

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2009.

**Executive Summary:** Brazil is one of the largest commercial markets for legitimate copyrighted materials in the Western Hemisphere, and the Government has manifested in most cases a clear appreciation of the importance of protecting intellectual property that is greatly appreciated by IIPA members. With the exception of the disturbing attitude toward photocopying practices in the academic sector, the Brazilian Government has actively worked with the private sector to develop and implement strategies aimed at education, enforcement and expansion of commercial opportunities. This overall commitment has produced some concrete results, but much remains to be done in the fight against piracy. There are several forms of piracy that continue to prejudice the position of the creative community in Brazil, broadly grouped as: (1) hard goods piracy, including retail and street piracy, end-user software piracy, camcord piracy and illegal photocopying, (2) online piracy, and (3) imports of infringing products and contraband. The rapid growth of Internet users in Brazil continues to pose both opportunities for new business models and more avenues for piracy for all industry sectors. During 2008, the copyright industries continued to work well with the National Council to Combat Piracy and Intellectual Property (CNCP), as this entity became more active in both operational initiatives and legislative coordination efforts than in 2007. Despite good cooperation between the law enforcement authorities and rights holders on seizing pirated product, there remain numerous challenges in obtaining deterrent and expeditious criminal prosecutions and civil judgments against copyright infringement. Universities, likewise, need to take more steps to legalize use of academic materials on their campuses. This coming year will also present a legislative agenda on many copyright law and enforcement issues that will require close monitoring. Finally, a thorough overhaul of the Brazilian judicial system is needed to have cases reach sentencing more quickly and with fewer procedural obstacles.

**Priority actions requested to be taken in 2009:** The copyright industries recommend that the following actions be taken in the near term in Brazil in order to improve the adequate and effective protection of copyrighted materials:

### Enforcement

- Achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process (BCM), including: (1) increase anti-piracy raids in well-known marketplaces, (2) encourage the establishment and formation of joint state and municipal anti-piracy intellectual property rights (IPR) task forces which focus on priority locations, (3) take enforcement actions on the Brazil-Paraguay border, both on-land and on-water, (4) enhance deterrence through criminal prosecutions and the application of deterrent penalties, (5) continue work to implement the action items in the CNCP national plan, (6) pursue federal government-sponsored educational and media anti-piracy campaigns, working with the private sector to raise public awareness of the anti-piracy fight, and (7) continue working with the industry through the CNCP.
- Create more Specialized IPR units at both the state and local levels.
- Improve actions against Internet piracy. This includes conducting *ex officio* actions on facilities that knowingly offer public access to unauthorized peer-to-peer programs, particularly those locations that facilitate or enable unauthorized transactions by providing the materials required for copying downloads (e.g. blank CD-Rs).
- Have the CNCP continue to support discussions between the copyright industries and the Internet Service Provider (ISP) community to combat Internet piracy.
- Conduct effective enforcement against copyshops, located both inside and outside university campuses that make illegal copies of books and related teachers' notes beyond the legal limits. Engage university administrations in efforts to encourage the use of legitimate materials on campuses.
- Establish a reference price for imported blank media.
- Establish a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures.

### Legislation

- Work with the House of Deputies' Anti-piracy Special Committee to pass pending legislation aimed at providing and enhancing the tools and measures necessary to conduct effective copyright enforcement (such as making criminal



copyright cases move faster, permitting sampling of forensic evidence, making camcording a crime, adopting the cybercrime bill).

- Ensure that the copyright sector can participate with the Ministry of Culture on any process in 2009 to amend the Copyright Law.
- Have the State of São Paulo University (USP) reverse its harmful administrative rule which allows widespread reprographic copying of portions of books by commercial, for-profit copy centers, and institute guidance for other universities that have followed in USP's footsteps.
- Create specialized IPR courts with copyright jurisdiction.
- Remove market access barriers, including high tariffs and taxes placed on entertainment software and consoles. Impose no new barriers (such as a theatrical window) on films.
- Amend the Penal Code to impose criminal penalties on the unauthorized camcording of films in theaters.
- Reject legislation that would have the effect of promoting unauthorized, overbroad reproduction of works in university settings (such as House Bill 5046/2005 and Senate Bill 131/2006).
- Ensure that the bill (House Bill 1120/2007) which deals with public availability of products or works based on publicly financed research, comports with international norms by leaving value-added copyrighted products incorporating publicly funded data out of its mandate;
- Amend the Digital TV bill to include a provision prohibiting the retransmission of digital audiovisual content on the Internet.
- Reject a bill which would exempt from taxes the importation of blank digital media.
- Reject a bill (Projeto dos Sacoleiros) which would grant a 50% exemption on the importation tax of products imported through terrestrial border. (If this bill passes, then the implementing regulation must assure that blank digital media will not be included in the list of products to benefit from the tax reduction).
- Reject a bill that would authorize the suspension of intellectual property protection in Brazil for nationals (individuals and/or companies) of WTO infringing countries, deny registration of intellectual property rights, block remittance of royalties and technical assistance payments, and provide for compulsory licensing.

BRAZIL Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 <sup>1</sup>										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Music Compositions	117.1	48%	151.6	48%	176.5	40%	334.5	52%	343.5	52%
Business Software <sup>2</sup>	1,068.0	60%	889.0	59%	574.0	60%	383.0	64%	359.0	64%
Motion Pictures <sup>3</sup>	NA	NA	NA	NA	NA	NA	101.0	22%	120.0	30%
Entertainment Software <sup>4</sup>	NA	NA	NA	91%	159.3	88%	120.8	77%	120.4	74%
Books	NA	NA	18.0	NA	18.0	NA	18.0	NA	18.0	NA
<b>TOTALS</b>	<b>1,185.1</b>		<b>1058.6</b>		<b>927.8</b>		<b>957.3</b>		<b>960.9</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of in IIPA's 2009 Special 301 submission at [www.iipa.com/pdf/2009spec301methodology.pdf](http://www.iipa.com/pdf/2009spec301methodology.pdf). For more information regarding the history of Brazil under USTR's Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more on IIPA's global issues, see IIPA's 2009 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

<sup>2</sup> BSA's 2008 statistics are preliminary and represent the U.S. software publishers' share of software piracy losses in Brazil. 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. The methodology is based on that found in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at [www.bsa.org](http://www.bsa.org).

<sup>3</sup> MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

Brazil is a beneficiary country of the U.S. Generalized System of Preferences program (GSP). The GSP program requires that a beneficiary country provide "adequate and effective" protection to U.S. copyrighted materials. During 2008, \$2.75 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code.

## COPYRIGHT PIRACY IN BRAZIL

Internet piracy is a major challenge for all copyright-based industries doing business in Brazil. At the same time, piracy involving hard goods continues to be a key concern for several copyright-based industries.

**Internet piracy:** Brazil is the sixth most populous country in the world, and the seventh largest in terms of Internet usage. There are an estimated 67.5 million Internet users in Brazil, which represents about 35% of the country's population (according to the ITU, reported by [www.Internetworldstats.com](http://www.Internetworldstats.com)).

The recording industry reports that Internet piracy in Brazil is today the most prevalent form of music piracy. Most of the problem is file sharing committed through peer-to-peer (P2P) networks. The most popular P2P network in Brazil is ARES, but Gnutella, BitTorrent and E-donkey are also very popular. According to a third party survey conducted by IPSOS, every year there are more than 1.7 billion illegal music downloads in Brazil, and there are almost 3 million downloaders.

However, during 2008 a significant increase in music piracy took place in "blogs", forums and social networks, where millions of links to illegal music files are posted by registered users. One of these social networks (ORKUT) comprises more than 35 million users and about one million active cyber-locker-links available at any moment in time. These specific cases remain largely ignored by the enforcement authorities, in particular because of their lack of training and attention to Internet-based piracy. The recording industry initiated in 2008 a notification campaign requesting ORKUT to remove links and "communities" dedicated to piracy. So far ORKUT responded with slow and sporadic actions not strong enough to solve the problem.

The Motion Picture Association (MPA) reports that its principal Internet problem involves cyberlockers such as rapidshare and megaupload. Hard good sales via the Internet continues to be a problem. On a positive note, auction websites offering illegal film content have decreased thanks to cooperative efforts between industry and the popular Brazilian website Mercado Livre.

The Entertainment Software Association (ESA) reports that there has been an alarming and dramatic increase in infringing activity for video game products occurring through P2P networks in Brazil. Over the past year, based on recently-completed studies, Brazil has risen to become one of the top ten countries for overall P2P game download volume. For example, in industry estimates of game downloads for 13 top game titles over a 4-week period (December 2008), Brazil accounted for 4.9% of completed downloads globally, and 5.4% of completed downloads for the two most heavily copied games. The industry estimated there to have been more than 318,000 infringing downloads of these titles completed during this period. The studies also revealed a disproportionately high percentage of console game downloads (52%) to PC game downloads (39%), which tends to confirm the widespread availability of console circumvention devices in this market.

**Hard goods piracy:** Three factors contribute greatly to the widespread availability of pirated hard goods in Brazil. First, there are large-scale distribution networks in Brazil that involve thousands of street vendors and established facilities (such as gas stations), which blanket the major highways in Brazil, as well as non-established facilities in *camelodromos* (street markets). Second, there is a large supply of blank media. An estimated 600 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country. Paraguay, as well as Hong Kong and Taiwan, account for 50% of the blank media entering Brazil. Third, organized crime is deeply involved in piracy in Brazil. Not only are Chinese and Middle East groups operating in the border with Paraguay, but they also control the distribution of pirate DVDs in the black markets at the end of a complex chain of command chain.

MPA reports that the most harmful form of audiovisual piracy in Brazil is indeed hard good piracy. DVDs in streets/markets increased despite public perception that DVD piracy had leveled off, primarily because the pirate distribution channels formerly dedicated to the distribution and sale of CDs have shifted to DVDs.<sup>5</sup> Most of the pirate audiovisual products

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<sup>5</sup> IBOPE (a market research institute in Brazil) conducted a survey on behalf of U.S. Chamber of Commerce and Angardi in 2008, and this report showed a slight decrease of pirate consumers but a big increase on piracy consumption of DVD units. The IBOPE study showed that in 2007, 30%

are burned CD-Rs or DVD-Rs. The vast majority of pirated DVD-Rs are locally reproduced in hundreds of facilities of varying sizes throughout the country. The large pirate black markets are a problem, as are strategic point of sales for certain street vendors, all of which create serious economic harm for legitimate business, especially local movie theaters and video rental stores. Pirated film products enter from Paraguay, and smugglers are moving to Guaira, Ponta Porã and Corumbá. Street sales of pre-release pirate DVDs (before the release of legal DVD and during theatrical release window) are especially damaging. Simply put, physical piracy damages the home entertainment market very rapidly. Sales of legitimate DVDs for the rental market decreased more than 30% in 2008.

MPA also reports that unauthorized in-theater camcording spiked in Brazil in 2008. In 2008 MPA identified 21 camcording cases in Brazil, compared to only one in 2007. Movies such as *Hancock*, *Speed Racer*, *Twilight*, *Madagascar: Escape 2 Africa* and *Kung Fu Panda* were camcordered in Brazil and posted to the Internet by organized release groups within days of their theatrical release in Brazil, undermining the lifecycle of the film not just in Brazil, but in other international markets, as well. To date, the National Anti-Piracy Council has proven unable to provide political support for such an initiative even though illicit camcording has a devastating impact on local video rental stores and theater owners.

The recording industry reports that the Brazilian music market saw some recovery during 2008. Physical piracy of recorded music in Brazil appears contained, mainly due to the consolidation of a national anti-piracy campaign and the striking increase of Internet piracy, especially of P2P file-sharing and cyber-lockers links posted on forums and social networking sites. Interestingly, the sales of hard copies of recorded music increased by 6.4% and sales through digital channels such as mobile phones increased by 89%. In total, the music market in Brazil saw an increase of 14%. The level of optical disc piracy of music products remains at 48% of the total Brazilian market. Street piracy in São Paulo and Rio de Janeiro is widespread, appearing in key traffic areas like Paulista Avenue in São Paulo. The larger problems are found in the popular street markets (*camelodromos*). However, because of the more systematic controls implemented by Civil and Federal police in recent years, the streets in major cities looks cleaner and seem to have lower amounts of pirated recorded music available.

The Business Software Alliance (BSA) reports no significant improvement in the business software piracy situation in Brazil during 2008; instead, the success was keeping the high piracy levels relatively stable. Software piracy continues to include the following: illegal reproduction and 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. The increasing use of the Internet as a means of advertising illegal software, along with the unauthorized electronic distribution of illegal software, continues. BSA reports that preliminary estimated trade losses due to software piracy rose to \$1.068 billion in 2008, with an estimated piracy rate remaining steady at approximately 60%. If the levels of software piracy were lowered by 10 points, there would be positive benefits to the Brazilian economy.<sup>6</sup>

The Entertainment Software Association (ESA) and its members report that there are a multitude of sources for pirated game product in Brazil. Small local disc-burning operations source their "masters" (from which they burn copies) either from counterfeit imports or, of late, more frequently from downloads of versions of pirated games on the Internet. These labs are then plugged into distribution networks that channel the illegal product into the major shopping centers and the street vendors that populate many of the major cities in Brazil. Pirated CDs have been increasing in quantity in São Paulo, especially in the open flea markets. "Feiras livres" (which ordinarily are where fruit and vegetable vendors congregate) are also increasingly becoming the leading hotspots for the sale of pirated video products in the country. Despite the focus on border enforcement, there is still Asian-manufactured product flowing into Brazil from abroad, particularly Nintendo cartridges, and high-end counterfeit game discs. Better enforcement against purveyors of circumvention devices and services is also necessary.

The publishing industry reports that very little about the book piracy situation in Brazil changed in 2008. Unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials continues to be the major form of book

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of the consumers interviewed had purchased piracy DVDs (against 22% in 2006), and in 2008 this number decreased to 28% (the error margin was 4%). Nevertheless, what is surprising is that the report also showed that the level of consumption of pirate DVDs increased from 11.6 units to 17.3 units per person.

<sup>6</sup> According to a January 2008 report issued by BSA-IDC, the information technology sector's contribution to the Brazilian economy could be even bigger if Brazil's PC software piracy rate were to be lowered 10% over the next four years. This would create an additional 11,500 jobs, \$2.9 billion in local industry revenues, and \$389 million in additional tax revenues for federal, regional, and local governments. See [The Economic Benefits of Reducing PC Software Piracy](http://www.bsa.org/idcstudy), available online at <http://www.bsa.org/idcstudy>.

piracy, resulting in substantial losses to international and Brazilian publishers alike. 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 Portuguese. The Associação Brasileira de Direitos Reprográficos (ABDR) has been working with authorities to conduct enforcement actions and plan for future endeavors. 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 most immediate concern of academic publishers in Brazil is the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP) almost four years ago. This rule allows (1) reprographic copying of portions of books by commercial, for-profit copy centers and (2) copying of foreign works that are "not available in the Brazilian market" without a license. It appears that "not available" means in practice, that if a book is not written in Portuguese and is not for sale in the nearest bookstore, it qualifies under this resolution. The latter provision applies even to the copying of 100% of a work. This ruling presents several problems under international norms and must be revoked. For-profit entities should not be given *carte blanche* to copy works outside the normal bounds of international obligations. Furthermore, "not available in the Brazilian market" has not been defined, and industry reports that in practice this provision is being used to copy en masse all foreign works. State and national authorities (including the Ministry of Education) should step in to revoke this rule, or at a minimum revise it to comport with Brazil's international obligations under the WTO TRIPS Agreement. ABDR presented a formal request for revocation of this rule to USP, receiving a refusal on the basis that the rule is "constitutional" and grants access to education and knowledge. Thus the ruling still stands, so forming a terrible precedent for others to follow. At least two private universities - Fundação Getúlio Vargas of São Paulo (FGV/SP) and Pontifícia Universidade Católica de São Paulo (PUC-SP) -- have implemented similar rules. This phenomenon contributes to an overall climate of disrespect for copyright in the academic context among universities in particular, and among government authorities more generally. Finally, as publishers are seeing an increase in electronic dissemination of textbooks, chapters and supplementary materials, authorities should be vigilant about addressing Internet piracy in the academic context as well.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

The Brazilian government through the federal, state and military police has conducted numerous enforcement operations. Police raids, especially on hard goods piracy, have been relatively successful seizing infringing product. Federal authorities conduct border operations and more complex investigations. However, as IIPA and its members have noted for many years, conducting raids merely to confiscate products, without further effective prosecution and deterrent sentencing, is not enough to reduce the significant piracy levels in both the hard goods and online environments in Brazil. A long litany of systemic problems and bottlenecks exist in bringing effective and expeditious criminal and civil copyright infringement cases in Brazil. An illustrative list of requested actions would be to:

- Encourage police to finalize their work and present cases to prosecutors, in a timely manner, as raids and seizures are rarely followed by criminal prosecutions.
- Encourage law enforcement to undertake more in-depth Internet piracy investigations, including surveillance on known pirate sites and generating leads that could lead to the identification of the sources of infringing product.
- Increase high-level investigations against organized crime syndicates.
- Augment coordination between federal and state IPR task forces.
- Establish a dedicated IPR section in the Federal Police and in Customs.
- Increase the number of border enforcement personnel, especially at the tri-border area.
- Legalize use of copyrighted materials on university and school campuses.
- Foster deterrent sentencing, encouraging training and outreach to the judiciary to increase understanding and appreciate of copyright piracy as a serious economic crime.
- Address, in a comprehensive manner, judicial delays in both criminal and civil copyright cases.
- Promote an environment of cooperation between ISPs and copyright holders to prevent online piracy.

**CNCP work and industry cooperation:** The CNCP (the National Council to Combat Piracy and Intellectual Property) is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign. All of the copyright industries' local colleagues participate directly on the CNCP. Copyright industry cooperation with the CNCP was excellent in 2008. In late 2007, new CNCP leadership was installed, and the new leadership seems to have emphasized educational and public awareness program planning. While such programs are indeed an important element of any national strategy, continued operational coordination, concrete actions, and leadership in legal reform, are imperative, and

indeed CNCP's focus in 2008 turned more toward these tangible action items. For example, the CNCP has supported an extensive training program that ABES and APCM have participated within more than 30 cities and exceeding the presence of over 2,000 law enforcement officials. The CNCP is overdue, however, in its obligation to understand and combat the Internet piracy problem in Brazil. Until now, no actions are being taken in the educational, enforcement or awareness area on the Internet front. The CNCP is not yet preparing itself for the present and future of the fight against digital piracy and that may compromise its effectiveness in the long term.

During 2008, the CNCP hired an outside Strategic Planning Consulting firm to develop a five-year anti-piracy plan to improve the quality and effectiveness of the CNCP and its programs. This process is in its final planning phase, as the discussion has turned to metrics and ways of measuring plan progress. Presently there are 23 proposed anti-piracy projects that range from strengthening partnerships with the ISP community, developing educational campaigns in schools, creating an anti-piracy intelligence database, working on an Internet anti-piracy portal, supporting cities with a "zero piracy" program and working to legalize the black markets, among others. In 2008, CNCP Executive Secretary Dr. Andre Barcelos and his staff personally participated in more than 20 training programs sponsored by ABES and APCM throughout the country. For example, proposed campaigns might include: (1) a "Legal Fair" campaign where the CNCP will work closely with vendors at fairs where pirate product is often offered, in order to have only legitimate product available; (2) a "Piracy Free Cities" campaign where the CNCP will support municipalities that will promote legalization of all products, following the example of Blumenau in the State of Santa Catarina; and (3) a "Business Against Piracy" Campaign where the CNCP will support shopping centers and outlets in promoting the public awareness of the problems of piracy. This strategic plan is in the final phase of construction. Members of the IIPA are very supportive of this new direction taken by the CNCP.

**More resources at the national level:** The local representatives of the copyright industry sectors all have good relationships with Brazilian law enforcement. Brazil's law enforcement agencies, various municipal authorities, and prosecutors all have authority to enforce copyright infringement. More resources should be provided to law enforcement.

**More cooperation needed with state and local officials:** State and local officials do conduct *ex officio* actions on a regular basis especially in São Paulo and Rio, but more actions are needed elsewhere. The relationships with State civil and military police vary, as does the level of local attention to anti-piracy efforts. The copyright industry strongly supports efforts by the CNCP and other government agencies to create task forces to focus on anti-piracy efforts. Seven police precincts specializing in IPR matters already exist (Rio de Janeiro, São Paulo, Bahia, Pernambuco, Minas Gerais, Federal District and Rio Grande do Sul). It is critical that such a specialized unit be also installed in the State of Paraná. Below is a listing of several state efforts to set up task forces to combat IPR piracy:

- The State of Rio de Janeiro created a special anti-piracy task force in mid-2002, and its Special Anti-Piracy precinct has been quite active. Nevertheless, this task force is a small operation with personnel and financial resources far below what is required by the private sector.
- The Governor of the State of São Paulo signed a decree in January 2006 creating an inter-secretarial committee to fight piracy.
- The state government of São Paulo created a specialized police unit for piracy cases, the DEAPIR – Delegacia Antipirataria, under the DEIC (Organized Crime Office). DEAPIR took part in several raids in 2008. Unfortunately, its participation in anti-piracy actions has been far below the level expected by the industries, mainly because it has no capacity to conduct its own investigations and relies exclusively on the information provided by the private sector. While it has been more cooperative recently, compared to prior years, it still lacks human and financial resources to be efficient and proactive.
- The municipality of Blumenau, in the state of Santa Catarina, declared itself "piracy free," and the mayor subsequently announced the creation of a municipal anti-piracy council to lead enforcement and educational initiatives to fight piracy.
- The municipality of Porto Alegre in Rio Grande do Sul has established a municipal anti-piracy entity.
- 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 Fortaleza and Curitiba.

**Criminal actions/raids involving primarily hard goods:** As mentioned above, the industry groups have excellent relationships with Federal Police. All assist these authorities in providing information and support to conduct anti-piracy operations. While the level of police attention to piracy varies throughout the country, many raids were conducted in Brazil.

The sound recording and motion picture industries combined their anti-piracy operations in 2007 in a new organization named APCM (*Associação Anti-pirateria de Cinema e Musica*), and this joint effort worked well last year. During 2008, APCM conducted, with support of different law enforcement agencies, 3,942 raids (almost a 40% growth compared to all of 2007), seizing more than 32.3 million blank and recorded discs plus over 8.8 million copies of filmed products (about 20% more than in 2007). Of these 41 million units, 42% were blank DVD-Rs and 21% pirated movies, and the rest was music CDs, music DVDs or blank CD-Rs. In all, 72% of raids were against street vendors and black markets. The South Region (the State of Parana that borders Paraguay) led with the most seizures of blank discs (74% of all blank media seizures), and raids concentrate in the São Paulo metropolitan area (24.97%), the interior of São Paulo (15.66%), Rio de Janeiro (14.20%) and Minas Gerais (14.18%). APCM reports that the Federal Police recently conducted raids on facilities dedicated to the manufacture of digital jukeboxes containing illegal copies of sound recordings. There were 149 arrests in 2008, with over 110 of them from São Paulo and 80% against street vendors. APCM reports that there were 195 convictions obtained in 2008, a slight increase over the prior year. A majority of the sentences (80%) imposed a minimum sentence of 2 years, but due to the Brazilian procedure penal code, those convicted rarely received an unsuspended jail sentence.

ABES, the local software association that represents the interests of both the business and entertainment software sectors, also has developed good relationships with the CNCP and local enforcement authorities. With respect to entertainment software piracy, ESA and ABES undertook a number of efforts to support anti-piracy actions and public awareness of entertainment game piracy in Brazil. These actions include: (a) supporting police search and seizure operations against retail centers, open-air markets and street sellers, (b) monitoring the Internet and requesting removal of announcements containing pirated products or websites that offer free illegal downloads, (c) conducting investigations targeting burning labs, importers, warehouses, or factory/replication facilities, (d) monitoring newspaper advertisements involving pirated products, (e) following-up and supporting issues and requests made by police, (f) preparing reports with all results related to the above actions, (g) participating in anti-piracy training programs directed to numerous enforcement officials, and (h) supporting the development of public awareness, training activities, and campaigns.

ABES undertook anti-piracy actions for BSA and ESA last year, and conducted 2,849 criminal and administrative raids that resulted in over 1.6 million illegal software seized, 1 laboratory closed, 5 people arrested, over 19,000 advertisements removed and 375 websites shut down. In addition, 3,328 cease and desist letters were sent to end users, and 128 civil actions were filed. For example, in November 2008, 200 Federal Police agents started an operation against the illegal commerce of IP equipment that reached 62 establishments, distributors and importers of portable PCs in Brasília, Belém, Manaus, Fortaleza, Recife, Salvador, Belo Horizonte, Rio de Janeiro, São Paulo, Curitiba, Florianópolis, Joinville and Porto Alegre. In addition, the customs office in Foz do Iguaçu almost doubled the amount of taxes assessed on merchandise coming from Paraguay in 2008 compared to 2006. In São Paulo, enforcement actions resulted in the closure of three long standing outlets for pirated goods, including Stand Center and Promocenter. Enforcement at Foz do Iguaçu appears much improved. For example, in October 2008, the Port of Santos Customs Office destroyed 1.2 tons of merchandise having an approximate value of R\$ 6 million (US\$2.6 million). Such objects were the products of fraudulent import, false statements of merchandise, piracy and abandoned merchandise. Pirated and counterfeit merchandise seized at the border by the customs office in Foz do Iguaçu in 2008 is valued at over US\$82 million, a 7% increase in value over seizures in 2007. The seized merchandise included blank and burned optical media discs valued at more than US\$5.6 million and electronic products (including consoles and cartridges) valued at more than US\$22 million.

**Actions in the Internet space:** The copyright industries confirm that there are no "safe harbor" provisions in Brazilian legislation. ISPs are considered subject to general liability principles on Civil Code; there are no specific liability provisions involving copyright infringement for the ISP community. Any notice and take down procedures are conducted strictly on a voluntary basis between ISPs and right holders and results vary based on the different forms of piracy in the Internet space.

APCM reports that Brazilian Internet Service Providers are cooperating in removing illegal music and film content identified by the APCM anti-piracy Internet investigation team, with respect to hosted content. The recording industry reports that the Brazilian ISPs have not taken any action to curb P2P music piracy despite their requests for industry assistance. However, the ISPs do take down sites hosted on their servers that offer illegal files. The recording industry's campaign to take action against major individual uploaders met a negative ruling in 2007. The judge, considering the recording industry's request

to ISPs to identify the uploaders, decided that such an action would violate the individuals' privacy rights; this case is under appeal.

BSA notes that there is no specific legislation that would establish a specific time period for ISPs to keep logs and records of Internet transactions. Currently ISPs are keeping the data for a short period, making it difficult to track and investigate P2P piracy (ideally such data should be kept at least for 6 months to 1 year). In a recent litigation case initiated by the recording industry's national group (ABPD) against a group of heavy uploaders in the São Paulo area, the appellate court confirmed the right of the plaintiff to obtain the disclosure of defendant's personal information. However, the ISP was unable to provide the data in view of the long period passed for the resolution of the appeal. The ISP's simply "lost" the information waiting for the appeal resolution. This specific deficiency certainly may frustrate the efforts developed by the recording industry in Brazil to challenge the massive exchange of illegal music files occurred over the P2P networks. The CNCP should dedicate resources to research the relevant legislation in Brazil in order to provide clear recommendations for a regulatory solution.

With respect to videogames, the domestic enforcement program of the Entertainment Software Association (ESA) reports success in their actions against local websites and auction listings. During 2008, over 19,000 online advertisements for pirated software products were removed from the Internet. ESA, working with the local software association ABES, reports that the level of cooperation between websites' ISPs and the game software industry is around 80%, while cooperation with auction sites' ISPs is 100%. Also, 375 websites that offered pirated software products or pirated software files for download, were taken down.

There appears to be no legal impediments to criminal enforcement of Internet piracy other than training law enforcement and providing them with the necessary resources.<sup>7</sup> APCM realizes that Internet piracy will not be the top priority for the police but it is grateful for the support from law enforcement special cybercrime units both in the federal and state police. Several criminal cases have been pursued in collaboration with Federal Police and Civil police against Internet pirates selling pirated DVDs and those offering the sale of pirated movies via social networks such as ORKUT. Currently the recording industry is not prosecuting any P2P case through criminal means, given that such actions may have a negative impact with the general public and with the government. BSA reports that it did not take any criminal Internet actions in 2008.

In mid-October 2008, Minister of Culture launched a roundtable negotiation between ISPs, the recording industry and the audiovisual industry with the aim to reach an agreement regarding P2P piracy with parties exchanging proposals. Two meetings have taken place and it is hoped that something more concrete will be finalized by early Spring 2009. A very positive point is that the CNCP is participating in these roundtable negotiations.

**Few criminal prosecutions and fewer deterrent penalties:** Copyright prosecution actions tend to concentrate in Rio de Janeiro and São Paulo, where there are specialized IP units. In 2008, the specialized IP precincts have contributed heavily for the success of many operations, but the number of agents dedicated to investigate the cases is still quite small. Prosecutorial attention to copyright offenses remains inconsistent, especially in the provinces. Enforcement efforts sometimes fail due to the lack of sufficiently skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence.

APCM reports that convictions improved in 2008, with 195 convictions for audiovisual and music piracy. Most of these convictions were issued in the states of São Paulo and Rio. To place this number in its proper context, it is important to realize that more than 80% of the convictions result in the minimum 2-year sentence, and that these sentences are usually suspended, and pirates rarely if ever serve time in prison. Brazilian legislation allows suspended sentences for first-time offenders, and the definition of first-time offender is so broad that only defendants whose cases have reached final judgment are termed repeat offenders.

**Delays in criminal cases begs for institutional reform of the judiciary:** It still takes three to four years for a criminal case in Brazil to reach the sentencing phase, and no improvement to resolve this situation was made over the past year. Many factors that contribute to such onerous delays.

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<sup>7</sup> The Brazilian Penal Code provides that the reproduction and distribution without the authorization of the copyright owner with direct or indirect profit intention is a crime, punishable with 2-4 years' imprisonment and a fine. The reproduction and distribution without a profit motive is not a crime but is a copyright offense subject to the possibility of heavy fines.

The police do not have deadlines to complete their investigations and deliver the results to the prosecutor and so investigations may take up to five years, with the interested rights holders pushing the process every step of the way. Moreover, the police often keep case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case. Two possible solutions may alleviate the situation: (a) The appointment of specialized IPR experts at the "Instituto de Criminalística" (CSI Institute of Brazil) that can dedicate full time to the piracy cases; and (b) an amendment to the penal procedures code to establish a specific term for the police investigations.

Furthermore, criminal case experts must be appointed only by the judge and there are few experts in the country. It would be very helpful if the law was amended to permit the private sector to appoint experts in order to expedite the preliminary investigations conducted by the police. The process of identifying and verifying low-quality pirated products is not difficult and should not require highly trained experts. It is easy to see how it takes years for the police and prosecution to present the criminal copyright case to the court. Brazilian courts already have very heavy case loads, and there is a tremendous backlog of cases. A solution to expedite matters that has often been proposed is to create a specialized court for copyright matters.

Another embedded problem in the Brazilian judiciary is the length of the process due to innumerable appeals existent in the procedure code. This is a problem that creates impunity for all sorts of serious crimes, such as homicide, drug trafficking and corruption. Reports suggest that the Brazilian government intends to reform its judiciary because of these widespread systemic problems. This much needed effort will likely encounter some difficulties as it moves forward, given that it will depend on political will and much coordination between the various political parties and the government.

**Civil actions, delays and high bonds:** BSA, via ABES, concentrates most of its efforts on bringing civil judicial actions (search and seizure) against end-users (usually businesses that do not use legitimate or licensed software). In 2008, BSA started 131 civil actions against end users (in contrast, ABES does pursue some criminal actions against distributors, but not end-users). BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Paraná, São Paulo, Rio de Janeiro, Minas Gerais, Espírito Santo, Bahia, Pernambuco, Ceará, Goiás, Mato Grosso do Sul, and the Distrito Federal (Brasília). However, Brazilian courts continue to require extremely high expert fees and bond requirements. In some BSA cases, bonds of US\$50,000 to US\$100,000 have been required and BSA had no option but to terminate the cases. On average, BSA has paid up to US\$5,000 for experts' fees and up to US\$25,000 as bonds. This situation has remained unchanged since 2005. In these cases, the courts appoint experts who search premises and seize eventual illegal material. Further delays occur as the court-appointed forensic experts have to analyze the results; to ameliorate the backlog caused by this, BSA supports legislative reform to permit foreign sampling and private sector assistance in the forensic work.

BSA continues to report that in 2008 the main problem in civil actions was the big backlog of cases in the judicial system. Given the several possibilities of appeal during any legal action, actions can take up to 12 years to reach a final decision. Cases usually take from 18 months to 4 years just to come to trial in the first instance. BSA took part in a seminar promoted by the School of Judges of the Rio de Janeiro State in October 2008, which brought a lot of attention to IPR issues. Subsequent discussions with the Copyright Office (INPI) showed that there is a possibility of bringing the discussion of IPR to judges and prosecutors in the form of courses and seminars.

**Border enforcement:** Brazil's extensive border makes it very vulnerable to smuggling of all sorts of goods, from drugs to DVDs. With increasing efforts in the Foz do Iguaçu-Ciudad del Este area, copyright pirates have gone either south (smuggling from Uruguay) or north in the dry zones of Ponta Porã-Pedro Juan Caballero (Brazil-Paraguay) or Corumbá-Puerto Suarez (Brazil-Bolivia), all known drug trafficking routes. Still, the tri-border area with Paraguay and Argentina remains an important focus of piracy (mostly due to the lack of commitment and results from Paraguayan authorities). Border enforcement would be enhanced if Brazilian authorities better coordinated with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. Seizures of blank media increased by 23% (26 million units in 2008 versus 21 million in 2007). 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 recent event at the Ministry of Justice, it was reported that 8% of the seizures of Federal Highway Patrol in the border area with Paraguay, contains guns, drugs and ammunition.

As in years past, the business 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 into Brazil, Argentina, and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice. ESA reports that their companies notices no effective decline in the flow of pirated entertainment software products, particularly

of counterfeit Nintendo cartridge-based products, into Brazil. Customs enforcement would also be much enhanced if cases of interdiction were referred to the appropriate authorities for criminal prosecution.

## COPYRIGHT LAW IN BRAZIL

The Brazilian government held a conference on December 5, 2007, to launch its National Forum on Copyright. There, government officials outlined several key actions anticipated for 2008 and the Minister of Culture highlighted two initiatives: (1) the creation of a National Copyright Agency, and (2) a revision of the 1998 Copyright Law, specifically a proposal to present an entirely new bill to Congress in late 2008 or in 2009. Neither of these two initiatives occurred in 2008.

Over the past year, the Ministry of Culture held various public meetings in several cities to discuss issues related to intellectual property law reform in Brazil. The copyright industries believe that its input and expertise is critical to the formulation of any copyright law amendment package that may be developed in Brazil, and we look forward to working with the Government in 2009 to identify and implement amendments that would enhance the protection afforded to creators in Brazil.

### Proposed legislation related to enforcement

For the past two years, the industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement.<sup>8</sup> Currently there are several proposals that the industries have worked to present both to the Congress and through the CNCP. In May 2008 a Special Commission to Combat Piracy (CEPIRATA) was created at the Chamber of Representatives in order to unify the various legislative proposals affecting copyright and piracy. While CEPIRATA did hold several public meetings, there has been no activity since July 2008.

Below is a summary of various bills pending in Brazil that are of particular interest to the copyright industries.

**Bill on forensics and destruction of illegal products:** This proposal would establish a system to facilitate forensic experts' work. It would allow criminal judges to appoint private sector experts and would secure increases in government resources allocated to fighting software piracy. The initiative contains provisions allowing private sector to appoint experts, anticipates destruction of seized merchandise and sampling of pirate seized goods for experts' reports purposes. It would also allow law enforcement to destroy seized material before the final judgment.

**Anti-camcording amendment:** This amendment is necessary to facilitate the enforcement and prosecution of unauthorized camcording. MPA is seeking to have an anti-camcording provision included in various bills. For example, PL 2927/03 seeks to modify the Penal Code and the Penal Procedure Code, and is pending before the House of Deputies. MPA is seeking to include an anti-camcording provision in a similar bill that has not yet been formally presented in the Senate. The proposed sanction for camcording would carry a two-four year jail term.

**Cybercrime Bill (Bill 89/2003):** BSA reports that Bill 89/2003 advanced last year and was approved by the Senate, but is still under consideration by the Chamber, and this bill is expected to pass in 2009. This bill amends the Penal Code to create criminal sanctions for Internet crimes, such as child pornography, invasion of privacy, identify theft, and the like. There also is a provision which establishes that ISPs shall only provide information regarding users to authorities with a judicial request; MPA is lobbying to have this particular proposal modified in order to allow ISPs to provide users' information through a court order and not only to police authorities and prosecutors.

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<sup>8</sup> In prior legislative initiatives with the CNCP in 2007, the copyright industry sectors identified several much needed enforcement-related measures, such as: (1) increasing minimum sentences so as to prevent alternative sentencing; (2) permitting the preparation of technical reports to accompany pirate samples; (3) permitting *ex officio* measures to extend to all copyright infringements; (4) penalizing the provision of raw materials in furtherance of infringing activities; (5) empowering judges to order the destruction of infringing products before a final decision; and (6) establishing minimum statutory damages equivalent to the value in the market of 3,000 legitimate copies in copyright piracy cases. Also at that time, the industries proposed additional amendments to this 2007 CNCP package, and as a result, some of industries' suggestion now appear in the pending legislation mentioned above. Additional suggestions at that time included: (a) adding an anti-camcording provision; (b) eliminating the requirement that a profit be realized in order for the act to constitute a crime, (c) adding sanctions for the circumvention of technological protection measures and rights management information; (d) adding criminal penalties for television signals; (e) increasing the minimum sentencing for software infringements in the Software Law; (f) easing forensic review of all suspected infringing products seized so as to permit sampling; (g) permitting rights holders the ability to serve as depository to warehouse/store seized materials, pending litigation/prosecution, and (h) simplifying the documents that record seizures (current documents are unnecessarily complex and detailed).

**Objectionable copyright bills regarding student copying:** There have been two objectionable bills proposed that would allow university students to make extensive copies of copyrighted content. Bill No. 131/06, presented in the Senate, would establish that a student could copy 25% of any work without remuneration to the rights holder. Based on our last reports, the bill is under review of the Senate Education Commission; its reporter has been appointed but has not yet issued the report on this bill. A separate bill (Bill No. 5046/2005), even more egregious, would modify Article 46 of the Copyright Law in a manner such that it would permit university students to make copies of entire works as long as those copies are not directly for commercial use; at last report, that bill was under review in 2007 by the Constitutional Commission of the House of Representatives. Academic publishers (local and international) already must combat unauthorized photocopying of books and journals in educational institutions, and legislation that in effect would codify such use should be opposed. Brazil must comport with the TRIPS three-step test for exceptions to protection, and this legislation fails to do so.

**Bill regarding electronic public availability of information produced with public funds by higher education institutions:** Bill No. 1120-2007 purportedly creates an electronic government portal through which technical and scientific information generated at higher education institutions using public funds would be available. IIPA supports the making available of data from publicly funded research, but the law should be carefully crafted to ensure that value-added publications resulting from such research and produced by third parties not using government funding are not included in this effort.

**Specialized IPR courts with copyright jurisdiction:** 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 support the creation of these courts, which would significantly improve intellectual property rights enforcement. During 2007, the CNCP held meetings with judges to discuss the possibility of creating specialized IP courts, but there was no progress on this in 2008.

**Sacoleiros bill:** A bill has been proposed (*Projeto dos Sacoleiros*) that would grant a 50% exemption on the importation tax of products imported through terrestrial border. This would likely have the effect of making it easier to legally import blank media through Foz do Iguacu, the main terrestrial port for smuggling of blank media used in piracy, and this bill should be opposed for that reason. However, if it does pass, it is imperative that any related regulation ensures that blank or recorded digital media will not be included in the list of products to benefit from the tax reduction.

**Tax exemption on certain imported media:** Bill PL 210/07 would exempt from taxes imported recordable blank media. It has been presented in the Senate and is before the Education Commission. A public hearing will take place likely in the first half of 2009. MPA is lobbying for the rejection of this bill.

### Remaining Deficiencies in Current Legislation

**1998 Copyright Law and 1998 Software Law:** The Brazilian government unfortunately continues to refuse to ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), despite the fact that its copyright law is quite comprehensive and the Brazilian creative community relies on copyright protection to reach the global market. Although the law is generally quite good, gaps do remain. 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. Brazilian law fails to provide criminal sanctions for circumvention of technological protection measures and removal or alteration of electronic rights management information. Although the law provides remedies against the removal or alteration of technical devices incorporated into works to protect against copying, there is currently no prohibition against circumvention devices or trafficking in such devices or circumvention services. Furthermore, additional measures are needed to clarify the responsibilities of ISPs in the online environment. As mentioned above, the Ministry of Culture is coordinating a working group among the content and the ISP communities and meetings are ongoing.

**Tax Evasion in the Software Law:** A "fiscal crime" provision was inserted into the 1998 Software Law, with the approval of the software industry. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independent of BSA's civil actions against software piracy. BSA was hopeful that this type of tax evasion case would have a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies. However, the Receita Federal and the respective state tax authorities have not pursued such tax evasion cases or dedicated any resources to pursuing them in 2007 or 2008.

**The Criminal Code (2003):** The business and entertainment software industries remain very concerned because the 2003 criminal code amendments fail to increase sanctions for the infringement of computer programs. 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. This increase is 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 maximum penalty of four years' imprisonment will apply if the violation involves supplying unauthorized works to the public via cable, optic fiber, satellite, airwaves or any other method of transmission for a profit. Those persons infringing copyright without intent to profit, are subject to a detention of three months to one year or a fine. The 2003 amendments also codify procedures to seize and destroy contraband and provide judges the authority to dispose of seized equipment in a way that ensures it will not be used for commercial purposes. However, the effectiveness of these amendments in practice has been diluted because defendants always gets alternative sanctions such as community service and minor fines instead of jail-time convictions. In addition, a critical unresolved problem is that the criminal code amendment did not change the Software Law. The one-year sanction for computer software infringement still appears in the separate 1998 Software Law, unchanged by the amendments to the criminal code. 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. And importantly, because the minimum penalty of the separate software law (one year) has remained unchanged, criminal infringement cases brought by the software industry will still be subject to automatic suspension under Law 9099.95, hence the need to amend the legislative to raise penalties.

## **IPR TRAINING AND PUBLIC AWARENESS**

It is essential that Brazilian government (CNCP) assume its duty of training the enforcement agencies and judicial officials.

The copyright industries on their own as well as working with the CNCP and other business groups, conduct numerous trainings, seminars and workshops with Brazilian enforcement officials, at the national, regional, and state levels. In addition, each of these groups provide training and seminars for police and customs officers in many states. During 2008, APCM participated in two important training programs. The first was with FIESP (Federation of Industries of the State of São Paulo) and training approximately 200 officials in the key ports of Santos, Vitoria, Recife and in Foz do Iguaçu. The second training, in conjunction with the software industry, was for law enforcement (civil and military police, federal police and municipal authorities), and involved more than 40 training sessions in 30 cities, training more than 3,000 agents. Through a partnership with ABES and the American Chamber of Commerce, BSA offered training to enforcement officials in 14 Brazilian States in 2008. The program has been extended to reach young executives, as well as key management officials within companies and to create awareness of software asset management and of companies' possible exposure to damages arising from a judicial prosecution.

## **ADDITIONAL ISSUES**

**Government software asset 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 to not only ensure all of its software is licensed, but 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.

**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 was a suggestion submitted to the CNCP some time ago but was not formally included in the Action Plan for 2008.

**High tariffs and barriers on entertainment software:** 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. For the entertainment software industry, the major tax problem relates to internal taxation within Brazil.<sup>9</sup> First, the state of São Paulo (which represents about 50% of the Brazilian market for this product) treats entertainment software as merchandise, which has a higher tax rate and raises the price of the legitimate product drastically. Second, entertainment consoles have a very high tax rate (about 50% of the value of the product), which poses quite a market access barrier. Brazil's taxes on videogame products are the highest in the hemisphere, and serve as an impediment to the ability of legitimate companies to develop a market presence and provide consumers with reasonably priced legitimate products, and thereby be able to compete against pirates. The high tariffs and taxes have contributed to the slow entry of console manufacturers into the market, and also contribute to the flood of grey market, pre-modified consoles and pirated software into Brazil. This matter needs to be adequately addressed by the Brazilian Government so that the purveyors of pirated products do not continue to thrive at the expense of legitimate businesses.

**Foreign ownership restriction bills on audiovisual sector (PL 210/07, PL 29/07 and three others):** Five bills were presented in the House that seek limitations on foreign capital participation, in varying proportions, in Brazilian companies that produce national audiovisual content, pay-TV programmers and operators, and Internet service providers and telecoms which distribute local content. MPA is actively involved in efforts, with its industry partners, to defeat these initiatives. These bills would not only harm foreign entities, but also impair the continued growth of the Brazilian audiovisual industry as a whole. The bills are expected to be approved in the House of Deputies by the end of 2009.

**Digital TV:** Administration officials send ambiguous messages on the government's commitment to addressing piracy. In 2006, Brazil chose the ISDB-T standard for the Brazilian digital terrestrial TV system and no system to protect digital TV content was adopted. MPA is lobbying on two bills in Congress (PL 6525/06 and PL 6915/06) to include a provision against the retransmission of digital audiovisual content on the Internet.

**Cross-retaliation bill against IP:** As a consequence of the Brazil-U.S. cotton dispute at the WTO, a bill (PL 1893/07) was presented in the House of Deputies that would allow the Brazilian government to undertake cross-retaliation measures affecting intellectual property rights granted under TRIPS. The bill would authorize the suspension of intellectual property protection in Brazil for nationals (individuals and/or companies) of WTO infringing countries; deny registration of intellectual property rights; block remittance of royalties and technical assistance payments; and permit compulsory licensing. The bill has already been approved in the Agriculture Commission and in the Economic Affairs Commission, and still needs to be analyzed by the Foreign Relations and Constitutionality Commissions. At this point, it seems nearly impossible to block passage of the bill in the House of Deputies since the government has majority in that chamber.

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<sup>9</sup> ESA indicates that its members report 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.