their illegal businesses from take-down policies applied by platforms and rights holders. The cyberlocker and BitTorrent audiences in Brazil are declining, 18% and 44% respectively, in a year-on-year comparison, according to SimilarWeb and IKnowWhatYouDownload.com data. Video game titles are the second most popular type of content among torrent downloads and the top 10 most popular titles are from ESA member companies.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Against Online Piracy:

The Brazilian campaign against online piracy performed very well at both federal and state levels during 2021. The following operations deserve special mention:

Operation 404 and Operation Brick: The third wave of Operation 404 against online content piracy was executed by the Brazilian Ministry of Justice and Public Safety (with the support of enforcement authorities from ANCINE and the Integrated Operations Secretariat) in July 2021. Search and seizure warrants were served in nine Brazilian states, and 334 websites and 94 illegal music apps were blocked pursuant to a criminal court order. Social media accounts, pages, and search results related to the targets were also delisted.

In November 2021, the Ministry of Justice and Public Security, through its Integrated Operations' Secretariat (SEOPI) and its cybercrime team (CIBERLAB), initiated Operation Brick, an extension of Operation 404, to tackle online video game piracy with 50 marketplace users dedicated to the sale and distribution of UDGs, selling over 1,350 illegal products, 35 infringing e-shops also dedicated to UDG sales, and two major resellers of circumvention devices. Five raids were conducted against site operators and 31 domain names related to these infringing game sites were seized by police. Another phase of Operation 404 successfully took place earlier in the year to target piracy in the audiovisual and music sectors.

Operation Final Boss: In March 2021, *CyberGaeco*, the cybercrime unit within the District Attorney's Office of São Paulo, led a criminal investigation against eight major infringing linking sites and several mirror sites dedicated to video game piracy in Brazil. All eight sites were disrupted and a total of 11 domains were shut down after their operators and owners were notified and brought to hearings by the public prosecutor. These sites had over 3.2 million combined monthly visits and 35 million visits in the last year.

Enforcement by Federal Regulatory Agencies: In 2021, federal regulatory agencies ANATEL and ANCINE together with Brazilian Customs inspected and seized more than 1.5 million ISDs at multiple entry ports throughout the country. In October, ANATEL also raided warehouses from *MercadoLivre*, the largest e-commerce platform in Latin America, and seized more than 10,000 units of non-certified telecommunications equipment (ISDs among them) in transit to final users.

Shutdown of Various Streaming Manipulation Services: Following a coordinated approach from Pro-Musica Brasil, Brazilian anti-piracy body APDIF, and the Brazilian police, the operator of *turbosocial.com.br* and six affiliated sites ceased offering streaming manipulation services. A further coordinated action by APDIF and Pro-Musica Brasil, by way of cease-and-desist letters, resulted in seven additional websites ceasing to offer music streaming manipulation services. In addition, IFPI, Pro-Musica Brasil, and APDIF worked with *CyberGaeco* (the cybercrime unit of the State of São Paulo's Prosecutor's Office) on an action that resulted in 18 websites and five users of *MercadoLivre* (a popular online marketplace) ceasing to offer stream manipulation services. An additional 12 websites voluntarily stopped offering streaming manipulation services as a result of this action. In total, more than 65 streaming manipulation services have been affected by this coordinated action in Brazil and an additional 35 listings for music streaming manipulation services have been removed from *MercadoLivre*.

Stream-Ripping Sites Blocking: In October 2020, the Criminal Justice Tribunal of the State of São Paulo (following an application filed by *CyberGaeco*, the Prosecutor's Office of the State of São Paulo (MPSP), and APDIF DO BRASIL (the recording industry anti-piracy association)), ordered all ISPs in Brazil to block access to 14 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. In August 2021, the Criminal Justice Tribunal of the State of São Paulo ordered ISPs to permanently block access to the 14 sites. In October 2021 the Criminal Justice Tribunal of the State of São Paulo also accepted public prosecutor criminal charges issued against the administrator and owner of the popular stream-ripping site *yout.com* and as an additional measure the site was blocked with a renewed court order. Further, in December 2021, the Criminal Justice Tribunal of the State of São Paulo also issued a preliminary order requiring ISPs to block access to 24 stream-ripping targets for a period of 180 days following an application by APDIF and *CyberGaeco*.

These enforcement actions speak to Brazil's improvement. However, too much of Brazil's judicial system

continues to lack adequate understanding of IP matters, though some exceptions exist, such as the specialized commercial and criminal courts in São Paulo (see above) and Rio de Janeiro. IIPA urges 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, as well as technical training for complex video game piracy.

In addition to these enforcement operations, the National Strategy serves as general guidance for all public initiatives concerning IP. Brazil's CNCP facilitated promising public-private agreements to tackle online piracy and the release of two best practices guidelines on e-commerce and payment services providers. Moreover, an MOU regarding online advertising was signed in February 2021 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 aims to stifle the cash income of pirate sites through Payment Service Processors (PSPs).

We encourage CNCP to build on its 2021 work, develop a strategic plan to give top priority to combating 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 develop better standards and effective voluntary agreements to fight online piracy. To do all this, IIPA urges the Brazilian government to adequately fund the CNCP and increase the CNCP capability to operate with more human resources and infrastructure.

Case Developments

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, *Ação Direta de Constitucionalidade Número 51* (ADC-51), is currently pending before the Supreme Court (*Supremo Tribunal Federal*, STF) and had little development during the last year. If the constitutional challenge succeeds, investigations of online crimes, including IP violations, from local servers and sites may be blocked or delayed, resulting in a severe weakening of IP protections online and potentially on the notice-and-takedown procedures for repeat infringers.

On August 10, 2021, the Tribunal of Justice of the State of São Paulo, issued a permanent blocking order against 14 stream-ripping sites in a criminal case initiated by the industry's anti-piracy body, *APDIF do Brasil* (APDIF). The decision is the first of its kind in Brazil against music piracy services and confirms the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. The decision is part of the campaign developed by APDIF and *CyberGaeco*.

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 São Paulo State Prosecutors Office in September to share investigative best practices and provide 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 to foster discussion of effective strategies to address each case scenario.

Enforcement Training

State law enforcement authorities held a series of five events dedicated to providing a continued training program covering investigations of IP-related crimes to highlight best practices adopted by *CyberGaeco*, and *Cyberlab-SEOPI* (the national cybercrime unit in the Ministry of Justice) on the current operations in place. The events are hybrid (online and in person) and are held in several Brazilian states.

LEGISLATION AND REGULATION IN BRAZIL

National Intellectual Property (IP) Strategy: In July 2020, Brazil's Economy Ministry launched a new consultation period to seek input on their proposal for a National Intellectual Property Strategy (NIPS), which was developed by the Inter-ministerial IP Group (GIPI) (overseen by the Economy Ministry). In late 2021, the National Intellectual Property Strategy (ENPI) was approved and made official by Presidential Decree, and Brazil's Ministry of Justice and Public Security launched the official National Plan Against Piracy (PNCP), as part of the aforementioned ENPI.

IIPA supports many of the strategy's goals, such as promoting the creation and strengthening of specialized IP public agency units and personnel, ranging from the judiciary to the police and customs; strengthening the structures of public policies against piracy that are already in place within the Ministry of Justice and Public Safety and other public agencies; reassurance of the authority of the administrative sphere to guarantee IP rights, including the opening of investigation procedures and the interruption of websites and other services used primarily to violate IP rights; and in terms of the ENPI's general guidelines, increasing society's awareness not only on the benefits of IP rights, but also on the losses caused by the violation of IP rights, among others.

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. IIPA urges Brazil to implement both policies, primarily focusing on Copyright Act reform and the implementation of a site-blocking system. Moreover, discussions on site-blocking at both ANATEL and ANCINE should be fast-tracked to implement an effective system to tackle online piracy.

As mentioned above, it is essential for Brazil to join and implement 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 two years 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, IIPA makes the following recommendations for the potential 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 dealing 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.
- Clarify the provisions on damages to ensure that deterrent-level damages and a choice of method to calculate damages are available in respect of copyright infringement and circumvention of TPMs. Article 103 of the Copyright Law should be amended to expressly allow rights holders to choose the method of calculation of damages and include damage/losses suffered, an account of the infringer's profits, and a reasonable royalty as methods of the calculation of damages.
- 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 therefore, fell 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.

Adopted Legislation: On August 14, 2018, a comprehensive data protection law was passed (Law # 13.709), containing several statutory provisions on acquisition, processing, storage, deletion, and personal consent related to personal data. Following a Presidential veto, a subsequent amendment was introduced (Law # 13.853). The new statute created a series of requirements for private companies and government entities when collecting, using, and storing individuals' personal information. On the positive side, the law does not approach the issue from a property right perspective and instead, provisions allow for the access and use of personal data by controllers as part of a normal course of business and include situations where the provision of personal data is a requirement to render services or provide a specific product. The Law also allows for the regulation of access to personal data via contractual arrangements.

Artificial Intelligence (AI) Bill: A bill on AI currently progressing through the Brazilian legislature (PL 21/2021) contains a provision that would lead to a presumption that the use of certain copyright material in training AI is not an infringement (without adequate delineations to limit its scope, as seen, for instance, with the scoping of the text and data mining exception in other jurisdictions to ensure that it is compatible with the three-step-test). This proposal must be withdrawn to avoid serious harm to rights holders.

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 and entertainment software are a long-standing concern, and while some progress has been made, 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. A legitimate market could, if allowed to develop, deliver innovative content to Brazilian 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 law that considered customized software a service, 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, which continued to be applied to off-the-shelf, physical software. However, the taxation of off-the-shelf software, such as video games, is widespread, including the federal IPI, import tariff (II), federal social contributions (PIS and COFINS), and the municipal services tax (ISS). The overall heavy tax burden on such software therefore marginalizes the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these

fees). IIPA urges the reconsideration of this problematic interpretation from 2013. While the overall tax burden for video game products remains high, IIPA commends Brazil's recent reductions of the federal IPI for video game consoles, accessories, and portables. IIPA encourages Brazil to continue efforts to further reduce or eliminate the federal-level IPI, import taxes, as well as the state-level (ICMS) and ISS taxes on video game consoles and accessories (the IPI on portables was fully eliminated in 2021).

Condecine Tax: Condecine tax applies to films, advertising, pay-TV, and "other segments," which some officials would assert that includes VOD content. The extension of Condecine tax to the VOD segment would be burdensome, especially when charged on a per-title basis, as intended by ANCINE across several years, and would curb consumer choice. Helpfully, in September 2021, the National Congress of Brazil voted against the levy of Condecine tax over VOD content on a per-title basis, overriding an executive branch veto in the process. In any event, there are parallel discussions, under the Executive and Legislative Branches, about the creation of a singular tax to be applied over both linear and non-linear content, in addition to regulatory burdens. Accordingly, notwithstanding recent positive developments in this area, industry stakeholders committed to the growth of Brazil's OTT market remain concerned about the future.

Several draft bills seeking to establish DSTs, if approved, would increase streaming platforms' already heavy fiscal burden, which could discourage investment, as well as hamper the local industry's growth. It remains unclear how the local administration and legislature will stand in regard to the global minimum corporate tax, in that it could conflate with discussions concerning overall digital taxation.

Accessibility Regulation in Both Theatrical and Over-the-Top (OTT) Windows: In Brazil, movie theaters are obliged to screen accessible films to disabled patrons using (audio description, closed captioning, and sign language). In May 2021, Brazil's National Congress approved Executive Order 1025/2020, which extended until January 1, 2023, the deadline for cinemas to offer these accessibility resources to people with visual and hearing impairment. The U.S. film industry supports measures to broaden access to its productions and to better serve patrons with disabilities. The U.S. film industry is working closely with regulatory bodies and other stakeholders to ensure that accessibility features are implemented with a technological solution that is secure, efficient, and ensures fair competition and global best practices.

Although both policymakers and lawmakers continue to discuss the OTT platforms' obligation to adopt these accessibility measures, the technology to meet these functionalities is still fairly nascent, in terms of the OTT window. Rushed implementation of such measures could impede platforms' ability to expand their catalogues, impacting consumers' access to diverse stories and potentially worsening piracy.

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 entitled to collect royalties only 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. IIPA urges the Brazilian government to constantly and officially reaffirm that CMOs can assert rights only to collect royalties for acts of communication to the public where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works. This continuous clarification is necessary to ensure that the CMOs assert only properly authorized claims and to protect rights of freedom of contract for all stakeholders.

Draft bill #3203/2021: This draft bill aims to eliminate the fiscal incentives applied to the audiovisual industry,

which is a problem because foreign audiovisual distributors, the major financiers of the local industry, rely upon these fiscal incentives to offset their costs. Thus, if passed, this effort would largely stall the local industry's growth.