

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### BRAZIL

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** IIPA recommends that Brazil be removed from the Priority Watch List and placed on the Special 301 Watch List in 2006, and that an out-of-cycle-review be conducted later in 2006 to evaluate progress and results achieved on copyright piracy and enforcement under the Bilateral Consultative Mechanism.

Brazil is one of the most important markets for the U.S. copyright industries. Its tremendous market potential is undermined by one of the highest piracy rates in the region. Widespread piracy in Brazil inflicts huge losses. The year 2006 marks a critical turning point. Last year, Brazil showed a definite and palpable shift in political willingness and took actions to combat piracy on a scale not previously seen. As a result, on January 13, 2006, with the support of IIPA and its members, USTR terminated the five-year review of Brazil's copyright regime under the U.S. government Generalized Systems of Preferences (GSP). This review was based on a petition filed by the IIPA in August 2000, and three special out-of-cycle GSP reviews were held between 2004 and 2005. The 2006 decision was based on progress made by Brazilian authorities, and their commitment to work through the U.S.-Brazil Bilateral Consultative Mechanism to address copyright piracy and enforcement problems in Brazil. The copyright industries look forward to continuing our work with Brazilian authorities to stop the illegal actions which undermine the economic vitality of a vibrant cultural marketplace.

The copyright industries' overarching goals in Brazil consistently have been, and remain, (1) reducing copyright piracy and (2) generating effective criminal enforcement. Achieving these twin goals will increase the sales of legitimate product and significantly increase the output of Brazil's cultural, educational and technical products. Piracy for U.S. copyright materials remains very serious in Brazil, contributing to at least \$4 billion in estimated trade losses due to piracy over the last five years (2001-2005). Retail piracy in well-known street marketplaces remains rampant throughout the country. Notwithstanding the tremendous progress made by the Government of Brazil in organizing itself to fight piracy, the fact remains that as of now, the number of criminal prosecutions and convictions for copyright infringements remains small, thus contributing to the lack of meaningful deterrence.

IIPA believes that the Brazilian government should, at a minimum, take the following actions:

- Implement and achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process, including:<sup>1</sup>

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<sup>1</sup> USTR's notice terminating the Brazil's GSP investigation did not identify the seven factors which will be monitored under the Bilateral Consultative Mechanisms; see 71 Fed. Reg. 2292 (Jan. 13, 2006) at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-368.pdf>. These factors were provided to IIPA by U.S. government sources. See IIPA's Press Release on the Brazil GSP IPR review, at <http://www.iipa.com/pdf/IIPA%20BRAZIL%20GSP%20case%20terminated%20Press%20Release%2001132006.pdf>. (issued Jan. 13, 2006).

- (1) Increase anti-piracy raids in well-known marketplaces;
  - (2) Encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces which focus on priority locations;
  - (3) Take enforcement actions on the Brazil-Paraguay border;
  - (4) Enhance deterrence through criminal prosecutions and the application of deterrent penalties;
  - (5) Continue work to complete the 99 action items in the national plan developed by the National Council to Combat Piracy and Intellectual Property Crimes (CNCP);
  - (6) Pursue educational and media anti-piracy campaigns sponsored by the federal government, working with the private sector to raise public awareness of the anti-piracy fight; and
  - (7) Continue working with the industry through the CNCP.
- Adopt anti-piracy legislation (specifically Bills No. 3.964/2004, No. 3.965/2004, and No. 3.966/2004).
  - Create specialized IPR courts with copyright jurisdiction.
  - Establish minimum prices on imported blank media.
  - Remove market access barriers on computer software and impose no new barriers (such as a theatrical window) on films.
  - Conduct effective enforcement against copyshops, located both inside and outside university campuses that make illegal copies of books and related teachers' notes that go beyond the bounds of the law, and engage university administrations in efforts to encourage use of legitimate materials on campuses.
  - States and municipalities must establish a routine of prevention and repression against piracy, instead of disconnected actions.

<b>BRAZIL</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2001-2005<sup>2</sup></b>										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music</b>	334.5	52%	343.5	52%	338.7	52%	320.4	53%	302.0	55% (MC99% CD47%)
<b>Business Software</b> <sup>3</sup>	385.2	65%	359.0	64%	309.0	61%	260.8	55%	272.3	56%
<b>Motion Pictures</b> <sup>4</sup>	NA	NA	120.0	30%	120.0	30%	120.0	35%	120.0	33%
<b>Entertainment Software</b> <sup>5</sup>	120.8	77%	120.4	74%	125.7	56%	NA	NA	NA	99%
<b>Books</b>	18.0	NA	18.0	NA	14.0	NA	14.0	NA	14.0	NA
<b>TOTALS</b>	<b>858.5+</b>		<b>960.9</b>		<b>907.4</b>		<b>715.2</b>		<b>708.3</b>	

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2006 Special 301 submission at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>3</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Brazil, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>4</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, [www.iipa.com](http://www.iipa.com).

<sup>5</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

For more details on the history of bilateral copyright engagement with Brazil under both the Special 301 and the GSP IPR trade mechanism, see IIPA's appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Previous IIPA reports on Brazil also can be found at <http://www.iipa.com/countryreports.html>.

## **COPYRIGHT WORK TO BE DONE IN 2006 UNDER THE BILATERAL CONSULTATIVE MECHANISM AND BEYOND**

IIPA and its member associations in the recording, music, film, computer software, entertainment software, and book publishing industries are heartened by developments in Brazil, including the cooperation between the copyright private sectors and the National Council to Combat Piracy and Intellectual Property Crimes (CNCP), under the direction of officials Luiz Paulo Barreto and Marcio Gonçalves. The CNCP resulted from a two year legislative process,<sup>6</sup> and was officially launched in March 2005. Membership in the CNCP involves a growing number of Brazilian government agencies and also includes the private sector. The CNCP has promulgated a 99-point action plan, and has held numerous meetings and has established a methodology to implement these actions by creating thematic working groups (Enforcement, Economic, Educational, Legislative and Institutional) and breaking down the actions into short-, medium- and long-term. IIPA and its members appreciate that this is the first time that the Brazilian government has outlined such a national plan and has involved private sector representatives in identifying such actions. This positive change in attitude toward the private sector is greatly welcomed, and the industries are committed to continuing to work collaboratively with the CNCP as well as other state and local officials. Approximately 35 of the 99 actions already have been implemented. In March 2006, the CNCP will meet to discuss and analyze the actions already implemented as well as the actions that remain to be fully implemented.

In mid-September 2005, the CNCP released an English translation of its report on the first six months of its operation, entitled Brazil Against Piracy (posted at [www.mj.gov.br/combatepirataria](http://www.mj.gov.br/combatepirataria)). The Brazilian government has conducted numerous enforcement operations, especially on the border between Brazil and Paraguay, at Foz de Iguacu, by the federal, state and military police. These actions, including the public destruction of pirated products, have been widely publicized in the media. Specific units have been created to fight piracy within the Federal Police Department and the Internal Revenue Department, and soon the government will be announcing the click-lead hotline. Perhaps the most important institutional steps regarding the CNCP have been the addition of the SENASP (National Secretary on Public Security), and SUSP (National Public Security System) to the CNCP. The inclusion of these two agencies will provide the necessary link to state enforcement agencies.

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<sup>6</sup> In late May 2003, the Brazilian Chamber of Deputies convened a parliamentary commission to analyze the adverse economic impact of copyright piracy, smuggling and tax evasion. Starting in mid-June 2003, the Commission on Parliamentary Inquiry (CPI) held hearings, and many IIPA member associations and their local representatives testified. The CPI, originally set to end its investigation at the end of September 2003, extended its efforts until June 2004. In August 2004, it released its comprehensive report, which included descriptions of the scope of piracy, problems related to enforcement, and policy and legislative recommendations to begin to improve the situation. The report noted the lack of national leadership and coordination to date. The CPI recommended the creation of a National Plan to Combat Piracy. Shortly thereafter, the federal government announced the formation of the "National Council to Combat Piracy and Protect Intellectual Property," and regulations establishing this entity were published in October 2004. The new National Council to Combat Piracy and Organized Crime held two preparatory meetings in Brasilia in late 2004. Its official launch was in March 2005.

As reported above, the Brazilian and U.S. governments have identified seven areas of action to be reviewed in the context of the Bilateral Consultative Mechanism. Many of the seven items are already included in the CNCP action plan, and all seven have the support of the copyright-based industries.

IIPA's overarching goals consistently have been, and remain, reducing copyright piracy and generating effective criminal enforcement in Brazil. Achieving these goals will result in the increase in the sales of legitimate product and a significant increase in Brazil's cultural, educational and technical output. To this end, IIPA offers the following specific goals that largely overlap with and refine the bilateral goals. The industries are looking to concrete and sustained actions which result in less piracy and better enforcement.

**(1) The authorities should initiate, on their own, continuous raids of well-known pirate marketplaces, including points of sale, such as —**

- São Paulo - Stand Center, 25 de Março, Galeria Pagé, Santa Ifigênia, Feira de Santana, Lapa e Santo Amaro
- Rio de Janeiro - Uruguaiana
- Brasília - Feira do Paraguay
- Pernambuco - Feira de Caruarú
- Recife – downtown points
- Belo Horizonte –Shopping Oyapoque, Caetes
- Salvador – street markets
- Campinas – Camelódromo
- Riberao Preto
- Sao Jose do Rio Preto

*Status:* Enforcement actions have been initiated. Recently the CNCP coordinated enforcement actions against most of the above mentioned markets. In some cases, such as Stand Center, the local authorities in December 2005 were able to make the seizures and close down the area for a good period of time, creating severe financial losses to pirates. These sorts of actions must be permanent and constant in order to really affect the pirates.

A few actions have been initiated to convert street vendors to legitimate sellers, for example, at São Paulo's municipal level: "Praça Benedito Calixto" and "Cracolândia." To succeed, these initiatives need task forces that coordinate enforcement actions and social investments at the above mentioned markets. The local authorities have to be able to make repeated raids at each area until pirates suffer substantial damages. At the same time, each area must have a social development plan to convert street vendors.

**(2) The Brazilian government should strengthen existing state and municipal anti-piracy task forces in priority capitals and states of São Paulo, Rio de Janeiro, Minas Gerais, Bahia, Distrito Federal, Pernambuco, Rio Grande do Sul and Paraná (Municipalities — São Paulo, Rio de Janeiro, Belo Horizonte, Salvador, Recife, Fortaleza, Belém, Campinas, Ribeirão Preto) and create task forces in areas not presently served.**

*Status:* Some task forces already exist, such as those in São Paulo and Rio de Janeiro. Again, the success of this initiative will be achieved by the constant and permanent presence of the CNCP leadership in this area.

**(3) The authorities should conduct more inspections and seizures at the Brazil-Paraguay border which result in cases forwarded for prosecution.** While IIPA applauds the increased numbers of inspections and seizures, those alone will not result in deterrence; those responsible must be prosecuted.

*Status:* Action has been initiated. Seizures in the border with Paraguay have increased significantly. There have been big increases in the seizures of blank CD-Rs and DVD-Rs. Seizures of blank DVDs increased from 191,000 units in 2004 to more than 2 million in 2005; and CD-Rs from 3.5 million units in 2004 to 8.2 million units in 2005. This effort must continue. Customs authorities must develop

intelligence to followup the constantly changing operations by the pirates; reportedly, Uruguay is starting to be a key port for transshipments of raw material.

- (4) **The government should issue recommendations to both state and federal public prosecutors to make all efforts to expedite criminal copyright prosecutions.**

*Status:* Action has been initiated. The CNCP is developing this proposal. The new participation of SENASP in the CNCP will be essential in this regard. The success of this particular initiative will only be achieved if it remains a permanent action item for the CNCP and SENASP.

- (5) **The authorities should continue to produce federal- and state-level educational and media campaigns** about the anti-piracy fight and how piracy threatens national cultural, scientific and economic interests. Specifically, the Brazilian government should ensure that educational campaigns are developed in conjunction with the private sector, and are disseminated as public service announcements by television networks and other media.

*Status:* Not yet initiated. In December 2005, the CNCP used the media in general (TV networks etc) to disseminate information regarding anti-piracy actions. The CNCP and private sector have been discussing and planning an educational campaign, which is expected to be released in March 2006 and to last the whole year. December 3 is the Anti-piracy Day, as created by Law 11.203/05, (published on December 12, 2005). The copyright private sector is willing to participate in this endeavor, as public awareness and educational issues have been a part of the industries' work in Brazil for years. There is no Brazilian Government educational campaign against piracy just yet; the CNCP has been articulating its educational campaign among private sector and several government agencies. To this end, the CNCP has held numerous meetings and has established a first project for a National Educational Campaign Against Piracy called "Campanha Nacional Educativa de Combate à Pirataria e ao Contrabando" (<http://www.mj.gov.br/combatepirataria/projetos>).

- (6) **In conjunction with private-sector representatives, the Brazilian government should design a strategy to centralize all imports of blank media such as CD-R and DVD-R in a single port of entry such as Santos.**

*Status:* Not yet initiated. Customs has been more active and helpful in intercepting and seizing these materials (usually due to false registrations or documentation) but port centralization is still needed.

- (7) **The Brazilian government should urge the inclusion of intellectual property rights and piracy as mandatory subjects of study for prosecutors, judges and in police academies.**

*Status:* Not yet initiated. This component will be very important in order to improve the prosecutorial and judicial bottlenecks in criminal copyright cases.

- (8) **Passage of the anti-piracy bill proposed by the CPI**, that is, to amend Articles 184 and 186 of the Criminal Code (as well as corresponding provisions to the Criminal Procedure Code) and the first and third paragraphs of the Law No. 9609/98 to increase imposable sentences for piracy, from a minimum of two years, to two years and two months.

*Status:* There are three relevant bills — No. 3.964/2004, No. 3.965/2004, No. 3.966/2004 — all of which are before the Committee of Constitution and Justice, the first sub-committee of the Brazilian House of Representatives. This initiative has been discussed in the CNCP, but has not yet been presented in Congress. Moreover, reports indicate that the CNCP is resistant to any increase of criminal penalties. In addition, the Motion Picture Association (MPA) wants to include specific penalties for unauthorized camcording in theaters, but the CNCP rejected MPA's suggestion based on the argument that the term "reproduction" includes the act of recording.

- (9) **Apply stricter custom controls at dry ports, also known as EADIs, to prevent the importation of blank optical media.**

*Status:* Not yet initiated. It is necessary to increase the number of Customs officials and modify administrative procedures to establish new routines for this specific Customs activity.

## **COPYRIGHT PIRACY IN BRAZIL**

Most of the industries continue to place estimated piracy levels at or above 50% of the market, meaning that more than half of each market in Brazil is composed of pirate products which are generally available at a fraction of the price of legitimate product. In addition to more traditional forms of piracy which the industries have been fighting for decades, piracy involving optical media and the Internet present more enforcement challenges.

**Music and Recording Piracy:** Piracy of music and sound recordings still remains at 52% of all CD sales in Brazil. The latest piracy survey shows a total number of 73 million pirate CDs being duplicated, which translates to trade losses that exceed US\$334 million. The legitimate market suffered a significant decrease during 2005 of 15 percent in units and 10 percent in local currency sales. This decrease is attributable to the still high piracy levels in Brazil and a higher volume of illicit files being traded on the Internet. The latest estimate based on a third party survey is that approximately 354 million illegal music files are being downloaded annually. Nevertheless, the industry continues to release low priced product to attract more consumers from various income levels. As a result, average record prices in Brazil are among the lowest in the world. Most of the pirate audio products are burned CD-Rs. While a small amount of finished product may be imported from Paraguay or elsewhere, the great preponderance is locally reproduced in hundreds of facilities spread out around the country. These CD burning facilities range from large operations in commercial warehouses with over 100 burners, to small outfits operating out of residential houses producing only a small amount of product. The original source of the blank CD-Rs continues to be Southeast Asia, primarily Taiwan and China.

**Audiovisual Piracy:** The priority areas of concern to MPA and its member companies are: (1) optical disc piracy, (2) Internet sales, (3) retail piracy, and (4) inadequate border measures to halt imports of infringing digital product. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs. As with CD-Rs, the vast majority of pirate DVD-Rs are locally reproduced in hundreds of facilities of varying sizes spread out around the country. In addition, the sale of hard goods over the Internet, both CD-Rs and DVD-Rs, is also increasing rapidly in Brazil. With the increased availability of broadband both in homes and Internet cafes, local member company executives are increasingly concerned that illegal Internet downloads and Internet-based hard good sales of CD-R and DVD-R will become more of a threat to legitimate sales and distribution. Furthermore, retail video piracy continues to be of concern in Brazil because of the continuing importance of video store revenue for local home entertainment operations. Finally, Ciudad del Este remains the principal port of entry and the source of both hardware and blank optical discs (mainly CD-Rs, but increasingly DVD-Rs) entering Brazil annually. These optical discs turn up quickly in major cities throughout Brazil as counterfeit copies further impacting sales in the legitimate market of products.

**Business Software Piracy:** The Business Software Alliance (BSA) reports that software piracy continues to exist in its traditional forms in Brazil, including illegal reproduction/duplication of software programs both for commercial and non-commercial ends; illegal use by end-users; hard-disk loading of illegal software by computer resellers; and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience, and for the unauthorized electronic distribution of illegal software. With respect to end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against companies, which has had some impact on the level of piracy. However, there still exists a considerable business segment in Brazil that is far from having legalized. In civil infringement cases, where the business software industry has achieved some success, Brazilian courts continue to require extremely high expert fees and bond requirements, and there are lengthy delays. BSA continues to engage in civil judicial actions (search and seizure) and criminal police actions promoted by the local industry association,

ABES. BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Parana, São Paulo, Rio de Janeiro, Minas Gerais, Espirito Santo, Bahia, Pernambuco, Ceara, Goias, Mato Grosso do Sul, and the Federal District of Brasilia. Preliminary estimated trade losses due to software piracy are \$385 million, with a 65% piracy rate. Lowering the business software piracy rate in Brazil would improve the local economy.<sup>7</sup>

**Entertainment Software Piracy:** Piracy of entertainment software products occurs through local CD-R burning as well as imports of factory-produced products, typically exported to Brazil from Asia through Paraguay, or increasingly through other transshipping countries (for example, a truck attempting to smuggle in pirated entertainment software was intercepted in Rio Grande do Sol on its way in from Montevideo, Uruguay). Pirated cartridge-based entertainment software products continue to be shipped from Asia (primarily China) through Paraguay, sometimes assembled there before being transported across the border into Brazil. Pirated entertainment software products are sold in a variety of venues. Large quantities of piratical and counterfeit factory-produced discs are still readily available in the “promocenters,” which are small retail booths renting space in larger markets and galleries, as well as through street vendors. Unfortunately, despite an increase in the number of enforcement actions in 2005, these raids have only had the effect of cleaning out the on-site stocks of pirate products, which are replaced within days of the action. Flea markets and street vendors continue to be sources of pirate products. The Internet is still largely used to advertise pirated products for local CD-R burning operations, either through websites, email solicitations or through auction sites such as mercadolivres.com and arremate.com. Internet cafés are also of concern, as of the 2,000 cafés in the country, only 20% are licensed. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Brazilian marketplace was \$120.8 million in 2005, with a 77% piracy rate.

**Unauthorized Photocopying and Book Piracy:** The publishing industry reports that very little about the book piracy situation in Brazil changed in 2005. Unauthorized photocopying of entire textbooks as well as study materials, individual lessons and chapters from textbooks continues to be the major form of book piracy. The Association of American Publishers (AAP) estimates losses to its members of US\$18 million in 2005, and those losses multiply sharply for local Brazilian publishers. Many universities tacitly or actively condone copying of *apostilas* (teachers’ notes or folders), and anthologies made up of chapters from various books copied illegally, both in English and in translation. Some estimate that the annual number of unauthorized photocopies ranges from 3 to 5 billion pages. Universities must take a role in fighting these illegal activities in and around their campuses. The Ministry of Education should engage on this issue during 2006 as well. Apart from the rampant on-campus copying, illegal copying flourishes in commercial establishments adjacent to institutions of higher learning. Illegal photocopying of academic materials cost both domestic and foreign publishers millions of dollars and cost the Brazilian government thousands of jobs and millions in tax revenues, but the government response is practically nonexistent. The Ministry of Education and the administrative bodies of universities and colleges should work with the enforcement authorities to make sure that a clear message is sent to those engaged in illegal photocopying, both on and off campus, that this activity will not be tolerated. The Associação Brasileira de Direitos Reprográficos (ABDR) has been working with authorities to conduct

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<sup>7</sup> BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: A 10-point drop in software piracy in Brazil, from 64% to 54%, could add \$4.8 billion to the economy, directly create 21,000 high-wage technology jobs, increase local industry revenues by \$3.7 billion, and generate an additional \$550 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Brazil.pdf>.

enforcement actions and plan for future endeavors. AAP will be monitoring closely the degree of cooperation the ABDR receives from authorities.

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

- MPA reports that, in 2005, more than 1,899 websites in Brazil were shut down, and 14 people were arrested at the request of MPA anti-piracy campaigns. Unfortunately, this is not enough to stop the trend of growing hard-goods or download piracy in the net. The audiovisual industry has seen an increase in the use of the Internet as a distribution system for optical disc piracy, usually offered on websites for collect-on-delivery. In 2005, MPA obtained good results in getting the ISPs to remove websites selling pirated goods as well as suspending accounts of users who were downloading films illegally.
- In 2005, the recording industry reports that through a local Internet anti-piracy campaign over 2,200 web and FTP sites were taken down, of which 1,100 were offering hard goods.
- The business software industry reports positive responses in auction sites and specifically in the biggest one (Mercadolivre.com which claims an 85% market share). In 2005, 27,401 Internet sites were removed. However, BSA has seen a significantly increase in the use of the Internet as a distribution system for software piracy, usually offered on websites for delivery (know as *hotwarez*). The takedowns of *hotwarez* have been increasing insufficiently to combat software Internet piracy efficiently in Brazil.
- With respect to videogames, the domestic enforcement program of the Entertainment Software Association (ESA) continues to take action against local websites and auction listings. In 2005, 57 websites and over 1,200 auction listings for pirated entertainment software products were taken down. The stepped-up local enforcement efforts against online piracy and increased cooperation from the operators of the domestic auction sites has resulted in a decrease in the monthly volume of auction listings of pirated games.
- In 2005, over 44,000 business and entertainment software advertising and websites were taken down.

**Optical Media Piracy:** Replication of pirate optical discs in Brazil, whether on a large- or small-scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, continues to cross the porous Brazilian borders, devastating the local markets. Reports indicate that Brazil has as many as 13 optical disc plants, with 88 production lines; most of these plants are believed to be operating legitimately and are not a significant source of pirated optical disc product. Growing numbers of small duplication facilities can produce a significant amount of pirate CDs each day. A related, and continuing, problem is the large-scale distribution networks in Brazil, whether these involve thousands of street vendors and established facilities (such as gas stations) which blanket the major highways in Brazil, or the non-established facilities in *camelodromos* (flea markets), or on the streets.

**Organized crime remains a significant factor in piracy.** In June 2004, the notorious piracy kingpin Law Kim Chong was arrested for attempting to bribe the Chairman of Brazil's Congressional Anti-Piracy Committee. As part of the follow-up to this arrest, authorities raided one warehouse owned by Chong in which over 7.5 million blank CD-Rs and 3.5 million blank DVD-Rs were seized. The bribe was alleged to be between US\$1 million and \$2.3 million. Chong owned numerous shopping centers and supplied product from China to over 10,000 points of sale throughout the country. Chong has been convicted under organized crime laws and is in jail.



The Federal Police have taken few organized crime–related investigations with no effective results after the ending of anti-piracy CPI. Ironically, the most important illegal commercial centers keep working normally. There is only sporadic police activity at the federal level, and the existing state-funded task forces are small operations in the states of Rio, São Paulo and Rio Grande do Sul, all with human and financial resources far below the requirements needed. In order to be more efficient, the Federal Police must coordinate operations and information with state police and create a permanent structure.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

The year 2005 marked a significant improvement in the attitude and willingness of many Brazilian agencies to focus on piracy and enforcement. Unfortunately, the industries cannot report a sea change of improvement in actual results in 2005 compared to prior years. The major criminal enforcement problem in Brazil continues to be the failure of Brazilian authorities to emphasize serious prosecution and deterrent sentencing. Police raids have been moderately successful (depending on the jurisdiction), but these result in few prosecutions and fewer criminal convictions. The civil system on the other hand has offered some relief in some cases involving computer software. The copyright industries believe that tangible progress on improving copyright enforcement — from raids through criminal sentences — may be within reach in 2006.

**Organized Actions at the State and Local Levels:** The level of governmental anti-piracy attention varies throughout Brazil. The copyright industries report good cooperation with certain Brazilian states. The industries strongly support efforts by the CNCP and other government agencies to create task forces to focus on copyright anti-piracy efforts. For example:

- In January 2006, the Governor of the State of São Paulo signed a decree creating an inter-secretarial committee to fight piracy. The committee includes the following agencies: Casa Civil, Segurança Pública, Justiça e Defesa da Cidadania, Fazenda, Cultura, Emprego e Relações do Trabalho, Tecnologia e Desenvolvimento Econômico e a Procuradoria Geral.
- The State of Rio de Janeiro created a special anti-piracy task force in mid-2002, and its Special Anti-Piracy “Delegacia” (Precinct) has been quite active. Nevertheless, this task force (which notably is state-funded and not a federal effort) is a small operation with human and financial resources far below the need shown by the private sector, both copyright and trademark.
- A few years ago, the state government of São Paulo created a specialized police unit for piracy cases, the DEIC, which is part of the Organized Crime Office. The participation of DEIC in the combat of piracy has been far below the level expected or hoped for by the industries.
- The municipality of Porto Alegre in Rio Grande do Sul has established a municipal effort to fight piracy.
- Other state-level anti-piracy efforts have arisen on an ad hoc basis, including police task forces in Goiás, Pernambuco and Minas Gerais;
- The industries have identified the need to have anti-piracy task forces in additional cities/states such as Belo Horizonte, Salvador, and Fortaleza e Curitiba.

**Police Raids:** While isolated police raids have been moderately successful, the actions they take rarely produce results in the courts. There is still a lack of clear and direct instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Polícia Federal, Polícia Civil, Polícia Militar, Polícia Fazendária, Alfândega) to act in cases of copyright infringement. The level of police attention to piracy varies throughout the country. Certain

industries are able to achieve adequate cooperation with police officials, often depending on the region and on personal contacts. Most enforcement efforts in Brazil are commenced by investigations conducted by the copyright industries themselves, and are usually not the result of any major Brazilian government or law enforcement initiatives. Because Brazil has many different police corps, the rivalry among them, with some few exceptions, negatively impacts their ability to conduct effective and efficient raids. Federal police officials have jurisdiction over the types of crimes that are generally viewed as producing large-scale corruption (such as tax evasion, drug trafficking and money-laundering). Even in 2005, most industry-led enforcement efforts end up being handled by state and local police officials. According to the MPA, in 2004 and 2005, at the request of the audiovisual sector, police authorities performed 32 arrests “in flagrante delicto” and 63 persons were indicted.

BSA and the Brazilian Association of Software Companies (ABES) report that, in 2005, a total of 1.7 million counterfeit CDs (both business applications and entertainment titles) were apprehended in more than 656 search and seizure raids staged over the course of the year throughout the country. This led to the closure of 19 counterfeiting laboratories and to 57 arrests of people caught in the act of committing crimes. Under the 2005 campaign, 99 lawsuits were filed against companies using pirate software. Fines imposed, which can reach as much as three thousand times the value of each software application used, totaled US\$1.55 million. The cases were executed in São Paulo, Rio de Janeiro, Minas Gerais, Goiás, Bahia, the Federal District, Paraná and Rio Grande do Sul. Over the last year, 3,036 cease and desist notices were sent out as a result of anonymous complaints, surpassing the 2,063 complaints registered in 2004. Because of this, companies in violation which acquired licenses to legalize their situation made payments totaling US\$4.9 million. 540 websites selling counterfeit programs were taken down, in addition to 44,400 online ads dedicated to publicizing this service.

ESA saw a positive enforcement trend in 2005, with more police actions focused on laboratory operations involved in the production of video game software, as well as the market-places notorious for selling it. Police cooperation has also been a factor in raids against retail outlets, storage warehouses and even against street vendors in São Paulo, Rio de Janeiro and Rio Grande do Sul. In April, the São Paulo police raided an optical disc factory, the Digimatic Oficina Replicador, and seized 8 replication machines, along with 30,000 pirated entertainment software products on optical discs (primarily PlayStation® games). The facility reportedly had a production capacity of 15,000 discs per day. The police arrested the owner, a Jordanian national, who subsequently posted bail. There has, unfortunately, been very little progress on this case in the ten months since the raid, with no one being charged.

In June 2005, two enforcement actions at two shopping outlets in São Paulo (the Super Shopping Center and the Stand Center) resulted in the seizure of close to 30,000 pirated video game products. In September, the São Paulo police raided a warehouse that netted approximately 53,500 video game software products. The raid on the warehouse coincided with actions against nine retail outlets at the Stand Center that resulted in the seizure of close to 40,000 pirated products, as well as actions against street vendors in the vicinity from whom about 5,800 pirated video game products were seized. A similar operation was also carried out in Rio de Janeiro, where police raided a CD-R burning lab, resulting in the seizure of 612 DVDs, 95 pieces of packaging material, 125 CD games, 3 CPUs and 12 CD burners. Various other raids were also conducted in Rio Grande do Sul against retail outlets and CD-R burning labs.

In December 2005, a São Paulo law enforcement operation (“Operation Sagitario”), involving 700 agents from the Federal Police and the Federal Revenue, was carried out against the Stand Center shopping outlet. The operation was reportedly a success and the timing was helpful, as it coincided with the beginning of the holiday shopping season. Although the action was

significant, the government did permit the Stand Center to re-open within weeks of the raid. The Stand Center, with approximately 214 retail “kiosks,” reportedly generates \$R20 million (US\$9.2 million) per month.

There are, however, remaining challenges. For example, Nintendo of America (NOA) generally files civil or administrative actions rather than criminal actions, as the latter are more difficult to pursue. The costs associated with pursuing a criminal case are much higher and the outcomes inconsistent. Cases remain unresolved for long periods of time; for example, NOA is awaiting resolution of some cases that have been pending for at least five years.

**Brazilian prosecutors pursued very few criminal cases.** Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Prosecution concentrates in Rio de Janeiro and São Paulo, where there are specialized IP units. However, the real problem is in the judicial system. Very often judges do not accept piracy charges or do not issue deterrent sentences. In a recent case the defendant was sentenced to two years and two months in prison, but was suspended and only a fine was imposed. Case backlogs also constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities and a general lack of resources. Over the last four years, the ratio of convictions for copyright infringement to the number of raids run each year have never exceeded 1% (see chart, below). Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence.

**Non-deterrent penalties continue to be issued by the courts.** In those very few criminal copyright cases which do reach judgment, the sentences are primarily small fines, probation and community service. Between 1995 and 2005, most of the cases resulted in suspensions or dismissals under Law 9099-95, a law which permits judges to sentence first-time offenders with up to two years’ probation and monetary damages. The Brazilian criminal code was amended in 2003 to clarify and strengthen certain procedures and penalties which had hobbled effective enforcement throughout the 1990s (see discussion, below). Since the 2003 amendments, it appears that judges are now more likely to authorize the destruction of seized pirated products even before the final resolution of the case. However, suspensions remain the norm.

**Delays by police, prosecutors and judges in criminal cases.** Industries report that it still takes a long time for a criminal case to wind its way through the Brazilian courts; no improvement was noted in 2005. Delays in criminal copyright infringement cases can extend as long as two to three years in the courts of first instance. As a result, there is a tremendous backlog of cases in the Brazilian courts. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor’s office to file the criminal case. One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters (see discussion, below). MPA reports that it has currently more than 8,200 pending cases of audiovisual copyright piracy in Brazil.

**BRAZIL**  
**COMPILATION OF CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS**  
**AS REPORTED BY THE MEMBERS OF THE**  
**INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)**  
**2002 – 2005**

<b>ACTIONS</b>	<b>RECORDING INDUSTRY</b> -2002- *2003* 2004 (2005)	<b>MOTION PICTURE INDUSTRY</b> -2002- *2003* 2004 (2005)	<b>BUSINESS SOFTWARE &amp; GAME SOFTWARE INDUSTRIES</b> -2002- *2003* 2004 (2005)	<b>TOTAL</b> -2002- *2003* 2004 <b>(2005)</b>
<b>NUMBER OF COMPLAINTS FILED WITH POLICE</b>	-206- *190* 113 (86)	-- 1,825 – *2,995* 3,361 ( 3,045 )	-253- *351* 668 (656 )	-2,284- *3,536* 4,142 ( 3,787 )
<b>NUMBER OF RAIDS CONDUCTED</b>	-870- *1,018* 936 ( 1,457 )	-- 1,640 – *2,995* 1,829 ( 2,552 )	-253- *175* 626 ( 656 )	-2,763- *4,188* 3,391 ( 4,665 )
<b>NUMBER OF PIRATE COPIES OR MATERIALS SEIZED</b>	-3.78 million-  *5,686,253*  5.6 million CD-R/CD; 11.4 million blank CD-R  ( 6 million CDR's/DVDR's 31.7 million blank CD-Rs and DVD-Rs )	-253,805 VHS, 56,037 blank OD-  *254,230 VHS and 134,417 CD-R*  254,996 VHS; 139,741 CD-R; 229,001 DVD; 9,134,880 blank OD  (154,407 VHS; 315,447 CD-R; 1,139,978 DVD; 17,640,383 Blank OD )	-355,156-  *Business software- 574,341 Game software- 845,977*  Business software 352,457; Game software- 861,637  ( Business Software 493,147 Game Software 1,224,190)	-4.4 million- *7.5 million*  28.0 million  ( 58.7 million)
<b>NUMBER OF CASES SUSPENDED OR DISMISSED</b>	-40- *29* 96 ( 5 )	-144- *23* 766 ( 1,259 )	-0- *0* 15 ( NA )	-184- *52* 862 ( + 1,264 )
<b>NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)</b>	-11- *8* 17 ( 21 )	-13- *14* 15 ( 14 )	-0- *0* 1 ( NA )	-24- *22* 32 ( + 35 )
<b>CRIMINAL SENTENCE ISSUED</b>	-Ranging from: 1-year community service; 2 years community service and fines; 2 years in jail plus small fine; 6 years in jail plus 20 days' fine-  *Minimal fines*	-Community service, probation-  *Minimum 1-year, maximum 18-months, all suspended*  Minimum 1 year, maximum 18 months, all	-None-  *None*  Commuted sentences  ( NA )	-Minimal- *Minimal* Minimal (Minimal)

**BRAZIL**  
**COMPILATION OF CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS**  
**AS REPORTED BY THE MEMBERS OF THE**  
**INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)**  
**2002 – 2005**

ACTIONS	RECORDING INDUSTRY -2002- *2003* 2004 (2005)	MOTION PICTURE INDUSTRY -2002- *2003* 2004 (2005)	BUSINESS SOFTWARE & GAME SOFTWARE INDUSTRIES -2002- *2003* 2004 (2005)	TOTAL -2002- *2003* 2004 (2005)
	Minimal fines  (Community Service and minimal fines )	suspended  (Ranging from 1 year of community services to 2 years of community services plus 10 to 20 days' fine )		
<b>RATIO OF CONVICTIONS TO THE NUMBER OF RAIDS CONDUCTED</b>	-1.26%- *0.79%* 1.82% ( 1.4 % )	-0.79%- *0.47%* 0.8% ( 0.54 % )	-0%- *0%* 0% ( NA )	-0.87%- *0.53%* 0.9% ( ~ 0.7 % )

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

**Border Enforcement:** During 2005, the Brazilian government improved its efforts to combat the importation of piratical and counterfeit materials. Customs authorities have been very active not only at the border of Paraguay where the seizures of blank optical discs increased significantly, but also in ports like Santos and Paranaguá. At a January 2006 conference in Washington, D.C., a CNCP official said that approximately 85% of infringing products in Brazil come from outside Brazil's borders. Regarding audiovisual piracy, almost all pirate products are produced locally; however, the blank optical media are imported or smuggled into Brazil. Various agencies have been involved in intercepting and seizing shipments full of pirated and counterfeit product. For years, the copyright industries have recommended that controls at the major transshipment points be strengthened, and we are pleased that improvement is underway. Border enforcement will continue to be enhanced if Brazilian authorities can better coordinate with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. Although much of the music and audiovisual piracy has turned to domestic production, infringing copies of entertainment software (both in silver disc and cartridge format), and mis-declared and infringing blank CD-Rs, continue to enter as infringing imports.

- The Justice Ministry's Anti-Piracy Council announced in September 2004 a new measure prohibiting the shipment of blank optical discs into Brazil through the Paranagua and Santos ports if those shipments were marked for transit through Paraguay and then to be returned to Brazil. This initiative operated well during 2005.

- In Fall 2004, the Federal Highway Police began to enforce federal highway regulations against contraband trafficking, usually involving buses transporting contraband merchants (*sacoleiros*) from Paraguay. Heavy fines and/or seizure of the bus can result. There were numerous actions by the highway police in 2005 to intercept buses transporting pirated materials.
- Brazilian pirates take advantage of the lack of border controls and install manufacturing, assembly and printing facilities on both sides of the border, bringing their products back and forth without any kind of control. To stem the flow of this product, IFPI and Phillips presented in 2002 a joint petition to the Customs Central Coordination (COANA) requesting a number of measures which include creation of a specific line item for blank CD-Rs, checking imports for under-valuation and monitoring entry of known pirate CD-R labels. Unfortunately, nothing was done about this in 2005.
- The software industry continues to be concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice. This was still true in 2005. Specific action is needed on this issue, focused on hardware parts and components.
- The ESA reports some positive developments on border enforcement in 2005. In April, Brazilian authorities seized over 10,200 pirated videogames (including 1,600 counterfeit cartridge-based games) crossing the border from Parana, Paraguay. In August and September, again at the Paraguay border, an enforcement action netted 37,000 pirated entertainment software products (including over 3,100 counterfeit video game cartridges). In August, federal highway police in Rio Grande do Sul intercepted a truck that had attempted to evade a roadblock set up by the local law enforcement authorities. Upon inspection of the truck, the police found approximately 538,000 pirated PlayStation® and PlayStation2® video games. The truck had originated in Montevideo, Uruguay, and its driver and accompanying “salesman” were arrested. Both were residents of Rio Grande do Sul.

**Civil Damages, Delays and High Bonds:** In 2005, the business software industry continued to bring civil search and seizure actions, usually followed up with the filing of civil damages suits. The level of damages awarded in these software cases is unprecedented worldwide with respect to software copyright infringement suits. However, such success is not without some glitches. First, the civil court system in Brazil is notoriously overloaded, inefficient, and slow. Cases usually take from 18 months to 4 years to come to trial. Moreover, defendants have many grounds for appeal, and this process regularly takes three to four years before a judgment is issued by the relevant superior court. Due in large part to these unacceptable delays and the lack of attention of judges to copyright protection, BSA currently reports that more than 200 civil cases are awaiting judgment. Second, Brazilian courts also continue to require extremely high expert fees and bond requirements. In some BSA cases during 2005, for instance, bonds of US\$50,000 to US\$100,000 were required, and BSA had no option but to terminate the cases. On average, BSA has paid up to US\$5,000 for experts’ fees and up to US\$25,000 as bonds.

**Training:** The copyright industries conduct numerous trainings, seminars and workshops with Brazilian enforcement officials, at the national, regional and state levels. In 2005, MPA conducted 11 training, seminars and workshops for enforcement authorities. The recording industry reports organizing two seminars and participating in another eight seminars aimed mostly at police and prosecutors. BSA and ABES (Brazilian Association of Software Industry) have conducted numerous trainings, workshops, and seminars with Brazilian enforcement officials, in partnership with the music and movie industries. In 2005, ESA and ABES participated in training events conducted in Rio de Janeiro, including the Global Congress to Combat Counterfeiting, at which more than 200 police officers were trained, as well as a training seminar for the Military Police of the State of Rio

de Janeiro. IIPA and its members support the August 2005 State Department/INL announcement to devote funds to Brazilian prosecutors on IPR/cybercrime enforcement.

## **COPYRIGHT LAW IN BRAZIL**

**1998 Copyright Law and 1998 Software Law:** The Brazilian government unfortunately continues to refuse to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, despite the fact that its copyright law is quite comprehensive and the Brazilian creative community relies on copyright protection to reach the global market.<sup>8</sup> As a statutory matter, Brazil has already implemented its substantive copyright obligations compliant with, and even beyond, those required by the TRIPS Agreement. These include protection for temporary copies, and pre-set statutory damages for copyright infringement. Brazil already affords a term of life plus 70 years for works and 70 years following first publication for sound recordings and audiovisual works.

**Proposal on student copying of works:** A new issue that has recently come to IIPA's attention involves pending legislative provision, No. 5046/2005, which modifies article 46 of the Copyright Act. The provision, which is currently under analysis by the Educational Commission of the Brazilian Congress, seems to grant overbroad privileges to university students to make copies of entire works as long as those copies are not directly for commercial use. The provision is expected to move to the Constitutional Commission of the Brazilian Congress within the next two months. The Congress should ensure that any provision it passes comports with international legal standards.

**Criminal Code Amendments 2003:** On July 1, 2003, the Brazilian criminal code was amended to increase criminal sanctions for copyright infringement and amend certain procedures. Effective August 1, 2003, Law 10695 amended Article 184 of the Criminal Code by raising the minimum penalty from one year to two years in prison for persons convicted of illegally reproducing, distributing, renting, selling, acquiring, smuggling into the country, or storing protected copyright works with the intent to profit from reproductions. A fine will also apply in addition to the prison sentence.<sup>9</sup> The maximum penalty of 4 years' imprisonment will apply if the violation involves supplying unauthorized works to the public via cable, optic fiber, satellite, airwaves or any other method of transmission for a profit. Those persons infringing copyright without intent to profit are subject to detention of three months to one year or a fine. These amendments were significant because penalties of one year or less of jail time, at the state level, could be commuted to a fine, or a judge could suspend a case indefinitely (Law 9099.95). The 2003 amendments also codify procedures to seize and destroy contraband and provides judges authority to dispose of seized equipment in a way that ensures it will not be used for commercial purposes. The amendment affecting experts' determinations is also positive in that it allows a single private party with technical knowledge to make a determination; such a determination, therefore, could be made by an industry expert.<sup>10</sup>

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<sup>8</sup> Brazil also has implemented at least some of the provisions of the two WIPO Internet treaties, such as civil sanctions against circumvention of technological protection measures and removal or alteration of electronic rights management information. On the other hand, Brazilian law does not establish ISP liability and notice and takedown procedures, and criminal sanctions for circumvention of technological protection measures and removal or alteration of electronic rights management information. The Copyright Law also needs to be amended to provide a comprehensive right of making available.

<sup>9</sup> The law changes the "unit" of fines and bonds from "daily salary" units to "monthly minimum wage" units. In other words, the minimum fine or bond is now 240 Reais (US\$110) instead of 1/30th of that amount. The judge sets the fine/bond, not the law. The maximum penalty continues to be four years in jail.

<sup>10</sup> The 2003 amendment is helpful in three additional ways: (1) It requires the judge to assign custody of the evidence to the injured party—in the past, judges have turned evidence over to suspects who have in turn altered the evidence in

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

**Pending Anti-Piracy Legislation:** The CPI drafted and presented to Congress five anti-piracy bills, two of which particularly implicate interests of the copyright industries.

(1) Bill Number 3964/2004: This bill proposes to amend Articles 184 and 186 of the criminal code (as well as corresponding provisions to the Criminal Procedure Code) and the first and third paragraphs of the Law No. 9609/98, in order to increase imposable sentences for piracy, and also some provisions of the criminal procedure code which would increase sentencing from a minimum of two years, to two years and two months. This change is significant because the higher jail time sanction will remove alternative and lesser sanctions such as community service. This bill was in the House of Deputies in 2004 and is currently before the Constitutionality Commission. The reporter was designated, but the report has not yet been issued. .

(2) Bill Number 3.965/2004: This bill proposes to increase the penalties in the Software Law from confinement from one to four years and fine to confinement from two years and two months to four years and a fine. This bill also details additional actions involving computer programs which would subject defendants to sanctions. Amendments introduced in the lower house of Congress in June 2004 now await a committee ruling to determine their constitutionality. The bill is before the Committee of Constitution and Justice, the first sub-committee of the Brazilian House of Representatives.

The CNCP is also preparing bills to be presented to Congress to expedite piracy investigations and legal actions. Reportedly the CNCP's Legislative Working Group is preparing a new substitution bill that will gather all ongoing bills and new legislative amendments in order to enhance intellectual property protection in Brazil. After the approval of CNCP's members, this proposal will be sent to the Brazilian Congress.

**Tax Evasion:** A "fiscal crime" provision was inserted, with the approval of the software industry, in the 1998 Software Law. Under the Software Law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as an independent public action. BSA was hopeful that this type of tax evasion case would have a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies. No improvements were reported in 2005; it seems clear that the Receita Federal and the respective state tax authorities are dedicating no resources to pursuing these tax evasion cases.

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ways prejudicial to copyright owners' cases; (2) police are more inclined to view piracy as a serious crime worth their time; and (3) suspects apprehended by police are now held until released by a judge, costing the suspect at least time, a bond and perhaps attorney fees.



## **ADDITIONAL ISSUES**

**Specialized IPR Courts with Copyright Jurisdiction:** The CNCP has been holding meetings with judges to discuss the creation of specialized IP courts. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which would significantly improve intellectual property rights enforcement. However, no specific action has yet been taken to create these courts. Consideration of this remedy to help ameliorate the sorry state of anti-piracy enforcement would be welcomed.

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

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

**Non-Tariff Barriers—Remittances, Computer Software and Tax Barriers:** Several barriers have been identified in prior IIPA 301 reports, and no progress was reported in 2005. First, although Brazil has eliminated most of the non-tariff barriers that afflict the computer software industry, several issues still remain. These non-tariff market access barriers, if corrected, could attract additional foreign investments in the technology sector and help further develop the technology industry in Brazil. One of the main issues deals with a law passed by the previous administration. Law 10.332 imposes an additional 10% tax called “CIDE” (*Contribuição de Intervenção no Domínio Econômico*) on international payments for technology and royalties of any nature. CIDE essentially raises taxes on foreign remittances of royalties, etc., to 25%, as there is currently a withholding tax of 15% on the remittance of payments related to software licenses. The constitutionality of CIDE is also questionable; it is currently being challenged in court by several Brazilian and international software companies, based upon the argument that CIDE was enacted under the wrong procedure. Second, the Central Bank requires (per Circular No. 2685 of May 1996) that an agreement duly registered with the Ministry of Science and Technology (including the registration certificate) be presented to the financial institution conducting the currency exchange operation as a prerequisite to remitting overseas payments. The Central Bank of Brazil currently requires all documentation listed in Circular No. 2682 of May 1996 of the Central Bank.

Third, high tariffs and taxes plague the entertainment software industry and serve as a significant barrier to market entry as these additional costs translate to higher prices for legitimate goods in the market. Nintendo of America (NOA) reports that tariffs range from 17.5% to 20% on video game products and video game software. Additional taxes are also imposed on entertainment software products, and include: (1) a federal industrial products tax of 50% of the value (i.e., cost, insurance and freight [CFI]) of the article; (2) a miscellaneous tax of 1%; (3) so-called social security taxes at a combined percentage of 9.25%; and 4) a value-added tax of 17% or 18% imposed by

state governments. These tariffs and taxes are imposed cumulatively, and as such, the actual cost to the consumer for a legitimate entertainment software product is three times the cost of a counterfeit product. Obviously, these costs are not borne by pirate operations that smuggle counterfeit and pirated products into the country. Brazil's taxes on videogame products are the highest in the hemisphere, and serve as an impediment to the ability of legitimate companies to develop a market presence and provide consumers with reasonably priced legitimate products.

**Possible "Theatrical Window":** It has been reported that ANCINE, the Brazilian National Film Agency, intends to impose a mandatory theatrical-to-video window, largely as a result of pressure by exhibitors. MPA strongly opposes any kind of windows regulations and defends the distributors' right to freely determine release dates, especially in the face of high levels of piracy and technological advances offering alternative delivery platforms to the public.