

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2013.¹

Executive Summary: Progress continues in Brazil's long-running struggle with widespread copyright piracy in the physical environment, spearheaded by the expansion of the "City Free of Piracy" initiative from São Paulo to other cities and other initiatives. But systemic bottlenecks in investigation, prosecution and the courts add up to an enforcement system that still struggles to deliver adequate deterrence. Meanwhile, piracy is rapidly migrating online, and Brazil has not put in place sufficient mechanisms to adequately address this. Criminal enforcement against online piracy has stalled, and the informal cooperation of other players in the Internet ecosystem remains inconsistent. As documented in a recent study for the Brazilian government, as broadband penetration increases rapidly, the vast majority of Brazilians who download music and movies from the Internet patronize illegal sources almost exclusively, including notorious Internet marketplaces linking to offshore pirate repositories, and illicit peer-to-peer (P2P) services. In this environment, it is difficult for services for legitimate delivery of copyrighted works online to gain traction, although there are a few positive trends in the music sector, notwithstanding the continued existence of an online environment dominated by infringement. Meanwhile, source piracy of motion pictures through illicit camcording continues unchecked; and the delays and backlogs that plague criminal enforcement are endemic in the civil courts as well. Good progress has been made in addressing software piracy (including unlicensed software use by enterprises), but the overall level of such piracy remains high.

Brazil's copyright legal regime needs modernization to sufficiently address the copyright protection and enforcement needs of all copyright sectors. For example, the copyright law lacks clear liability rules for Internet Service Providers (ISPs). Additionally, deficient laws against circumvention of technological measures used by videogame copyright owners to restrict access and copying, coupled with exorbitant taxes and duties on legitimate imported videogame consoles, has stunted the development of a legitimate market for these games in Brazil. Current copyright reform efforts would take some modest steps forward to address some of these issues (but, unfortunately, some steps backward on technological protections); but even these appear to have stalled. Meanwhile, an overall "law of the Internet" proposal is under active consideration by Congress. While this should be an important opportunity to strengthen copyright protection, instead this initiative as drafted overlooks the role of copyright protection in delivering a healthy and viable Internet marketplace, and may undermine the ability to foster the kind of cooperative relationships that are necessary to enhance online accountability for the benefit of society by encouraging legitimate commerce. We note there have been recent proposals to amend this legislation to preserve the possibility of notice-and-takedown and other needed copyright remedies, and urge that these be adopted. Finally, prompt Senate approval of a bill passed by the House of Deputies to streamline copyright prosecutions would be an excellent step toward broader enforcement reforms. Along with copyright law reform, reduction of market access barriers, and Internet legislation that respects intellectual property rights, Brazil should be encouraged to take these steps toward a legal regime that effectively addresses all forms of piracy and bolsters the growth of its creative industries.

¹For more details on Brazil's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.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 2013 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2013

Enforcement

- Sustain and expand the “City Free of Piracy” initiative to implement coordinated attacks on hard goods piracy in more major cities, and verify that the cities that have signed on to the initiative are abiding by their commitments to increased and effective enforcement.
- Ensure that the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) is structured and operated to maintain a priority focus on concrete steps to fight piracy, and that it receives enhanced resources to do that.
- Building on the CNCP Internet working group, set up monthly roundtable discussions among rights holders and the ISP industry to achieve a cross-industry agreement to combat Internet piracy in Brazil.
- Launch criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- Effectively enforce the Penal Code to address illicit camcording in theaters.
- As steps toward a deterrent enforcement system, prioritize a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; implement judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.

Legislation and Regulation

- Advance copyright law reform legislation to modernize Brazil’s copyright legal regime, including by keeping any new limitations and exceptions narrowly focused to achieve their intended purpose, and bringing provisions on technological protection measures (TPMs) and online piracy into line with global best practices.
- Ensure that the Internet “Marco Civil” bill reflects the critical role of copyright protection in promoting the healthy growth of e-commerce, including by fostering (not impeding) copyright enforcement and by authorizing right holders, ISPs and consumers to enter into constructive and cooperative voluntary agreements and procedures to combat online piracy.
- Enact pending legislation to streamline copyright prosecutions and to clarify forfeiture and destruction remedies.
- Reduce high tariffs and taxes placed on videogame products.
- Avoid implementing significant government procurement preferences for locally produced copyright products, such as software, that will effectively close the market to foreign companies.

Brazil is a major beneficiary country of the U.S. Generalized System of Preferences program (GSP), which provides preferential access to the U.S. market for certain countries that provide “adequate and effective” protection to U.S. copyrighted materials. During the first eleven months of 2012, almost \$2.1 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code, a 10.6% increase over the same period in 2011, and amounting to about 7.1% of Brazil’s total exports to the U.S.

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. The software industry continues to combat high rates of enduser piracy by corporations and other enterprises. The book publishing industry still confronts widespread unauthorized photocopying of educational materials. The videogame industry continues to see pirated games and circumvention devices widely available for sale in markets throughout the major cities.

Piracy Impacts: A study conducted for the Motion Picture Association of America (MPAA) in 2011 by IPSOS and Oxford University quantified the overall economic impact of piracy in Brazil on the audiovisual sector.² It estimated that piracy caused direct losses of R\$3.5 billion (US\$2 billion) to Brazil's Gross Domestic Product, with overall losses to the economy totaling R\$7.3 billion (US\$4.16 billion). The study estimated that this illegal activity cost R\$1 billion (US\$570 million) in foregone tax revenues, and counted 92,000 jobs either not created or lost due to piracy. These figures constitute the second largest economic impact of piracy among the ten countries studied in the research.

Another study, prepared by the market research firm IDC for BSA | The Software Alliance (BSA), found that 53% of PC software installed in 2011, with a commercial value of more than US\$2.8 billion, was unlicensed.³ In an earlier study, IDC found that decreasing Brazil's software piracy rate by ten points over a four-year period would add US\$3.9 billion to GDP, generate US\$888 million in additional tax revenues and create 12,333 new IT jobs. The benefits would be even greater if the ten point reduction were achieved in two years, yielding over \$5.2 billion in added GDP and nearly \$1.2 billion in new tax revenues.⁴

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 have been modified to enable the use of pirated copies of games, and such games dominate the market.

Internet Piracy: Internet access continues its explosive growth in Brazil, with double-digit increases in the level of broadband penetration in each of the past three years.⁵ But the development of a robust legitimate online marketplace in delivering copyrighted materials to these users continues to be stunted by the prevalence of online piracy. The Internet is certainly the fastest-growing forum for piracy in Brazil, and has become the primary piracy challenge for several industry sectors.

A study conducted for the Secretary of Strategic Affairs of the Presidency of the Republic by the Ipea public foundation, and released in May 2012, concluded that "online piracy appears to be widespread among downloaders of music and films, including individuals from all economic classes, regions, age brackets, levels of formal education and employment status..... Estimates made by authors indicate that at least 41% of Internet users could be classified as 'pirates' in 2010."⁶ This study, which was intended to provide "a summarized, objective assessment" of the situation by a respected foundation that "offers technical and institutional support for government decision-making," also estimates that some 81% of Brazilians who download music or films from the Internet do so exclusively from illegal sources. The Ipea study corroborates in general terms the findings of a number of industry studies that indicated the pervasiveness of online piracy in Brazil.

²Economic Consequences of Movie Piracy: Brazil," January 2011 (on file with IIPA).

³BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Brazil was 53%, representing a commercial value of unlicensed software of US\$2.85 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

⁴See http://portal.bsa.org/piracyimpact2010/cps/cp_brazil_english.pdf.

⁵See <http://www.budde.com.au/Research/Brazil-Telecoms-Mobile-Broadband-and-Forecasts.html>.

⁶Comunicado do Ipea - 2012 - Maio - nº 147, "Download de músicas e filmes no Brasil: Um perfil dos piratas online", at http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=14071 (unofficial translation on file with IIPA). Note that this study used a very conservative definition of "online pirate," which excluded any downloader who purchased music, films or ringtones on even a single occasion online or offline during the previous twelve months. It thus appears from this study that two-fifths of all Brazilian Internet users rely exclusively on illegal online sources for the music and films they consume.

Internet piracy problems in Brazil involve two main distribution channels. The first involves sites that link to infringing distribution hubs (sometimes called “cyberlocker” services), nearly all of which are located outside Brazil. (Brazilian websites that directly host pirate content remain relatively rare.) Link sites to infringement hubs account for over 60% of online music piracy, and at least that proportion of the Internet piracy cases involving audiovisual works like movies and TV programs. Sites such as 3000filmes.com and baixedetudo.net (which translates to “download everything”) are flagrant examples of sites that aggregate links to pirate movies (including via streaming)⁷ and music, with the latter also engaged in distributing hacked or cracked software codes or programs, and that attract high volumes of visitors. One very popular site in this category, degracaemaisgostoso.org (“free is much better”), reaches 1.5 million unique users each month, while Musicas para Baixar (“music for download”) has 900,000 unique users monthly. Some of these linking sites, like baixedetudo, have now moved their hosting out of Brazil, and the files to which they link are generally stored on offshore hosting sites such as 4Shared and Depositfiles. But, the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively. Many websites also offer links to infringing game files in downloadable form, and such links also continue to be propagated massively through social networking communities such as Orkut. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

The second channel for Internet piracy is filesharing via illicit P2P networks. While there is still filesharing of music (accounting for over 30% of online music piracy) and audiovisual works in Brazil, this medium stands out as a growing online piracy threat for the entertainment software industry; pirated games are widely available in Brazil on P2P networks. BitTorrent remains overwhelmingly the most popular P2P network, boasting a 47% year-on-year growth rate, followed by eDonkey and Ares. Indeed, in 2012, Brazil again ranked second in the world in the number of connections by peers participating in unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks. According to the Ipea report referenced above, Brazilian telecommunications operators estimate that 50-60% of all Internet traffic in Brazil consists of P2P traffic.

Other forms of networked dissemination of pirate products in Brazil include: the use of online auction sites to sell circumvention devices, such as game copiers⁸; LAN houses and Internet cafés where pirated games are commonly downloaded; and, the use of the Internet as a means of advertising illegal business software, along with the unauthorized electronic distribution of such software.

Taken together, these forms of online piracy have crowded out many of the efforts to develop legitimate online distribution channels for copyrighted works in Brazil. One relatively bright spot in this picture is the robust growth in the past year of the legitimate market for online music, including the successful roll-outs of international services such as iTunes and Rdio. Online revenues are projected to expand in 2012 by 80% over 2011, and to account for more than 30% of local music industry revenues (compared to 17% in 2011). The fact remains, though, that the online music marketplace is dominated by illegal sources, with only a small minority of Brazilian online consumers patronizing authorized services (as documented by the Ipea study).

Hard Goods Piracy: Even as more of the piracy problem shifts to the Internet, pirate hard goods remain an enormous problem in Brazil. Large-scale distribution networks involve thousands of street vendors, established facilities (such as gas stations) which blanket the major highways, and stalls in camelodromos (street markets). Hundreds of millions of 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, and are used to burn pirate musical recordings, movies, and software.

⁷For example, 3000filmes.com, hosted in Brazil, embeds and links to video players offering instant streaming access to over 2900 unauthorized titles of first-run motion pictures and TV content stored on offshore infringing distribution hubs such as videobb.com.

⁸One ESA member company reports that internet auction sites in Brazil are responsible for more than twice as many listings of circumvention devices than any other country.

Physical piracy of entertainment software remains quite prominent in Brazil's two largest markets, São Paulo and Rio de Janeiro, and is also prevalent in other states. In downtown São Paulo, ESA representatives continue to find burning labs servicing sellers of pirated games in street markets and shopping centers, as well as street vendors. In Rio de Janeiro, the Camelódromo Uruguaiana continues to house sellers of pirated games, modified consoles and other circumvention devices, despite periodic raids that serve to temporarily reduce these numbers. In the capital city, the large open air market Feira Do Paraguai has been the venue for sales of pirated games for many years, with a December 2012 raid confiscating several thousand copies from sellers in this market. Pirated games are generally sold on discs and micro secure digital (SD) 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. In some specialized markets, like Santa Ifigenia Street in São Paulo, pen drives loaded with huge quantities of pirate games are increasingly prevalent.

Santa Ifigenia Street is also a leading venue for sales of circumvention devices, such as game copiers and mod chips for consoles such as PS2, Wii and Xbox, and the R4 devices and other game copier circumvention devices, at prices as low as US\$39-59. Typically, sellers of the game copiers also include a memory card with 50-150 game titles that were illegally downloaded from the Internet. As noted above, these circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software. Game copiers and mod chips generally are produced in Asia and are flown into Brazil or delivered through the same channel for modified game consoles.

Hard goods piracy in the music sector is less visible than before, as more music piracy shifts to the Internet. However, pirate CD-Rs persist in the streets and flea markets of São Paulo, São Paulo State, Rio de Janeiro, Belo Horizonte and Recife.

MPAA reports that while hard goods piracy remains a serious problem, it represents a declining trend, as illegal downloads and streaming from the Internet grow in prevalence, and as the scale and effectiveness of enforcement against hard goods piracy improves. The highest level of hard goods piracy is found in major cities like São Paulo, Rio de Janeiro, Salvador, Recife, Foz de Iguacu, and Vitoria, and specifically in many of the same large pirate black market venues cited by ESA for videogame piracy, such as Galeria Page, Feira do Paraguai, and Mercado Popular de Uruguaiana. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs, with the content sourced from illicit camcording of movies in theaters, and 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. Street sales of pre-release pirate DVDs (before the authorized release of DVDs or during the theatrical release window) are especially damaging to legitimate businesses, including local movie theaters, video rental stores, and the home entertainment market.

The Independent Film and Television Alliance (IFTA) confirms that hard goods piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute films and television programming worldwide. DVD sales in Brazil have been negatively impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Unable to compete with free, legitimate DVD distributors in Brazil are not able to commit to distribution agreements, or they 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, because national distributors release independent films on their own schedule in each country, producers of these films are unable to time releases in a way that would limit incentives for pirates to flood pirate product into markets where titles are not yet legitimately available. Brazilian as well as international film producers and distributors are adversely impacted by the damage from piracy and the shrinking of the local distribution channels.

Software Piracy: BSA reports that while gradual progress has been made (the software piracy rate dropped from 54% to 53% in 2011, down from 59% in 2007), software piracy in Brazil continues at a high level, including unlicensed software use by 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.

Camcord Piracy: Ninety percent of all pirated movies originate as illegal camcords. Unauthorized in-theater audio camcording spiked in Brazil beginning in 2008 and continued to increase in 2012. MPAA identified 44 member company films stolen from Brazilian theaters in 2012, a 19% increase from 2011. The majority of these were audio captures, which are 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. While there was one enforcement action brought in 2010, MPAA is not aware of any such actions in 2011 or 2012.⁹ IFTA reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings. While much of the picture remains the same for 2012, progress continues against hard goods piracy, with the expansion of the successful "City Free of Piracy" initiative beyond São Paulo into other major cities, and a record number of piracy convictions. But a number of important issues have not been adequately addressed, including the need for more law enforcement resources; staggering court backlogs; and, the need to impose more deterrent penalties. Meanwhile, the lack of effective enforcement against the pervasive menace of online piracy means that the prospects, for all copyright sectors, of establishing robust e-commerce marketplaces in Brazil for copyright materials remain dim.

As IIPA has detailed in past reports, the CNCP is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign, and (despite some limitations) has been an important instrumentality for improving the enforcement of intellectual property rights in Brazil. CNCP was formed following the issuance of a report by the Brazilian Congress demanding reforms to attack piracy. Its adoption and implementation of multi-pronged action plans to address piracy and counterfeiting led to positive developments that were the basis for the U.S. decision, with IIPA support, to close a years-long GSP investigation of Brazil in 2006. A key element of the most successful aspects of CNCP activities over the years has been the robust participation by organizations representing many of the copyright industries in seeking practical solutions to piracy problems. A reorganization of the Council by the Ministry of Justice in early 2012 sparked concerns about whether the CNCP would maintain the high level of participation and cooperation with industry groups that has been its hallmark, although we understand the CNCP has continued to engage with many key industry groups throughout the year. It is critical to closely monitor developments and urge the Ministry of Justice to take the necessary steps to ensure that the reorganized CNCP continues to work closely with industry, and that it is adequately resourced. One key area where the CNCP has not made progress is the development of a plan to address online piracy.

Enforcement Against Physical Piracy: Signs of Progress, but Many Challenges Remain

During the first eleven months of 2012, the number of piracy convictions in Brazilian courts set another record: 744 (up from 704 in 2011 and only 501 in 2010). Enforcement efforts were more focused on the larger and more important pirate channels (e.g., production labs and warehouses), and while this strategic shift led to somewhat

⁹MPAA appreciates the Minister of Culture's statement confirming that camcording is covered by the Penal Code. This formal opinion has been useful to MPAA in seminars and workshops with public officials.

fewer raids, it may have been more effective than the more scatter-shot efforts of the past. In building on the success of the “City Free of Piracy” project carried out in the City of São Paulo in 2011, the program has been expanded to Curitiba, Brasilia, Belo Horizonte, Osasco, Rio de Janeiro, Vitoria, Cuiaba, and Varzea Grande, with more cities expected to join up in 2013. All these cities saw stepped up enforcement action against long-time hard goods piracy hot spots, in a coordinated effort of law enforcement on the municipal, state and federal levels. It is critical that these coordinated campaigns be sustained and expanded, and that the active participation of city authorities in improved enforcement be verified. The working relationship between copyright industry anti-piracy organizations and the Brazilian authorities in the field of physical piracy remains excellent.

Despite these encouraging signs, many critical bottlenecks and deficiencies in Brazil’s enforcement system remain to be addressed. While the number of criminal convictions increased in 2012, it remains the case 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, even those cases that are prosecuted to a verdict take three to four years before sentencing, and deterrent penalties are rarely imposed. Among the main deficiencies, (which have been described in detail in past IIPA reports) are in:

- 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. Among other detrimental impacts, the requirement to store all seized goods throughout the long pendency of the case drains away resources that could be better applied to running more enforcement operations.
- 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 several 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.
- Prosecutors and judges lack specialized training in IPR cases, and there is no effective national program to train them. Although currently most training for judges, prosecutors and police officers is organized and financially supported by the affected industries¹⁰, CNCP has been active in stimulating, promoting and participating in such events at the national, regional, and state levels, but these efforts must be expanded considerably.
- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and São Paulo, would improve judicial expertise and help expedite case processing. The Industrial Property Law (Law No. 9279, which entered into effect in 1997) authorized the judiciary to create specialized IPR courts, and such courts exist for patent and trademark matters, but this authority has never been exercised with respect to copyright.
- Finally, criminal penalties imposed on pirates are too frequently suspended. 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 other prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, sometimes conditioned on the defendant agreeing to provide minimal monetary compensation to the victim.¹¹

In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system does not adequately deter copyright piracy. Similar concerns apply to Brazil’s civil judicial system, on which BSA relies extensively. BSA’s enforcement campaign is based on a cease and desist letter procedure aimed at legalizing use of

¹⁰For example, in 2012, BSA sponsored four training sessions for 80 court experts on examination of software and licenses.

¹¹The software industry faces a similar problem. 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.

business software, escalating to the filing of civil lawsuits against specific companies that will not agree to purchase required licenses. While this enforcement campaign is effective in its overall goal – to encourage businesses to legalize their software use – its effectiveness is undermined by court backlogs. It can take up to four years for a civil case to come to trial in the first instance, and up to 15 years to reach a final decision in a civil infringement case, due to repetitive appeals. Furthermore, far too many judges lack adequate training and experience to handle copyright infringement cases.

A major enforcement impediment identified by BSA is the extremely high expense for forensic experts who conduct searches and seizures in civil cases and analyze the results, and for bonds imposed on U.S. and other foreign rightsholders. 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. This situation has remained unchanged since 2005, and requires legislative reform to permit sampling and private sector assistance in the forensic work.

In those cases that do proceed to judgment, BSA is pleased to note that relatively fewer courts have simply been ordering 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. Instead, fines of multiple times the market value of the unlicensed software are increasingly being imposed. This provides greater deterrence in those cases that proceed to final judgment, but also sends a message to companies that they should not wait to be sued before legalizing their software use.

BSA recommends that authorities 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.

Internet Enforcement: Cooperation and Government Action Needed

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among rights holders and ISPs. This cooperation is forthcoming in some areas. Purely on an informal basis, a number of ISPs are responsive in a reasonably prompt fashion to requests from rights holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;¹² to delete advertisements for infringing copies; and even to shut down blogs, forums and social networking communities that are dedicated to disseminating pirate product. But clearly this piecemeal and passive response is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials, as outlined above. Furthermore, 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 effectively deal with repeat infringers. Consequently, ISPs do nothing, and this channel for piracy proliferates unchecked.

Clearly, the missing piece of this puzzle is active government involvement to bring ISPs and rights holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. As long ago as 2008-9, the CNCP identified as a priority for its future activities the area of “Partnerships and Cooperation with Internet Service Providers.” The goal was to create mechanisms with the ISPs to prevent the distribution of pirate products over the Internet. Unfortunately, there has been little progress toward this goal. While the convening of a working group under CNCP auspices in 2012 on “Intellectual Property and the Internet” is a hopeful sign, thus far there has been no participation in it by ISPs. In the past, some government agencies have impeded the search for cooperation.¹³ In 2010, an initial legislative draft for Internet regulation (discussed below)

¹²As noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there.

¹³In 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.

seemed to discourage or even prohibit the limited voluntary actions ISPs are now taking to remove access to pirated hosted content after rights holder complaints. In any case, it is clear that the mandate to convene an inter-industry roundtable is a major piece of unfinished business 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. IIPA urges the Brazilian Government to revive this initiative, in order to 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.

The situation is different with regard to criminal enforcement against serious online copyright crimes. Existing legislation provides a framework for this, and Brazilian enforcement authorities have considerable experience in investigating online crimes in other areas. But, in contrast with the progress being made on enforcement against offline piracy, Brazilian authorities continue to take 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. In the past, some criminal cases were pursued against Internet pirates selling pirated DVDs and those offering the sale of pirated movies via social networks such as ORKUT. However, progress in this area has slowed considerably. For example, while 13 criminal investigations have been opened in eight states against the operators of 36 websites that offer cyberlocker links for unauthorized downloading of music, none has yet resulted in a prosecution, even though all have been pending for at least a year (the first of these cases was presented to police in September 2010). Even though court orders have been obtained requiring ISPs to disclose information relevant to some of these cases, most of these orders have not yet been fulfilled. 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 P2P programs, or that clearly and intentionally build their business on providing links to clearly infringing materials.

LEGISLATION AND REGULATION IN BRAZIL

Copyright Law Reform: Brazil's copyright law is in need of updating to reflect today's copyright protection and enforcement challenges. In March 2011, the Ministry of Culture released a revised draft of copyright law amendments for public comment. Press reports indicated that further revisions were made before a draft was forwarded to the President for a final analysis; but with the arrival of a new Culture Minister in mid-2012, the draft was returned to the Ministry, and appears to have stalled. IIPA understands that a new draft is being prepared and may move forward in the first half of 2013.

IIPA submitted detailed comments on the revised 2011 proposal, as did several IIPA members. IIPA's comments welcomed Brazil's efforts to modernize its copyright law. The 2011 draft contained a number of positive features, including a narrowing of some of the excessively broad exceptions to copyright protection that had been proposed previously, and the establishment of a liability regime applicable to the online hosting of infringing content, which would increase the incentives for providers of such services to cooperate with right holders, such as through a notice and takedown system. However, a number of significant problems remained unresolved. Some of the more important include:

- The draft proposal does **not provide adequate safeguards for TPMs used by copyright owners to control access to or copying of their works**. As noted, the shortfalls in Brazilian law on this topic have led to a virtually unregulated market in game copiers, mod chips and other circumvention technologies. In order to bring its law up to global minimum norms, Brazilian law should protect 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 technologies. Under the 2011 draft, current law would be further weakened by a broad exception for any act of circumvention carried out for the purpose of exercising any limitation on copyright (the uncertain scope of several of these limitations exacerbates this problem). The draft law would also have imposed a new tort

liability on rights holders if TPMs are later found to inhibit the use of such limitations. While the latter liability would not have applied to TPMs that are “essential to the purchase or licensing of works in digital media,” that exception was not specific enough to ameliorate the crippling level of uncertainty that the liability provisions would impose on the decision to employ TPMs. Brazil’s aspirations to grow digital commerce are not well-served by laws that are hostile to TPMs usage, and IIPA urges Brazil to avoid these pitfalls when the new copyright law reform proposal is drafted.¹⁴

- Several of the **exceptions to copyright protection** in the 2011 draft bill were so broad, or so vaguely defined, as to run afoul of international norms to which Brazil has agreed. In particular, the broadly worded exception for “portability or interoperability” (proposed Article 46(II)); the numerous undefined terms in the exception for facilitating access by the disabled (proposed Article 46(IX)); and the “catch-all” exception that appeared in proposed Article 46, paragraph 2, should all be re-examined to ensure they will meet global standards and avoid unnecessary harm to legitimate licensing markets.
- With regard to applicability to **computer programs**, it should be clarified that Brazil’s Software Law still governs the issue of **limitations and exceptions to copyright protection** for such works.
- The exclusive **“making available” right for sound recordings** should be explicitly recognized in Brazil’s copyright law, rather than simply being inferrable from a general “use” right. “Making available” on an interactive basis is the 21st century equivalent of distribution, and the rights of producers and performers to control this central aspect of digital commerce should be spelled out.
- The 2011 draft’s provisions on **online piracy**, while taking an important first step toward encouraging cooperation with respect to hosted content, fail to tackle other critical aspects of the pervasive and growing online infringement problem in Brazil, in which, as noted above, domestically hosted infringing content plays a relatively minor role. So long as a comprehensive legislative response to this problem is not undertaken, one that addresses online theft through linking and P2P services as well as through domestic hosting, the healthy growth of the online marketplace for copyrighted works will continue to be stunted in Brazil. A key element of the comprehensive approach that is needed is dismantling of any legal impediments to voluntary cooperative arrangements among right holders and service providers that would provide more effective and comprehensive tools for dealing with online infringement. The notice and takedown system proposed in the Article 105-A of the 2011 draft, while welcomed, also needed improvement to meet global best practices, notably to incorporate the requirement that a provider implement policies to prevent abuse of its services by repeat infringers, as a condition for claiming limitations on liability.

IIPA urges USG to continue to engage with Brazilian authorities to encourage the enactment of 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 rights holders to enforce their rights.

“Marco Civil” Internet Legal Framework: This proposal, to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil,” was the subject of intensive discussion in Brazil’s Congress in 2012, but remains pending there. From IIPA’s perspective, the fundamental flaw of the legislation, ever since its initial draft was released in 2010, is the omission of any recognition of the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. While this omission is troubling on a number of grounds, it raises specific questions about whether enforcement against online piracy under Brazilian copyright law (either in its current form or as it may be amended) would be trumped by the broad standards in the Internet law, or whether the adoption of the latter law would be without prejudice to enforcement of the current or amended copyright law. In particular, Article 15 of the Internet bill provides blanket immunity to all “providers of Internet applications” unless they disobey a specific takedown order issued by a court; Article 14 immunizes all “providers of Internet connections services” even in that circumstance; and providers could claim these sweeping

¹⁴Law No. 12.737/2012, which came into force in December 2012, improves criminal remedies for “undue violation of security mechanisms to obtain, tamper or destroy data or information.” Producing or trafficking in devices or software to enable breaking into computers, tablets and other devices would also attract criminal penalties, as would dissemination of material obtained by the invasion. While this commendable cybercrimes initiative could be applicable to some scenarios of circumvention of TPMs, it is no substitute for more comprehensive legislation as outlined above.

immunities even if they refuse to cooperate in dealing with those who employ Internet access to commit copyright theft. Furthermore, because the bill makes no provision for any notice and takedown system, even for infringing hosted content, it could be read to prohibit any such system from being adopted under the copyright law or on a voluntary basis. Indeed, the initial release of the draft bill in 2010 was perceived in many quarters as a statement discouraging voluntary cooperative anti-piracy measures. While some of these potential constraints are subject to interpretation, it is necessary to have a clearer provision on the possible notice and take down mechanisms.

IIPA is quite encouraged by recent reports that Article 15 of the bill will be modified so that the immunity would not apply to cases of violation of copyright or neighboring rights. This would be a significant improvement to the legislation and would preserve Brazil's ability to design an effective and flexible legal regime for dealing with the online copyright theft. However, the modified legislation has not yet been approved by the House of Deputies due to other unresolved issues in the bill. At the same time, the bill could benefit from other improvements to reflect a more balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element. To reflect this balance, the bill should be modified to recognize the responsibilities, as well as the rights, of Internet users, to ensure that privacy and data protection rules accommodate respect for the rights and freedoms of all stakeholders, including intellectual property rights, and, to allow for the reasonable use of network management tools, including those that facilitate dealing with massive online infringements. IIPA looks forward to reviewing the bill as it makes its way through the legislative process.

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 enforcement measures and penalties for copyright infringement. A number of bills were introduced, but few of them progressed until 2012, when Bill 2729/03 was approved by the House of Deputies. This legislation contains a few vital reforms, such as allowing expert reports in infringement cases to be based on a sampling of the goods seized, and authorizing the destruction of all pirate product seized in a criminal case. If adopted by the Senate and ultimately enacted, this bill will streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA urges its passage as soon as possible, but also calls attention to a number of other provisions of the original bill (and other proposals) which had to be jettisoned to expedite passage. Once these initial reforms are adopted, IIPA urges Brazilian legislators to turn to consideration of some of these other long-overdue enforcement reforms.¹⁵ We also note that the debate on reform of the Criminal Code getting underway in the Senate should be closely watched, as it includes consideration of penalties for intellectual property offenses.

MARKET ACCESS AND RELATED ISSUES

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.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector (Law 12.485): This law, which entered into force in September 2012, has some positive features (it opens up the Pay-TV market to telephone companies, thus expanding the number of platforms on which consumers can enjoy legitimate content). But, it also contains a number of harmful elements. It imposes local content quotas for pay television to be enforced by ANCINE, the national film agency, and it delegates to ANCINE unprecedented powers to limit advertising and to direct business activities. MPAA is concerned that local content quotas will limit what consumers experience and

¹⁵Taken together the various bills would, among other improvements, allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; increase the minimum penalties for IPR infringements to avoid automatic suspension of prosecutions under the Software Law; and provide prosecutors with the authority to pursue criminal actions in the absence of a rights holder action.

push consumers towards illegitimate sources of content. MPAA participated actively in hearings on the new law's implementing regulations, and will continue to monitor developments such as the crucial definition of Brazilian audio-visual work for purpose of applying the quotas. It is also participating in public hearings in the Brazilian Supreme Court, where lawsuits have been filed challenging the constitutionality of the law. Careful scrutiny is required to minimize this law's adverse impacts.

Software Procurement Preferences: As part of a plan to foster IT sector growth, the Brazilian government last year proposed a new program to evaluate and certify software products as locally developed in order to qualify them for existing government procurement price preferences as high as 25% (the Certification of National Technology Software and Related Services (CERTICs)). While the overall goal of bolstering the local Brazilian IT industry is commendable, it should not be done in a way that discriminates against foreign providers of software and other IT goods and services and ignores the global supply chain through which these products are developed. The development of this program should be carefully monitored to ensure that it does not unduly restrict access of foreign software and other IT products to the Brazilian procurement market.

Patent Pendency: Brazil's patent pendency problem undermines IP protection and market access for both foreign and Brazilian software and other innovative companies in the Brazilian market. There is a ten-year (or more) backlog in computer implemented patent applications, in part because there are too few patent examiners (INPI, the Brazilian patent office, only has 12 examiners in the ICT division, and as many as half of those are scheduled to retire within a year). In addition to staffing for INPI, greater regulatory flexibility is needed so that INPI can implement novel solutions that require no additional funding to reduce the patent backlog, such as queue swapping, techniques to encourage abandonments, using positive patent examinations from other jurisdictions to permit work sharing in Brazil, etc. Putting out the March 14, 2012 proposed Patent Examination Guidelines for computer implemented inventions for public comment, and the recent initiative by the Brazilian government to support a significant increase in the number of examiners for INPI, are positive steps. We urge the Brazilian government to move forward and build on these efforts.