

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2010.

Executive Summary: The Brazilian Government has actively worked with the copyright industries to develop and implement strategies aimed at education, enforcement and expansion of commercial opportunities. This overarching 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) end-user software piracy, hard goods piracy, including retail and street 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.

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. Despite a large volume of raids, most of the well-known marketplaces are still operational. Few task forces have been created at state and municipal levels despite Federal Government efforts. Universities, likewise, need to take more steps to legalize use of academic materials on their campuses. Copyright cases, both criminal and civil, have been at the mercy of a broken judicial system that requires serious reform so that cases reach sentencing more quickly and with fewer procedural obstacles. In the Internet realm, rights holders have worked with Internet Service Providers to take down infringing content involving hosted websites, but that success has not translated into any action involving the grave problem of peer-to-peer (P2P) file-sharing of unauthorized copies of copyrighted content and most recently the free access to millions of illegal cyber-locker links posted on social networks, forums and blogs.

The copyright industries continued to work well with the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) during 2009. We are pleased that the CNCP has issued a new national plan that provides a more targeted list of priority actions, and has taken initial steps to implement its top five priorities for 2010. We also note that a special commission of the Congress focused on anti-piracy efforts issued a report with some positive recommendations for legislative action. And we welcome the Minister of Culture's formal opinion that camcording is captured by the Penal Code. In early 2010, the Ministry of Culture is poised to release draft legislation that would amend the current copyright law. Lastly, the copyright industries are concerned with the prospect of Brazil "cross retaliating" against U.S. intellectual property products as compensation in the WTO cotton case. In sum, this coming year will present an agenda on many copyright law and enforcement issues that will require close monitoring, and we expect the government (including, but not limited to, the CNCP) to continue to consult with the copyright community on these issues.

Priority actions requested to be taken in 2010: 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

- Continue to achieve concrete results in the seven areas that have been previously 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 (tasks forces were already created in Sao Paulo, Rio de Janeiro, Minas Gerais, Bahia and Pernambuco);
 - (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.
- Ensure that the CNCP has adequate resources and high-level government attention to implement the top priorities of its national plan effectively.
 - Under the leadership of the CNCP, set up a new roundtable negotiations between right holders and the ISP industry aiming to achieve a cross industry agreement to combat Internet piracy in Brazil. 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.
 - Create more Specialized Police IPR units at both the state and local levels.
 - 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 national program to train judges, prosecutors, and police officers on IPR law and enforcement measures.
 - The CNCP should provide Minister of Culture with a concrete proposal to include effective legal tools against the Internet Piracy in the context of the announced copyright reform.

Legislation

- Ensure that the copyright sector with the Ministry of Culture can participate in copyright law reform efforts expected to begin this year. There are a number of improvements that merit inclusion (including, for example, amending the section on technological protection measures).
- Avoid legislation or other implementation of "cross retaliation" against U.S. intellectual property products as compensation for the WTO cotton case ruling.
- 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.
- Amend the Penal Code to increase the penalties applicable to infringement of copyright in software programs so that criminal cases involving software infringement are not eligible to be suspended by judges.
- Reject legislation that would have the effect of promoting unauthorized, overbroad reproduction of works in university settings (e.g. 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.
- Reject discriminatory legislative proposals that would limit foreign investment in the audiovisual industry.
- Avoid legislation on the mandatory use of open source software by government agencies and government controlled companies.

Cross-retaliation bill against IP: The copyright industries remained very concerned about the impact any retaliation against U.S. intellectual property would have on respect for intellectual property and accompanying enforcement in Brazil.

In August 2009, the World Trade Organization ruled that Brazil could impose \$294.7 million annually in sanctions because of subsidies paid to U.S. cotton farmers. According to the Foreign Ministry, Brazil will seek to impose as much as \$270 million in intellectual property sanctions. On February 10, 2010, the government enacted legislation (Medida Provisória 482) that will allow Brazil's suspension of concessions or other commitments related to intellectual property

rights because of the U.S.' failure to comply with its WTO obligations in this case.¹ A group of ministers responsible for setting Brazil's trade policy will release a list of goods that will face higher tariffs by March 1, 2010.² Both Brazil and the U.S. have stated that they hope to resolve this cotton dispute without resorting to actual sanctions.

IIPA notes that 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 2009, \$1.97 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code. For more information on Brazil's history on the Special 301 lists, please see other sections of this IIPA Special 301 report.³

COPYRIGHT PIRACY IN BRAZIL

Piracy involving hard goods continues to be a key concern for several copyright-based industries. The business software industry continues to combat end-user piracy among corporations and other businesses. Internet piracy is a major challenge for all copyright-based industries doing business in Brazil.

Business software piracy: The Business Software Alliance (BSA) reports there was no specific change in the nature and scope of piracy in the software industry in Brazil over the past year. Software piracy continues to include the following: business end-user piracy, illegal reproduction and duplication of software programs (both for commercial and non-commercial ends), 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. Digital piracy has grown consistently in Brazil due to the growth of broadband penetration as well as the increase in the possession and use of home computers by Brazilian population in general.

BSA reports that preliminary estimated trade losses due to software piracy was US\$831 million in 2009, with an estimated piracy rate remaining steady at approximately 56%.⁴ These preliminary numbers reflect a slight decline from the prior years (US\$905 million at 58% in 2008), despite market growth and devaluation of the U.S. dollar against the Real. A package of tax reductions and incentives for the production and sale of PCs in Brazil has resulted in a significant reduction in the final price of computers in the retail market and the increase of the PC local market. These results are due to good coordination by the CNCP, better public awareness, lower prices on software, and good enforcement. This decline is a move in a positive direction; if the levels of software piracy were lowered by 10 points, there would be positive benefits to the Brazilian economy.⁵

¹ Under this new decree, intellectual property covers copyright, trademarks, patents and other rights, and the following measures may be adopted: the suspension of intellectual property rights; the limitation of intellectual property rights; the amendment of measures to apply rules to protect intellectual property rights; the amendment of measures to obtain and maintain intellectual property rights; the temporary suspension on royalty payments or remuneration related to the intellectual property rights; and the application of rights of a commercial nature on the payments of the holder of intellectual property rights.

² *BusinessWeek*, "Lula Sets Law for Brazil to Retaliate on U.S. Patents," posted February 11, 2010, at <http://www.businessweek.com/news/2010-02-11/lula-sets-law-for-brazil-to-retaliate-on-u-s-patents-update1-.html>.

³ For more information regarding the history of Brazil under USTR's Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more on IIPA's global issues, see IIPA's 2010 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

⁴ BSA's 2009 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 Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at www.bsa.org. BSA's final 2009 data will be available later in 2010.

⁵ 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>.

Internet piracy: There are an estimated 67.5 million Internet users in Brazil, which represents about 34% of the country's population; between 2000 and 2009, there was a 1,250% increase in the number of Internet users (see www.Internetworldstats.com).

Most of the Internet piracy problems in Brazil involve file sharing 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. Although the majority of Internet piracy occurs through P2P networks, the use of social networks for piracy is on the rise. During the past two years there has been a significant increase in piracy facilitated through the exchange of links to infringing materials in "blogs", forums and social networks. As an example, one of these social networks (ORKUT) comprises more than 35 million users, over two million active cyber-locker-links, and over 1,000 communities dedicated to the illegal sharing of music posted via these cyberlockers.

In Brazil, the recording industry suffers greatly from widespread Internet piracy, illegal file sharing on P2P networks, and illegal links made available through social networks. Local industry estimates that over 2 billion songs are being downloaded annually in Brazil. This has decimated the local legitimate music industry.

For the time being, Internet piracy is the prevailing form of digital piracy in Brazil, although the growth in the "smart phones" with Internet navigation capabilities indicates that in the near future, mobile piracy will be increasing its share of the illegal market.

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. ESA estimates there to have been approximately 576,465 infringing downloads⁶ made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Brazil during December, 2009, comprising approximately 5.99% of the total number of illegal copies made by P2P users globally during this period. These numbers reflect a dramatic increase in the rate of online piracy in Brazil since 2008, when Brazilian users accounted for only 4.9% of global infringing downloads. These figures place Brazil as number 4 in highest overall volume of P2P game downloads. Breakdowns by ISP show that subscribers of Brasil Telecom, Tele Norte Leste Participacoes, and Telecomunicacoes De Sao Paulo were responsible for approximately 69% of this activity occurring in Brazil -- more than 399,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. Brazilian consumers access these sites through blogs, forums, social networking sites and other websites ("linking sites") where links are provided that provide direct access to the infringing files stored on the hosting sites. Brazil's troubling online piracy problem is facilitated by the widespread availability of circumvention devices that are necessary to make infringing copies of games and also to enable infringing copies to operate on a user's video game console or PC. Local industry representatives estimate that up to 95% of game consoles in use in Brazil have been modified with circumvention devices. As part of its efforts to crack down on online piracy, ESA hopes the Brazilian government will amend its current TPM provisions to make criminal sanctions available for defendants engaged in the distribution of circumvention devices.

The Motion Picture Association (MPA) reports that its principal Internet challenge involves cyberlockers such as rapidshare and megaupload. Hard good sales via the Internet continues to be a problem although show a declining trend. 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 Independent Film and Television Alliance (IFTA) reports that a worldwide Internet monitoring program it conducted in the last quarter of 2009 for 90 of its Members films recorded over 4,500,000 instances of P2P infringements and almost 50,000 instances of OSP infringement. Brazil ranked in the top ten countries of illegal downloading with over 100,000 instances of P2P infringements.

⁶ This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

Hard goods piracy in general: 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 800 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country. Paraguay, as well as China, 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.

Music sales in 2009 remains the same as 2008 with no signals of growth or recovery. The most damaging effect is suffered by local artists because 70% of the music consumption goes to Brazilian acts. Physical piracy of music and sound recordings in Brazil appears contained, mainly due to the consolidation of a national anti-piracy campaign and the striking increase of Internet piracy (discussed above). CD and DVD piracy sold in the streets and flea markets is the most common form of "hard goods piracy" in the music sector. Optical disc piracy is relatively low and the cities that cause the most impact here are also the largest consumers centers, although the sale of music pirated products in the black market is spread all over the country. Street piracy in São Paulo and Rio de Janeiro is visible 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. Finally, the use of "fake licenses" for the production and distribution of bootleg music DVDs may be considered a growing problem in Brazil. This situation accounts for 48% level of music piracy and commercial losses to recording companies for about US\$147 million in 2009.

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 that are then burned locally in small labs. 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, Rio de Janeiro, Minas, Pernambuco, and Brasilia, 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, circumvention devices (game copiers and mod chips) and high-end counterfeit game discs. A law making such circumvention devices illegal along with consistent enforcement thereof would be significant factors in helping to reduce game software piracy, as they have been in other countries where such laws and enforcement practices exist.

MPA reports that the most harmful form of audiovisual piracy for its members in Brazil is indeed hard goods piracy. This hard goods piracy is fueled by illicit camcording of movies in theaters. 90% of all pirated movies originate as illegal camcords. Unauthorized in-theater audio camcording spiked in Brazil through 2008 and 2009. In 2009, MPA identified 23 member companies' films camcordered from Brazilian theaters compared to only one in 2007. This is a 2,200% increase in the number of camcords sourced from Brazilian theaters over a two-year period. Movies such as *Wolverine*, *Harry Potter and the Half Blood Prince*, *Avatar*, *Ice Age 3*, *Monsters vs. Aliens*, *Night at the Museum 2*, *Terminator Salvation* were stolen from Brazilian theaters, uploaded to the Internet, and replicated onto DVD-Rs which are then distributed to Brazil's many black markets, undermining the lifecycle of the film. Many of the illegal recordings out of Brazil are audio captures which are then coupled with visual captures found on the Internet, and distributed in hard goods and on the Internet. MPA appreciates the Minister of Culture's statement confirming that camcording is covered by the Penal Code. This formal opinion has been useful to MPA in seminars and workshops with public officials. 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.⁷ Most of the pirate

⁷ 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% 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.

audiovisual products 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. Physical piracy damages the home entertainment market very rapidly. Sales of legitimate DVDs for the rental market decreased more than 16% in 2009.

The Independent Film & Television Alliance (IFTA) reports that many local distributors are claiming that they must pay lower licensing fees due to declining DVD sales caused by Internet and hard goods piracy. This is particularly devastating for Independents who depend on distribution commitments and minimum license fees to finance films. Local distributors who are competing with pirated copies are permanently damaged. The local Brazilian copyright community is equally impacted by the damage from piracy and the shrinking of the local distribution channels while piracy remains rampant.

The book piracy situation in Brazil has not changed dramatically over the last year. Unfortunately, unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials remains rampant and continues to be the predominant form of book 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. It is imperative that the Ministry of Education and the administrative bodies of universities and colleges work with the enforcement authorities to send a clear message 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 should 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, 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. Online piracy is a growing threat in the country. Unauthorized copies of textbooks, readers and dictionaries are being downloaded from websites hosted in Brazil and overseas.

COPYRIGHT ENFORCEMENT IN BRAZIL

CNCP work and industry cooperation: The CNCP (the National Council to Combat Piracy and Intellectual Property Crimes) is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign.

The CNCP's effort to better prioritize its efforts and target resources is commendable. This year will be an important one to determine whether the CNCP has the resources and high-level government attention to make meaningful progress on its goals. On May 28, 2009, the CNCP launched its second national plan, which identified 23

priority projects that will guide CNCP activities between 2009 and 2012. The CNCP's five priority projects to be addressed in 2010 (in the order they are identified by the CNCP) are:

(1) Piracy Free City: The goal is to actively involve municipal governments in the fight against piracy by creating incentives and establishing local strategies to pursue piracy. City Free of Piracy Project is an agreement between the city halls, the Ministry of Justice and the Brazilian Institute of Competition Ethics (ETCO) to bring awareness against the illegal commerce. Status: The main players in official and private sectors have already been identified to conduct the program in principal cities around the country. In December 2009, Curitiba and Sao Paulo signed their respective agreements to participate in the program. It is expected that other important cities will sign the agreements soon. It is critical that these programs address the broad range of piracy concerns, including unlicensed use of software by businesses (business end-user piracy).

(2) Legal Fair: The goal is to negotiate with the managers of the most popular fairs to legalize trade by offering legal alternatives and reducing or eliminating the sale of illegal products. Status: The National Confederation of Commerce (CNC) is leading the initiative and is making contacts with representatives of flea markets and "camelodromos" for a possible agreement. Educational campaigns along with legal businesses owners are being conducted.

(3) Shops Against Piracy: The goal is to unite shop owners nationwide against piracy, and to improve public awareness about the harmful effects of piracy.

(4) Anti-Piracy Portal: The goal is to develop an interactive communication portal, including educational and promotional campaigns, to improve communication with the public and present national efforts to fight piracy. We understand that the local software association ABES has been requested to assist in the development of this portal.

(5) Partnerships and Cooperation with Internet Service Providers: The goal is to create mechanisms with the Internet service providers to prevent the distribution of pirate products over the Internet. This is a critical element for many.

All of the copyright industries' local colleagues participate directly on the CNCP. Copyright industry cooperation with the CNCP continued to be very good in 2009. Recent news that the head of the CNCP, Luiz Paulo Barreto, has taken office as the new Minister of Justice on February 10, 2010, bodes well.

Overview of Copyright Enforcement: 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.⁸ Moreover, any progress made in the effort to curb the hard goods piracy problem has been undermined by a lack of effort to combat online piracy.

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

⁸ To recap, here is a list of action issues that IIPA has identified in the past and which remains relevant today (numbering follows for clarity's sake, not priority): (1) 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; (2) 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; (3) increase high-level investigations against organized crime syndicates; (4) augment coordination between federal and state IPR task forces; (5) establish a dedicated IPR section in the Federal Police and in Customs; (6) increase the number of border enforcement personnel, especially at the tri-border area; (7) legalize use of copyrighted materials on university and school campuses; (8) foster deterrent sentencing, encouraging training and outreach to the judiciary to increase understanding and appreciation of copyright piracy as a serious economic crime; (9) address, in a comprehensive manner, judicial delays in both criminal and civil copyright cases; (10) promote an environment of cooperation between ISPs and copyright holders to prevent online piracy.

prosecutors all have authority to enforce copyright infringement. More resources should be provided to law enforcement. On major issue for the movie and recording industries in Brazil is the cost of storage for seized merchandized. Since the judicial power and prosecutors do not have the resources to provide for a public facility for the storage of pirate products, the private sector must keep those materials in custody until destruction is ordered by criminal judges. This represents along about one third of the budget of local associations dedicated to combat music and audiovisual piracy. Hence, the Brazilian government must destined appropriate resources to relief private sector from this expense.

More cooperation needed with state and local officials: A long time IIPA recommendation involves creating more specialized IPR units at both the state and local levels. 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. Relationships with State civil and military police vary, as does the level of local attention to anti-piracy efforts. The Military Police of Sao Paulo were particularly helpful in 2009, facilitating enforcement actions by ensuring the security of those conducting raids.

The copyright industries working in Brazil strongly support 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 have been formed (Rio de Janeiro, São Paulo, Bahia, Pernambuco, Minas Gerais, Federal District and Rio Grande do Sul). However, the only active police precincts are Rio de Janeiro and Pernambuco. São Paulo does not work properly, Minas Gerais is about to be terminated and Rio Grande do Sul has not been implemented yet.

It is important that such a specialized unit be also installed in the State of Paraná. During 2009, there was little activity on this particular topic, although some initiatives were taken to establish state and municipal IPR units, such as Joinville and Recife.

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 last year.

ABES, the local software association that represents the interests of both the business and entertainment software sectors, has good relationships with enforcement authorities. With respect to business software piracy, ABES reports that it conducted the following actions in 2009: 185 raids against street vendors; 6 raids on software shops; 7 raids at ports and borders. The following copies and equipment were seized as a result of these raids: 1,120 application software, 12,583 PC games, 79,147 videogames (CDs), 815 videogames (cartridge).

Unfortunately, this impressive number of raids is completely undermined by a lack of follow-up investigations or prosecutions. Indeed, the 614 raids of targets engaged in the piracy of entertainment software did not result in a single conviction, ESA reports. Raids in and of themselves are not effective in combating piracy. When vendors of pirated goods realize that raids are not followed with criminal prosecutions leading to convictions and the imposition of penalties, they begin to view seizures as the mere "cost of doing business."

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.

In 2007, the sound recording industry and the major studios combined their anti-piracy operations in 2007 in an organization named APCM (*Associação Anti-pirataria de Cinema e Música*). During 2009, APCM conducted, with support of different law enforcement agencies, conducted an active anti-piracy campaign. In the first 11 months of 2009 APCM

conducted, with support of different law enforcement agencies, the following actions: raids on 2,800 street/black market, 225 production facilities, 149 warehouses, 18 cybercafés, and 350 regular shops. These 2,800 raids resulted in the following seizures: 4,596,000 recorded CD-Rs, 7,594,865 blank CD-Rs, 2,707,115 recorded DVD-Rs of music, 14,348,677 recorded DVD-Rs films, 20,845,530 blank DVD-Rs, along with 8,650 CD- and DVD-burners and 96 jukeboxes. This represents a 20.6% increase in recorded-R's of music and a 48.1% increase in the number of recorded DVD-Rs of films.

APCM also confirms that at the federal government level, there are constant raids at the borders, customs facilities and--at a smaller scale--major operations against crime organizations connected with smuggling, tax evasion and piracy. The bottleneck as far as physical piracy of music and movies is concerned lies in the federation state and municipal levels. At the state level, music piracy done with the intent to profit, although classified as a crime (with penalties that vary from two to four years of jail time, which in 99.9% of the cases is replaced by alternative penalties, usually inexpensive fines), is perceived by police authorities as a non-serious crime, and by the people as something never punished. This is not to say that state police do not carry out raids, seizures, arrests; they do. The problem is that the scale of the physical piracy problem is so vast that the state police alone are not enough to tackle it, especially considering the serious public security problem in major Brazilian cities. At the municipal level, the lack of enforcement of municipal regulations regarding street commerce combined with a policy of "tentative destination" of certain public areas to an organized and (in theory) legal street commerce, have led in the past 10 years to the creation of street markets where everything from clothes to electronics are sold at cheap prices, with lots of pirated products of all kinds sold. State police and Municipal authorities (especially in Rio de Janeiro and São Paulo) raid those premises with certain frequency, but the so-called "camelódromos" (street markets) continue to be the biggest distribution centers for pirated music and movies. With the issuance of the Minister of Culture's formal opinion that camcording is captured by the Penal Code, the MPA would appreciate augmented attention to and cooperation on anti-camcording enforcement actions.

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.

Industry-initiated actions: 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 ISPs do take down sites hosted on their servers that offer illegal files.

Here is a summary of APCM's music-related internet actions for 2009: sent 8,870 cease and desist notices and removed 128 webpages, 196,395 permalinks located on blogs, 332 offers of illegal products from virtual auction sites, 652,199 cyberlocker links, 344 links at forum sites and 9,826 P2P links. Some 17,193 "topics" (indexing of users that exchange illegal files of music) were removed from social sites, as was 3,036 pre-release music from sites and social networks. The major problem the music industry faces in Brazil continues to be "Orkut," the social site owned by Google. Around 65% of the Internet piracy problem in Brazil is concentrated inside the MP3 communities operating from Orkut. This includes the offering of complete career discographies from many international artists. The MP3 communities in Orkut congregates around 1.5 million registered users exchanging illegal music files.

The following is a summary of APCM's film-related actions for 2009: sent 9,823 cease and desist notices; took down 181,441 webpages/URLs; stopped 510,127 cyberlocker film links; shut down 5 virtual auction users and 455 virtual action products, removed 45,716 P2P film links, alerted ISPs about 16,884 social networks with illegal content and took down 97,270 links to pre release films. MPA notes that, in relation to cyberlocker links illegally made available through social networks, despite Google's recent improvements on Orkut on the removal of links upon notice, the fact is that the communities in Brazil remain dedicated to sharing music and movies, and many more illegal links are posted daily than are removed upon a notice received.

Unfortunately, Brazilian ISPs continue to take no action to curb P2P music and movie piracy despite requests for industry assistance. APCM reports that the problem of P2P file sharing is vast, involving millions of Internet users.

Nevertheless, the industry was able to remove 652,199 cyberlocker links. It is prohibitive at this time for the record and film industries to consider a court solution against Internet users (not to mention the fact that it would take some time simply to get the Internet users identities in order to initiate individual legal claims).

With respect to internet actions for the business software industries, BSA and ABES report that 23 websites were removed, 1,453 auction announcements were removed, and 214 internet advertisers removed. BSA is not involved in any *ex officio* actions on ISP facilities, but has alone and with the support of the local software association (ABES) removed several websites. BSA is also aware of a certain number of police raids against piracy in cyber cafés and “LAN houses” in several states last year.

Data retention: 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 ISPs 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.

Criminal enforcement: 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 APCM is not prosecuting any P2P case through criminal means, because of possible negative repercussions with the general public and with the government.

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.⁹ When police authorities want to investigate Internet crimes (such as bank fraud, child pornography), a judicial order is necessary to allow the identity disclosure of the user involved in that crime and further prosecution. In that sense, there are no obstacles that prevent internet investigations as long as they are legal and authorized by a judicial authority. The challenge is in having the police authorities understand the scale and nature of P2P and social network piracy (as described above) may, in appropriate circumstances, require criminal investigation.

Discussions between content industries: In 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. The CNCP participated in those meetings, and the working group coordinated by Ministry of Culture has this issue as one of the priority projects of the new CNCP’s Anti-Piracy plan (as discussed above).

During this past year of discussion regarding ISP talks with the content community, one proposal arose. This involved the possibility of adopting a “warning system” through ISPs to their customers whose IP addresses were identified by rights holders as “heavy uploaders” of film and music content. At the request of Brazilian ISPs, the government asked for opinions from the Federal Public Attorney’s Office, the General Union Advocacy and the Consumer’s Protection Department (DPDC). The DPDC was the one agency to oppose this warning system, alleging that an ISP sending warnings to their customers at a third party’s request would violate the subscriber’s right to privacy. At the Ministry of Justice’s request, the DPDC (which reports to Justice) is being asked to reconsider its position. The bottom

⁹ 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.

line, however, is that one year has gone by with millions of files being downloaded illegally and little has been done to prevent it. The government needs to resolve this issue internally, and ideally have DPDC remove its opposition to this proposal. Locally, MPA, IFPI, BSA and ESA are supporting the Ministry of Justice in this matter.

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. 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 250 convictions for audiovisual and music piracy in 2009. 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. The suspension of the criminal action against first time offenders has become an individual right for the accused in Brazil; in practice there is not an option for the prosecutor provided that the accused meet minimum requirements such as good behavior and commitment to compensate the victim (which is always reduced to a minimum in view of the personal finances of the majority of the accused).

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.

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. The problem with the length of Police investigations ("inqueritos") is in the hands of the judicial power. Every six months police authorities must request to criminal judges a formal authorization to keep the investigation "open"(normally due to unfinished recollection of evidences) and the normal practice is the renewal of the judicial authorization without further analysis. The Supreme Court and the state level supreme courts must instruct criminal judges everywhere in the country to limit the number of "permit renovations" for police inqueritos to an acceptable number so the police "delegacias" will know that they have to complete all relevant investigations before the last judicial renewal is granted.

Furthermore, criminal case experts can only be appointed by a judge and there are too few experts in the country. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint. 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. No changes in this regard since last submission, no new experts appointed to examine pirate evidence.

Civil actions, delays and high bonds: BSA 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). BSA's enforcement campaign is based on a cease and desist letter procedure aiming at legalizing licenses. On specific cases voted by the BSA member companies, civil actions are filed in order to get the target companies to stop using irregular licenses and to pay a fine for the past use of irregular licenses. In 2009, BSA started 188 civil actions against end-users of software (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). BSA is increasing the number of legal actions to 230 in 2010 and we are generally satisfied with this number of cases, since the idea rather than penalizing is to have the companies legalize the illegal products and we accomplish that with the Cease and Desist letters. The outcome is satisfactory, although we have detected a tendency of the courts in the southern states to sentence the companies found using irregular software to pay the price of the software only, without any additional penalty. This is harmful, since some of these companies may wait until they are sued before legalizing the licenses.

The bottleneck resides in courts, where judges have little or no knowledge of IPR. 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. More 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 2009 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.

Border enforcement: Brazil's extensive border makes it very vulnerable to smuggling of all sorts of goods, from drugs to DVDs. 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. Also, 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.

Seizures of blank media increased by 9% in 2009, up to 28.4 million units (comprised of 7,594,865 blank CDs and 20,845,530 blank DVDs). 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. Customs authorities in the state of Parana alone seized over 300,000 pirated video games. APCM reports that some 14,348,677 pre-recorded CD/DVDs were also seized.

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.

IPR trainings and public awareness: It is essential that Brazilian government take increased actions to properly train enforcement agencies and judicial officials. There is no national program to train judges, prosecutors and police officers on IPR law and enforcement programs. Although most of the training seminars/workshops for judges, prosecutors and police officers is organized and financially backed up by the affected industries, CNCP has been active in stimulating, promoting and participating in such events at the national, regional, and state levels. For example, in 2009, BSA and ABES trained enforcement officers in 12 cities throughout Brazil. BSA has also taken part in seminars from the Rio de Janeiro School of Judges to discuss IPR law and enforcement measures and is an active member of the "Escola Legal" project of the American Chamber of Commerce. APCM also participated in many of the seminars MPA participated in 14 trainings in 2009 with 847 officials trained. In partnership with APCM and the CNCP, the ESA and ABES developed a training program aimed at training public agents and engaging university students and businesses executives about the

importance of intellectual property rights and the need to combat software piracy. Over the course of 2009, the Road Show program visited 11 cities, helped to train 725 public agents, and reached out to more than 1,500 university students and executives.

COPYRIGHT LAW IN BRAZIL

There was no significant legislative movement on key issues related to improving copyright enforcement in Brazil last year. The CNCP was not very active with its work with the Chamber of Deputies in 2009. There is also some pessimism that there will be any progress in 2010, as this is an election year in Brazil. In any case, it is hard to evaluate with any certainty what legislative progress might be made this year.

Possible copyright reform in 2010: Over several years, 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. We look forward to working with the Government in 2010 to identify and implement amendments that would enhance the protection afforded to creators in Brazil. The copyright industries are concerned about reforms that would weaken existing copyright protections in a number of areas.

In July 2009, the Ministry of Culture established a Division of Intellectual Property which broadened the government's ability to take action on copyright issues. However, any effective action from the government on the regulatory process will only be possible through amendments to the existing legislation. In November 2009 the Ministry of Culture held the III Congress on Copyright and Public Interest. Proposals discussed III Congress were to be compiled into a draft bill and presented to the public; this has not yet occurred but is expected in the early part of 2010.

IIPA has pointed out in previous Special 301 reports some of the key gaps in the current Brazilian copyright regime (which includes the 1998 Copyright Law and 1998 Software Law). The Brazilian government unfortunately continues to refuse to join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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. But there are some gaps. For example, Brazilian law is weak on technological protection measures and needs to be amended so that it: (1) covers both access-controls and copy-controls; (2) prohibits not only the act of circumvention but also preparatory acts, such as the manufacture and distribution of circumvention devices; and (3) includes criminal remedies for the distribution or manufacture of circumvention devices.

Proposed legislation related to enforcement

For the past three years, the industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement.¹⁰ Currently there are several proposals that the industries have worked to present both to the Congress and through the CNCP.

¹⁰ 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 (this action is no longer requested in 2010); (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).

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. The president of CEPIRATA, Dep. Pedro Chaves, and the reporter, Dep. Maria do Rosario, presented a bill (5057/2009) on forensics and destruction of illegal products. The final report of the CERIPATA was issued in 2009 and recommended a series of actions: the creation of a Commission to analyze the "bio-piracy" problems; amend copyright law to increase civil sanctions for copyright infringement; have the Ministry of Justice and Ministry of Labor adopt measures against piracy; have public authorities coordinate on actions and measures against piracy; and approve bill 3378/04 which establishes ex-officio authority for crimes against industrial property (trademark, patent design, etc).

Bill on forensics and destruction of illegal products: This proposal would establish a system to facilitate forensic experts' work. Bill 5057/2009 would amend article 530-D of the Criminal Procedure Code to authorize sampling on pirated materials; this was considered a priority for the CEPIRATA. The bill also 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 sampling of pirate seized goods for experts' reports purposes. The bill does not contain any provision related to destruction of seized material; MPA is lobbying to have such a provision included.

Cybercrime Bill (Bill 89/2003): This proposed bill would amend 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. Bill 89/2003 advanced was approved by the Senate in 2008, but is still under consideration by the Chamber of Deputies, and that Chamber reported is not interested in amending this bill as the Senate would then have to approve those modifications.

Objectionable copyright bills regarding student copying: Academic publishers (local and international) already must combat unauthorized photocopying of books and journals in educational institutions, and legislation that would codify such use should be opposed. 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 still waiting for review of the Senate Education Commission. Brazil must comport with the TRIPS three-step test for exceptions to protection, and this legislation fails to do so.

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 either 2008 or 2009.

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.

Tax exemption on certain imported media: A bill proposed several years ago would exempt from taxes imported recordable blank media. This bill has been presented in the Senate and is still pending before the Education Commission. A public hearing was to have taken place in 2009 but did not, nor is a hearing likely in 2010. MPA is lobbying for the rejection of this bill.

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. This bill is pending at the Constitutionality and Justice Commission; its report has already been issued and recommends approval of the bill.

The Criminal Code (2003): The Penal Code needs to be amended to increase the penalties applicable to infringement of copyright in software programs so that criminal cases involving software infringement are not eligible to be suspended by judges. 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, 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 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. Unfortunately, the amendments to the criminal code did not change the separate provisions in the Software Law. Defendants found guilty of commercial scale software piracy are eligible for only one year in prison, and as a result, these defendants often have their sentences commuted. 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. This problem has undermined the deterrent value of criminal enforcement actions against those dealing in pirated software. A bill (Projeto de Lei no. 333/1999) to achieve this was introduced in 1999 and was approved by the Chamber of Deputies in 2000 but this bill has been stuck in the Senate since then, despite having received approvals by various Senate Committees.

ADDITIONAL ISSUES

Government software procurement: The Brazilian Government should be encouraged to continue its efforts to implement effective software asset management practices in its public ministries and agencies, while avoiding mandates for procurement of software based on the model of development or the business model of the developer. 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. Following a technology neutral approach to procurement will allow government agencies to purchase the best software available on the market to meet their particular needs. The government should work closely with the private sector in this regard.

High tariffs and barriers on entertainment software: High tariffs and taxes continue to 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.¹¹ 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,

¹¹ 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.

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 2010. The bill remains pending approval before the House of Deputies and needs to be analyzed by the Constitutionality and Justice Commission.

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. In 2009, the House of Deputies' Public Security and Fight against Organized Crime Commission held a public hearing to discuss the importation of blank media through Brazilian ports. The copyright industries participated, as well as representatives from the Federal Police and Brazilian IRS (Receita Federal). Despite having the participation of the public authorities, discussions regarding adoption of a reference price did not evolve.