

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2011.¹

Executive Summary: Notwithstanding some recent progress, high levels of copyright piracy pose serious challenges for all sectors of the copyright industry in Brazil. The challenge is especially acute in the online environment, where legitimate services find it difficult to establish a foothold because so much pirate product is readily available through peer-to-peer piracy, links to offshore cyberlockers, and other channels. There are some encouraging signs of increased cooperation with online service providers to combat this problem, but the government needs to get off the sidelines and actively promote greater cooperation. Meanwhile, serious problems persist with "hard goods" piracy, book piracy (especially of educational materials), camcord piracy, and end-user piracy of business software. Devices to circumvent the technological measures employed to protect videogames are widely available, decimating the legitimate market for console videogames.

The government has taken steps to improve enforcement against copyright infringement – including raids of black markets and border seizures – but there is still a lack of sufficient deterrence due to a number of factors: prosecutions rarely follow arrests, convictions are rare, punishments are light, and judicial processes are protracted. The copyright industries continue to work well with the National Council to Combat Piracy and Intellectual Property Crimes (CNCP), which needs more resources to carry out its ambitious mandate. Internet piracy, and CNCP's commitment to sponsor roundtables aimed at inter-industry cooperation, must be accorded a higher priority. CNCP's strategies aimed at education, enforcement and expansion of commercial opportunities must be maintained and intensified. Universities must be prodded to legalize use of academic materials on their campuses. Judicial reforms are needed so that both criminal cases, and civil actions against business end-user pirates, reach conclusions more quickly and with fewer procedural obstacles.

Proposals to amend the copyright law, and to provide a legislative framework for the Internet, were both released for comment in 2010. Both are in need of significant revision in order to provide adequate protections for Brazilian and foreign creative works. Finally, Brazil should move to dismantle daunting market access barriers faced by several copyright industries.

PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2011:

Enforcement

- Provide enhanced resources to the CNCP to complete existing priority projects under its national plan and initiate new ones.
- Under the leadership of the CNCP and with the express support of the Brazilian Government, set up new roundtable negotiations between right holders and the ISP industry aiming to achieve a cross-industry agreement to combat Internet piracy in Brazil.
- Give higher priority to *ex officio* criminal actions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- As steps toward a deterrent enforcement system, establish a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; implement judicial policies that expedite criminal

¹For more details on Brazil's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For more on IIPA's global issues, see IIPA's 2011 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



copyright investigations; and establish specialized IPR courts with copyright responsibilities in key jurisdictions.

Legislation and Regulation

- Review the Copyright Law reform legislation to correct fundamental problems, including by narrowing any new limitations and exceptions, and bringing provisions on technological protection measures (TPMs) and online piracy into line with global best practices.
- Refocus any legislative framework for the Internet to reflect the critical role of copyright protection in promoting the healthy growth of e-commerce, including by authorizing right holders, Internet service providers (ISPs) and consumers to enter into constructive and cooperative voluntary agreements and procedures to combat online piracy.
- Enact legislation to facilitate copyright prosecutions and to clarify forfeiture and destruction remedies.
- Remove market access barriers, including high tariffs and taxes placed on entertainment software and consoles, and avoid excessive restrictions in the audiovisual sector.
- Avoid technology-specific mandates and preferences in government procurement, allowing government agencies to choose software and other IT products that best meet their needs for particular tasks.

Brazil has been a major beneficiary country of the U.S. Generalized System of Preferences program (GSP), which provides it with preferential access to the U.S. market. Although the GSP program has lapsed for 2011, if it is restored it will presumably still require beneficiary countries to provide “adequate and effective” protection to U.S. copyrighted materials. During 2010, \$2.1 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. Piracy involving hard goods – mostly CDs and DVDs carrying pirate content, but also devices that circumvent access controls – continues to be a key concern for several sectors, while the business software industry continues to combat high rates of end-user piracy by corporations and other enterprises, and the book publishing industry confronts widespread unauthorized photocopying of educational materials.

1. Internet piracy. There are an estimated 75.9 million Internet users in Brazil, which represents about 38% of the country’s population. Over the past decade, Internet use has increased more than fourteen-fold in Brazil.² But the development of a robust legitimate marketplace in delivering copyrighted materials to these users has been stunted by the prevalence of online piracy.

The Internet piracy problems in Brazil involve two main distribution channels. The first is file sharing through peer-to-peer (P2P) networks, the most popular of which are BitTorrent for audiovisual content and ARES for music files. The second involves links to cyber-lockers where pirate material is stored. This second channel has been growing rapidly in recent years; it probably now accounts for the majority of the online pirate music market. (Brazilian websites that directly host pirate content remain relatively rare.)

Increasingly, these links are propagated through popular social networks such as ORKUT, as well as through blogs and forum sites.³ In recent years, ORKUT has been the biggest source of illegal music files in Brazil through “music communities” organized for the sole purpose of posting cyber-locker links to complete-career

²See <http://www.internetworldstats.com/stats10.htm#spanish>, reporting an increase of 1419%, based on data from “Nielsen-Online, ITU and trustworthy local sources.”

³ORKUT is one of the most popular social sites in the world with more than 60 million registered users, 50.5% of them from Brazil. It ranks 103rd in the world in terms of traffic volume, according to Alexa.com, and ranks 13th in Brazil.

recordings of national and international acts. Around half a million registered users are actively engaged in downloading music files from these virtual communities in Brazil. ORKUT has recently taken some positive steps towards addressing this problem, as discussed below.

Similarly, the Motion Picture Association (MPA) reports that cyberlocker services such as RapidShare and Megaupload are the main sources of online piracy of audio-visual product in Brazil. The Business Software Alliance (BSA) also reports that the use of the Internet as a means of advertising illegal software, along with the unauthorized electronic distribution of illegal software, continue.

Taken together, these forms of online piracy have crowded out efforts to develop legitimate online distribution channels for copyright works in Brazil. This has been extremely damaging to the music industry and has virtually foreclosed the growth of a legitimate online music sector.

With regard to videogames, the market for pirate games, whether delivered online or via hard goods, has been enabled by the absence of enforceable legal remedies against game copiers, mod chips, and similar devices that circumvent technical measures used by game publishers and game console manufacturers to prevent piracy. As a result, most game consoles in use in Brazil (as many as 95% according to local industry representatives) have been modified to enable the use of pirated copies of games, and such games dominate the market. When such pirate-ready consoles are available to the public in "Lan Houses" and Internet cafes, the damage to the legitimate market increases further.

Industry research helps to document the alarming scope of the online piracy problem in Brazil. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 9.2 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Brazil, placing Brazil fourth in overall volume of detections in the world.⁴ Two of the top ten ISPs implicated in P2P detections globally during 2010 (Tele Norte Leste Participações S.A. and Brasil Telecom) are Brazilian.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Internet-based piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets.

2. Hard goods piracy. For several reasons, pirated hard goods remain widely available in Brazil, even as more of the piracy problem is shifting to the Internet. First, there are large-scale distribution networks that involve thousands of street vendors; established facilities (such as gas stations) which blanket the major highways; and stalls in camelodromos (street markets). Second, there is a large supply of blank media used to burn pirate CDs and DVDs. An estimated 800 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country, mainly from Paraguay, China, Hong Kong and Taiwan. Third, organized crime groups operate at the border with Paraguay, and also control a complex chain for distribution of pirate DVDs across Brazil.

Physical piracy of entertainment software remains quite prominent in Brazil's two largest markets, Sao Paulo and Rio de Janeiro, and is also prevalent in Minas Gerais, Pernambuco, Brasilia, Belo Horizonte and other cities. Pirate games are sold on discs (even for games published for platforms that use other media, such as Nintendo DS cards). Most of the pirate discs are produced by local disc-burning operations, which source their master copies either from counterfeit imports or, increasingly, from downloads of versions of pirated games on the Internet. Of course, one of the most significant hard goods problems for the entertainment software sector is the

⁴These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

ubiquitous sale of circumvention devices, such as mod chips for consoles such as Ps2, Nintendo Wii and Xbox, and the R4 modification for Nintendo DS units, at prices as low as US\$45-50. As noted above, these devices are the gateway to game piracy, since without them users are unable to play pirate games on these platforms. Game copiers and mod chips generally are produced in Asia and many are flown into Brazil from abroad, along with some high-end counterfeit games and cartridge products. There is also a steady flow of modified consoles entering Brazil from Paraguay, most of these modified in modding operations in Ciudad del Este.

Hard goods piracy in the music sector is less visible than before. As more and more music piracy shifts to the Internet, street sales shift more toward pirate DVDs. However, major retail centers for pirate CDs persist in the streets and flea markets of Sao Paulo, Sao Paulo State, Rio de Janeiro, Belo Horizonte and Recife.

MPA reports that the most harmful form of audiovisual piracy for its members in Brazil is hard goods piracy, which is fueled by illicit camcording of movies in theaters. Contrary to public perception that DVD piracy had leveled off, it increased in Brazil's streets and markets, primarily because the pirate distribution channels formerly dedicated to the distribution and sale of music CDs have shifted to DVDs. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs, and are locally reproduced in hundreds of facilities of varying sizes throughout the country. Pirated film products also enter from Paraguay, and smugglers are moving to Guaira, Ponta Porã and Corumbá. The large pirate black markets are a problem, as are strategic point of sales for certain street vendors. All of these create serious economic harm for legitimate business, especially local movie theaters, video rental stores, and the home entertainment market. Street sales of pre-release pirate DVDs (before the release of legal DVD and during theatrical release window) are especially damaging.

Independent producers and distributors confirm through IFTA that DVD sales in Brazil have been negatively impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors are not able to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as a "day-and-date" release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible. The local Brazilian copyright community, including the Brazilian theatrical box-office marketplace, is equally impacted by the damage from piracy and the shrinking of the local distribution channels while piracy remains rampant.

3. Business software piracy. The Business Software Alliance (BSA) reports that software piracy in Brazil continues to include unlicensed software use by businesses and other enterprises; 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. 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 the Brazilian population in general.

BSA reports that the preliminary PC software piracy rate in Brazil in 2010 was 56% (unchanged from 2009), with an estimated commercial value of pirated PC software from U.S. vendors of \$1.2 billion.⁵ There has been some reduction in software piracy levels in recent years, due to good coordination by the CNCP, better public awareness,

⁵BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Brazil. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at www.iipa.com.

and improved enforcement. This decline is a move in a positive direction, but more progress is needed in a market that is as rapidly growing as Brazil. Moreover, a 10 point reduction in the software piracy rate would yield significant benefits to the Brazilian economy.⁶

4. Book Piracy. 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. The Ministry of Education and university and college administrators need to work with the enforcement authorities to address the rampant unauthorized photocopying occurring on and off campus. Additionally, authorities should conduct effective enforcement against copy shops, located on and around university campuses that produce unauthorized copies of books and related teachers' notes. The most immediate concern of academic publishers in Brazil is the problem of university administrative rules that purport to authorize high-volume infringements of foreign works, including by commercial, for-profit copy center. (See discussion below under legislation.) 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.

5. Camcord piracy. 90% of all pirated movies originate as illegal camcords. Unauthorized in-theater audio camcording spiked in Brazil beginning in 2008 and continued to increase in 2010. There was a 31% increase in audio captures from Brazilian theaters in 2010, with a decrease in the number of video source captures. Audio tracks are stolen from Brazilian theaters and married with high quality video captures made available online. This infringing product is then disseminated across the Internet and burned onto DVD-Rs which are then distributed to Brazil's many black markets.⁷ Only one camcording pirate was caught in Brazil in 2010, attempting to steal a Brazilian film, "Tropa de Elite 2". IFTA reports that camcording is particularly damaging in Brazil because it fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

6. Piracy at the border. Brazil's extensive border is 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. Also, with increasing import control 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.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings. The picture remains largely the same in 2010. Many raids against hard good piracy operations are carried out, and considerable pirate product is confiscated. But these raids rarely lead to effective prosecution or deterrent sentencing. Law enforcement needs more resources; and the coordination among different levels of government should be improved. But until the system delivers deterrent penalties, pirates can simply treat dealing with the enforcement regime as a manageable cost of doing business. And until the government begins to engage the

⁶According to a 2010 report issued by research firm IDC for BSA, a 10 point reduction in the PC software piracy rate in Brazil over four years would - create 12,300 new IT jobs, \$3.9 billion in added GDP and \$888 million in new tax revenues. If this reduction were achieved over two years, the benefits would be even greater, with \$5.2 billion added to GDP and \$1.1 billion in new tax revenues. See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>.

⁷MPA 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.

growing menace of online copyright piracy, the prospects, for all copyright sectors, of establishing robust e-commerce marketplaces in Brazil for copyright materials will remain bleak.

A. The Bilateral Consultative Mechanism

Since its inception in 2006, the Bilateral Consultative Mechanism has provided the framework for a U.S.-Brazilian dialogue regarding copyright enforcement matters.⁸ IIPA uses the same framework to introduce its reporting on copyright enforcement trends during 2010. The BCM items include:

(1) *increase anti-piracy raids in well-known marketplaces*

Enforcement cooperation with industry is generally good. The number and quality of police raids targeting hard goods piracy continue to grow. For example, ESA, through its anti-piracy partner in Brazil ABES, supported police in 724 raids in 2010, leading to the seizure of over 1.5 million pirate discs (27% more than in 2009). The Brazilian recording and audio-visual anti-piracy organization APCM reports that a total of 3,686 raids were conducted by police authorities in 2010. This is a 2.5% increase from 2009. These raids resulted in the seizure of 3,516,121 music CD-Rs and 19,176,143 DVD-Rs containing movies. Regarding blank media, 2,713,241 CD-Rs and 11,968,783 DVD-R's were seized.

The problem remains, however, that even successful raids are not sufficiently followed up with successful prosecutions of pirates. Moreover, Brazilian authorities are taking virtually no enforcement actions in the fastest growing marketplace for copyright piracy in Brazil – the Internet – even though the police have by now developed considerable experience in investigating other aspects of Internet crime.

(2) *encourage the establishment and formation of joint state and municipal anti-piracy intellectual property rights (IPR) task forces to focus on priority locations*

Besides the initial task forces set up in Sao Paulo, Rio de Janeiro, Minas Gerais, Bahia and Pernambuco, BSA reports that special task forces are also active in Rio Grande do Sul, Brasilia, Espirito Santo, and Goias. ESA reports that the cooperation between levels of government in Sao Paulo City and State is especially noteworthy; the City has hired knowledgeable anti-piracy personnel from the State police ranks, and these new hires have performed well in neighborhoods such as Lapa, Pinheiros, and Bras. An equally pressing need, however, is for the development of specialized IPR enforcement police units at the state and local levels. Only one new unit was inaugurated last year, in Blumenau, Santa Caterina state.

(3) *take enforcement actions on the Brazil-Paraguay border, both on-land and on-water*

While border enforcement continues, seizures of blank media decreased by 61% in 2010. 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 600,000 pirated video games in 2010. APCM reports that some 19.2 million units of pre-recorded CD/DVDs were also seized – a 47% increase over 2009.

Border enforcement would be enhanced if Brazilian authorities better coordinated with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. Customs enforcement would also be much enhanced if cases of interdiction were referred to the appropriate authorities for criminal prosecution.

⁸For further background on the Bilateral Consultative Mechanism, see <http://www.iipa.com/rbc/2006/2006SPEC301BRAZIL.pdf>.

(4) *enhance deterrence through criminal prosecutions and the application of deterrent penalties*

This remains a serious deficiency in the Brazilian system. Industry associations uniformly report that the great majority of persons arrested never face criminal prosecution. Even for those who are charged, cases are usually dropped or suspended indefinitely. Due to huge case backlogs and other systemic problems, those cases that are prosecuted to a verdict take three to four years before sentencing, and deterrent penalties are rarely imposed.⁹

The police do not have deadlines to complete investigations and deliver results to prosecutors. As a result, investigations may take up to five years, with the interested rights holders having to push the process every step of the way. Judges could ameliorate this problem, because every six months police authorities must request from criminal judges a formal authorization to keep the investigation “open” for evidence collection. Normally, these extension requests are granted automatically. The Supreme Court and the state level supreme courts must instruct criminal judges everywhere in the country to limit the number of extensions 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.

Another systemic shortcoming is that 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 experts. The process of identifying and verifying low-quality pirated products is not difficult and should not require highly trained experts. The appointment of specialized IPR experts at the “*Instituto de Criminalística*” (CSI Institute of Brazil) with the capacity for full-time dedication to piracy cases would also help address the problem.

Additionally, prosecutors and judges lack specialized training in IPR cases. There is no national program to train judges, prosecutors and police officers on IPR law and enforcement programs. Although most of the training seminars or workshops for judges, prosecutors and police officers are organized and financially supported 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 2010, the music industry provided trainings for judges in Curitiba and Florianopolis; ESA participated in an international IP and high tech seminar in Florianopolis at which half the 100 or so attendees were judges or prosecutors; and BSA took part in IPR-focused seminars organized by the Rio de Janeiro National Institute of Law and Criminal Studies, the Rio de Janeiro Federation of Industries and other bar groups.

Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and Sao Paulo, would help address this problem and would also lead to more expedited case processing. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts, but this authority has never been exercised with respect to copyright.

Finally, criminal penalties imposed on pirates are too frequently suspended.¹⁰ Since prosecutions take so long to reach final disposition, a defendant who may have been caught multiple times is treated as a “first offender” so long as none of the prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, so long as the defendant agrees to provide minimal monetary compensation to the victim. In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system does not adequately deter copyright piracy.

⁹None of ESA’s raids in 2010 resulted in a conviction. APCM reports only two convictions arising from raids in 2010. Overall, APCM notes that convictions increased from 254 in 2009 to 534 in 2010, but more than 80% of these resulted in the minimum 2-year sentence, which was usually suspended, so that few if any pirates serve time in jail.

¹⁰The Brazil Series case, discussed below, is a welcome exception to this rule. The site owner has been imprisoned and is also being pursued for other crimes.

- (5) *pursue federal government-sponsored educational and media anti-piracy campaigns, working with the private sector to raise public awareness of the anti-piracy fight*

CNCP has been involved in some important anti-piracy media and educational campaigns, most recently the release by the National Cinema Agency of four films directed to young audiences about the harmful cultural and economic effects of piracy. These were screened in 700 top theaters at the end of 2010. CNCP also joined in partnership with the American Chamber of Commerce and private sector groups including BSA to coordinate a "School Project." Finally, a training "Road Show," carried out by industry groups in conjunction with CNCP, visited 11 cities in 2010 with separate presentations to law enforcement agents, student groups and business about the importance of combating software piracy.

- (6) *continue working with the industry through the CNCP*

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. Local representatives of the leading copyright industry groups participate actively in CNCP and the level of cooperation continues to be high. CNCP has taken some steps to prioritize efforts and target resources. However, in general, 2010 was not a fully productive year for CNCP, due to leadership and membership changes.

In its second national plan launched on May 28, 2009, the CNCP identified five top priority projects for 2010. Only the first of these – the Piracy Free City program – was noticeably active in 2010. Its goal is to actively involve municipal governments in the fight against piracy by creating incentives and establishing local strategies to pursue piracy. The first agreements to participate were signed in December 2009, and in 2010 the programs kicked off in Sao Paulo, Brasilia, Curitiba and Sao Luis. In all participating cities, the program launch was followed by anti-piracy training programs for municipal enforcement agencies, in which copyright industry groups actively participated. CNCP should continue and grow this program in 2011, and must also insure that these programs address the broad range of piracy concerns, including unlicensed use of software by businesses (business end-user piracy).

An important CNCP priority for the year involved Partnerships and Cooperation with Internet Service Providers. The goal is to create mechanisms with the ISPs to prevent the distribution of pirate products over the Internet. Unfortunately, there is no real progress to report on this important project, and it seemed to receive very little attention from CNCP in 2010. In great part, this reflects a lack of political will. As discussed below, some government agencies have given ambivalent or even negative messages about encouraging greater cooperation from service providers in the fight against online piracy. The uncertain status of legislation on Brazil's proposed Internet regulation may also provide a rationalization for CNCP's inaction on this priority. Whatever the explanation, it is clear that this is a major piece of unfinished business, either for CNCP, or for whatever government entity is in the best position to provide incentives for the partnership and cooperation that is needed to effectively combat online piracy.¹¹

B. Internet Enforcement

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among right holders and Internet service providers (ISPs). This cooperation is forthcoming in some areas, including (to an increasing extent) in one of the two main channels for online piracy, links to cyberlockers propagated through social networks and other means. However, in the other critical channel, p2p trafficking in pirated works of all kinds, little cooperation has been shown. The Brazilian government, which has been sidelined on this

¹¹The other three CNCP priorities for 2010 were: Legal Fair: 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; Shops Against Piracy: to unite shop owners nationwide against piracy, and to improve public awareness about the harmful effects of piracy; and Anti-Piracy Portal: to develop an interactive communication portal, including educational and promotional campaigns, to improve communication with the public and present national efforts to fight piracy. The status of these three projects is unclear.

issue over the past year, needs to get actively involved in convening roundtable discussions that can lead to progress on this critical issue for the future of the marketplace in copyright works.

An important step forward was taken in mid-2010, when the social networking service ORKUT began the removal of virtual communities deeply engaged in piracy. These communities offer their participants literally millions of links to cyber-lockers (mainly located outside Brazil) where pirate music, films, videogames and software can be obtained. ORKUT now receives a weekly list from the recording industry identifying the communities involved, and within 5 business days they are generally removed from the service. In the last half of 2010, over one million links to pirate material were removed in this way. While the recording industry appreciates this level of cooperation, much more work remains to be done. Entire communities dedicated to offering infringing music are still present on ORKUT; new communities re-form to offer the same services and must be subject to new notices. More illicit links may be posted every week than are removed through the new system. Still, this is a critical positive step toward the proactive cooperation that is needed.

Cooperation continues in other areas as well. ISPs continue to respond reasonably promptly to requests from right holders to take down infringing content on hosted sites that are making pirate material available, although as noted this is not the main venue for online piracy in Brazil. ESA reports that the dominant Internet auction service, Mercado Livre, removes advertisements for pirate products almost immediately after receiving notice from right holders. The recording industry in Brazil has a similar cooperation agreement with Mercado Livre that allows local anti-piracy groups to remove illicit content promptly after detection. Overall, Mercado Livre remains one of the most cooperative digital businesses in the region.

Unfortunately, this cooperation does not extend to working together to fight the pervasive piracy of all forms of copyright material carried out via P2P services. Brazilian laws and regulations provide no incentive for ISPs to pass on notices to their subscribers who misuse their access to engage in P2P piracy, nor to exclude repeat infringers from continued use. Consequently they do nothing, and this channel for piracy proliferates unchecked.

Clearly, the missing piece of this puzzle is active government involvement to bring ISPs and right holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. The CNCP assigned itself this responsibility two years ago, following an initiative from the Ministry of Culture in 2008, but has failed to deliver. To the contrary, some government agencies have impeded the search for cooperation. In 2009, when the Ministry of Justice asked several agencies for comments on a proposal for a "warning system" through ISPs to customers whose IP addresses were identified by rights holders as "heavy uploaders" of film and music content, the consumer protection agency (DPDC) opposed it on the stated grounds that an ISP sending warnings to their customers at a third party's request would violate the subscriber's right to privacy, and the proposal was derailed. At the Ministry of Justice's request, the DPDC (which reports to Justice) was asked to reconsider its position, but to date its opinion remains unchanged.

In 2010, a legislative draft for Internet regulation (discussed below) seemed to require a court order for sending any warning notices, and even to prohibit the voluntary actions ISPs are now taking to remove access to pirated hosted content. As a result of this counter-productive signal, the CNCP mandate to convene an inter-industry roundtable is at a standstill. IIPA hopes the new Brazilian government will revive this CNCP initiative, and send a clear signal that effective cooperation against the piracy that now blights the online marketplace is in the best interests of Brazil's economic, technological and cultural development.

There is also an important role for criminal enforcement against serious online copyright crimes. Legislation on the books would provide a framework for this, and Brazilian enforcement authorities have considerable experience in investigating online crimes in other areas. Some criminal cases have been pursued in the past 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. In a positive development, the Brazil Series case, in which the investigation began in 2007, was concluded in 2010. The Brazil Series site had approximately 40,000 users every

month, and its owners also owned four other sites that sold illegal content. The owner, a Peruvian, has been imprisoned and is also being pursued for several other crimes.

However, there is some indication that progress in this area has stalled. The recording industry reports that currently not a single police unit anywhere in the country is conducting a serious investigation in the online piracy area. In view of the significant damage that pirates inflict on Brazil's economy and culture, police authorities must accord a much higher priority to criminal investigations of online piracy. In particular, authorities should take *ex officio* actions against 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.

C. Enforcement against End-User Software Piracy

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 properly licensed software). BSA's enforcement campaign is based on a cease and desist letter procedure aimed at legalizing use of business software, escalating to the filing of civil lawsuits against specific companies that will not agree to purchase needed licenses. In 2010, BSA started 215 civil actions against end-users in the first 11 months. While this enforcement campaign is effective in its overall goal – to encourage businesses to legalize their software use – some problems have been encountered in the courts. Many judges have insufficient knowledge of copyright law, and huge backlogs are commonplace. Cases usually take from 18 months to 4 years just to come to trial in the first instance, and repetitive appeals can require up to 12 years to finally resolve. Brazilian courts continue to require extremely high fees for forensic experts who conduct searches and seizures and analyze the results, and for bonds. On average, BSA has paid up to US\$5,000 for experts' fees and up to US\$25,000 as bonds, but in some cases, courts have demanded multiples of these sums, and BSA has had no option but to terminate the cases. This situation has remained unchanged since 2005. BSA supports legislative reform to permit foreign sampling and private sector assistance in the forensic work.

For cases that succeed in running this gauntlet, satisfactory judgments can be obtained, except for some courts that simply order companies to pay the license fee they would have had to pay in the first place for the software they have been using without authorization, without any additional penalty. This lacks any deterrence and encourages companies to wait until they are sued before legalizing their software use.

BSA urges authorities to make more use of the "fiscal crime" provision in the 1998 Software Law. 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. Such tax evasion cases would have the potential for a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies.

LEGISLATION AND REGULATION IN BRAZIL

During 2010, two important law reform projects in Brazil were opened to public comment: a draft proposal from the Ministry of Culture to revise the 1998 Copyright Law, and a seemingly more embryonic proposal from the Ministry of Justice on possible Brazilian legislation of a legal framework for use of the Internet. IIPA submitted comments on both proposals. We understand that both are now under review by the respective ministers of the new administration.

A. Copyright Law Reform. While the draft Copyright Law reform proposes a number of improvements to current law, it also raises a number of concerns for the copyright industries. These include the following:

- The draft proposes many new exceptions and limitations to copyright that are unnecessarily broad and inconsistent with a workable balance between protections and exceptions. Concerns include a broad new

general exception for a number of socially beneficial uses, as well as exceptions for interoperability, access by the disabled, and out of print works, all of which lack critical definitions. It was not clear that these new exceptions would be limited by the three-step test set forth in Article 13 of the TRIPS Agreement.¹² Moreover, it is important that there be language clearly specifying that with regard to computer programs the exceptions that apply are those found in Brazil's Software Law.

- The draft proposal fails to close significant gaps in Brazilian law's safeguards for technological protection measures (TPMs) used by copyright owners to control access to or copying of their works. In particular, the law should cover both access controls and copy controls; should prohibit not only the act of circumvention of TPMs, but also trafficking in circumvention devices and services; and should include criminal remedies for making or distributing circumvention devices. As noted above, these shortfalls in Brazilian law have led to a virtually unregulated market in game copies, mod chips and other circumvention devices, which have themselves opened the door to a videogame market completely dominated by pirate product. The draft law would worsen the situation, by weakening even the inadequate laws currently on the books with a broad exception for any act of circumvention carried out for the purpose of exercising any limitation on copyright. Given the breadth of some of these exceptions, as noted above, this exception clearly threatens to swallow what exists of the rule against circumvention of TPMs.
- The draft proposal represents a missed opportunity to address the critical area of online piracy, and in particular to provide legal incentives (such as through secondary liability provisions) to encourage cooperation between online service providers and right holders in dealing with online piracy.

IIPA is encouraged by preliminary indications that the new Minister of Culture will carefully review the 2010 draft proposal, as well as the comments received, before putting forward a revised draft for legislative action. We urge the Minister to use this opportunity to correct the shortcomings in the 2010 draft and to address the fundamental issues which this draft overlooks. The goal should be a law that enhances the protection of copyright and neighboring rights, and thus promotes production of new original works, in the face of technological developments that have effectively eroded the ability of right holders to enforce their rights.

B. "Marco Civil" Internet Legal Framework. This proposal, prepared by the Center for Technology and Society from Fundacao Getulio Vargas and the Justice Ministry, fails to recognize the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. In addition, the draft would create impediments to effective copyright enforcement on the Internet; pre-empt the potential use of a number of mechanisms to address online piracy; and create broad immunities from liability without any conditions to cooperate in dealing with those who employ Internet access to commit copyright theft. As noted elsewhere in this submission, the release of the draft Internet legal framework bill was perceived in many quarters as a statement discouraging voluntary cooperative anti-piracy measures, and thus cast a pall over efforts to convene a roundtable for candid discussion of such voluntary measures. IIPA is pleased that this proposal will be subject to further review and examination, and looks forward to participating in an effort to develop a balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element.

C. Legislation/Regulation Impacting Publishers.

- University Administrative Rules. Academic publishers in Brazil remain concerned over the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP). 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

¹²Article 13 of TRIPS provides: "Members shall confine limitations or exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder." [Numbering added]

license. "Not available in the Brazilian market" is not defined, but reports indicate that this criterion has been interpreted to mean 1) where a book is not written in Portuguese and 2) is not for sale in the nearest bookstore. In practice, it has allowed the copying of a work or book in its entirety – a practice that exceeds what is allowable under international norms. Several years ago, publishers presented a formal request for revocation of this rule to USP, but were rebuffed, the argument apparently being that the rule is "constitutional" as it grants access to education and knowledge. The rule established a terrible precedent and should be revoked, or at a minimum, revised to conform to international standards.

- Objectionable copyright bills regarding student copying. Bill No. 131/06, presented in the Senate, appeared to establish that a student could copy 25% of any work without remuneration to the rights holder. Academic publishers (local and international) already face rampant unauthorized photocopying of books and journals in educational institutions, and legislation of this sort would have exacerbated the problem. With a new government in place, the bill is reportedly on hold. This legislation requires significant revision, and we urge the new government to ensure that it meets the TRIPS three-step test for exceptions to protection.
- Bill regarding electronic public availability of information produced with public funds by higher education institutions. Bill No. 1120-2007 would create an electronic government portal through which technical and scientific research generated at higher education institutions using public funds would be made publicly available. The proposed law should be carefully crafted to ensure that publications that publish peer-reviewed research, or research produced by third parties that were not government funded, are not lumped into the general category that the legislation seeks to cover. The bill reportedly remains under consideration by the legislature but its status is unclear.

D. Proposed legislation related to enforcement. For the past several years, copyright industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement. Currently there are several proposals that the industries have worked to present both to the Congress and through the CNCP. IIPA encourages positive action on these bills.

- Bill on forensics and destruction of illegal products. In May 2008, a Special Commission to Combat Piracy (CEPIRATA) was created by the Chamber of Deputies 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 bill 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.
- Bill on destruction and forfeiture of equipment used to produce pirated goods. One topic addressed by CEPIRATA but omitted from bill 5057/2009 was the destruction of seized pirate product and forfeiture of equipment used to produce it. A new bill (8052/11), introduced on the last day of 2010, would fill this gap, while also authorizing an expert report to be based on sampling of the goods seized.
- Other enforcement legislation. Draft law 2729/03 would modify the Criminal Code, the Criminal Procedure Code, the Industrial Property Code, the Copyright Law and the Software Law to facilitate the search, seizure and destruction of pirated goods. It also contains other valuable improvements, including criminalizing the advertisement of pirated goods, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; increasing the minimum penalties for IPR infringements

to avoid conditional suspension of prosecutions;¹³ and providing prosecutors with the authority to pursue criminal actions in the absence of a rights holder action.

MARKET ACCESS AND RELATED 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 acquire 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: Brazil's high tariffs and taxes on videogame products continue to plague the entertainment software industry and serve as a significant barrier to market entry and as a spur to the pirate market. Cumulatively, tariffs and taxes can nearly triple the price of a legitimate copy of videogame software, compared to a smuggled copy that reaches the consumer without paying these fees. A customs ruling in early 2010 exacerbated the problem of high tariffs, ordering that import fees be imposed on the copyright value of imported games, rather than on the (much lower) value of the magnetic media in which they are embodied. The practical effect was a sharp increase in the cost of importing legitimate games into Brazil. A court decision handed down on December 17, 2010 has suspended the effect of the customs ruling but may be subject to modification. With regard to internal taxation, 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. In particular, the 50% federal tax on entertainment consoles has contributed significantly to the slow entry of console manufacturers into the market, and to the flood of grey market, pre-modified consoles and pirated software into Brazil. The federal government must address this problem so that the purveyors of pirated products do not continue to thrive at the expense of legitimate businesses.

Foreign ownership restrictions and content quotas bills on the audiovisual sector (PLS 210/07 and PL 29/07-PLS 116/10): 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 ISPs and telecoms that distribute local content. These bills would not only harm foreign entities, but also impair the continued growth of the Brazilian audiovisual industry as a whole. After significant discussion throughout 2010, the House of Deputies modified and approved the bills. The current text sent to the Senate would impose local content quotas for pay television to be enforced by ANCINE, the national film agency, and delegate to ANCINE unprecedented powers to limit advertising and direct business activities. It would also set rules on technological convergence, opening the way for telephone companies to compete with cable operators in offering content and broadband service. Currently the Bill is being analyzed by the Senate's Constitutional and Justice Commission, and will also need review by the Science and Technology Commission; the Economic Affairs Commission; the Education, Culture and Sports Commission; and the Consumers Defense and Environment Commission. While MPAA supports expanding the number of platforms on which consumers can enjoy legitimate content, it is concerned that local content quotas will limit what consumers experience and push consumers towards illegitimate sources of content.

¹³This is a serious problem for the software industry. Because the minimum penalty under Brazil's separate software law is only one year, criminal infringement cases brought by the software industry are subject to automatic suspension of prosecution under Law 9099.95. Increasing the minimum penalty would eliminate this automatic suspension and ensure that more software piracy cases are actually prosecuted.