

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2017.¹

Executive Summary: In a year of political tumult and economic stress in Brazil, there were no dramatic changes in the environment for the copyright industries. A legitimate Internet marketplace for copyright materials in Brazil continues to develop, but pervasive piracy operations targeting the Brazilian market still hampers the healthy growth of e-commerce in creative works. Federal criminal enforcement that took down three leading piracy websites was an isolated bright spot; otherwise, the online piracy ecosystem—including the growing phenomenon of “stream ripping” services, a particular threat to legitimate digital music services—remained largely undisturbed by Brazilian law enforcement. The roster of notorious physical marketplaces (including in São Paulo) for products and services enabling widespread video game piracy, as well as for counterfeit optical discs, remained unchanged. The main obstacles to an effective anti-piracy response include inadequate resources, insufficient training, jurisdictional frictions among federal and state authorities, and the lack of an overall national strategy and the political will to implement it. The legislature’s congressional commission on cybercrime, *CPI do Cibercrime* (CPI), cybercrime commission could help spark some of the needed changes; however, the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) remains an underutilized resource. That could change if, in 2017, CNCP adopts and implements a national strategic plan that gives priority to criminal enforcement against well-established pirate operators, and to active government encouragement for voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. Enactment of pending legislation against camcording, and setting guidelines for court orders on blocking access to websites dedicated to pervasive piracy (as developed by CPI), are also needed steps forward. Implementation of the 2014 Marco Civil legislation must also be carefully monitored to ensure that it preserves space for voluntary notice and takedown for copyright infringement, and other inter-industry cooperative efforts. Exorbitant taxes and escalating duties on legitimate imported video games and consoles continue to stunt the development of a legitimate market for video games in Brazil. A wide range of market access barriers for the audiovisual sector also remain to be addressed.

PRIORITY ACTIONS REQUESTED IN 2017

Enforcement

- Launch additional criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so, seeking strong penalties to raise awareness and foster deterrence.
- Adopt, fund and implement a CNCP strategic plan that prioritizes encouraging cross-industry efforts to combat Internet piracy, and that extends CNCP training and coordination activities to the fight against Internet piracy.
- Ensure that all cities in the “City Free of Piracy Initiative,” including São Paulo, are devoting adequate resources and using all available legal tools to combat pirate marketplaces and distribution chains within their jurisdiction.
- As steps toward a deterrent enforcement system, implement a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.

¹For more details on Brazil’s Special 301 history, see previous years’ reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Brazil’s Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



Legislation and Regulation

- Enact pending legislation to authorize court orders requiring Internet service providers (ISPs) to block access to offshore websites dedicated to criminal activity, including criminal copyright infringement.
- Enact pending legislation to provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit.
- Ensure that implementation of the Marco Civil Internet law and related decrees and legislation do not interfere with voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Advance the efforts of the CPI for legislative reforms and clarification of jurisdictional boundaries to enable inter-agency coordination needed to effectively address online copyright theft.
- Reduce high tariffs and taxes placed on video game products in order to enable industry growth.
- Mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand; restrain national film agency (ANCINE) efforts to regulate intrusively the digital cinema sector; and relax audiovisual quotas that discriminate against non-Brazilian content.

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Internet Piracy: Internet access continues to grow in Brazil, with over 59% of Brazilian households online, and nearly 89 mobile broadband subscriptions per 100 inhabitants.² Increasingly, these connections are used to access legitimate, licensed sources of copyright materials. According to music industry research, more than two-thirds of urban Brazilian Internet users consume music via smartphone, one of the highest proportions in major world markets, and 52% patronize audio streaming services, half of these on a paying subscription basis.³ Music industry digital revenues in Brazil increased 45% in 2015, led by streaming revenue, which nearly doubled. Digital is now the single leading contributor to music industry revenues in Brazil, the world’s tenth largest music market.⁴ Some 14 legal online music services compete to deliver recorded music to Brazilian listeners at compelling price points.⁵ Similarly, at least a dozen free or low-cost online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime as the most recent entry in the market. Most pay-TV operators also provide TV Everywhere services, allowing subscribers to access authenticated content across multiple platforms. All this makes Brazil the region’s most competitive and largest online video market, reaping an estimated total of US\$527 million in gross revenue in 2016. Online access in Brazil to legitimate video game play is available through Xbox Live and PlayStation Network.

Despite this progress, the development of a robust legitimate online marketplace in delivering copyright materials to Brazil’s growing population of Internet users continues to be stunted by the prevalence of online piracy. Government and private sector studies described in previous IIPA Special 301 submissions documented the huge volume of Brazilian IP addresses engaged in unauthorized downloads using the BitTorrent Peer-to-Peer (P2P) protocol⁶, and the shockingly high proportion of Brazilian Internet users who relied on illegal sources for their online music or audiovisual consumption.⁷ While the increasing ubiquity of legal alternatives may have ameliorated these adverse trends, it has hardly eliminated them. A recent motion picture industry report noted “over 400 piracy websites

²International Telecommunications Union, *Measuring the Information Society Report 2016*, at p. 244, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>.

³Ipsos Connect, *Music Consumer Insight Report 2016*, at pp. 6-8, available at <http://www.ifpi.org/news/IFPI-and-Ipsos-publish-Music-Consumer-Insight-Report-2016>.

⁴IFPI, *Global Music Report* (April 2016), at p. 110, available at <http://www.ifpi.org/recording-industry-in-numbers.php> (“GMR 2016”).

⁵<http://www.pro-music.org/legal-music-services-latin-america.php>

⁶See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <http://iipawebsite.com/rbc/2016/2016SPEC301BRAZIL.PDF> (“IIPA 2016”) at p. 67, documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

⁷See Comunicado do Ipea - 2012 - Maio - nº 147, *Download de músicas e filmes no Brasil: Um perfil dos piratas online*, available at http://www.ipea.gov.br/portal/images/stories/PDFs/comunicado/120510_comunicadoipea0147.pdf (unofficial translation on file with IIPA), summarized in IIPA’s 2013 Special 301 submission, at p. 106, available at <http://www.iipawebsite.com/rbc/2013/2013SPEC301BRAZIL.PDF> (“IIPA 2013”).

dedicated to the Brazilian market [that] are currently in operation, 57 of which receive over one million visitors per month. Combined, these pages offer over 13,000 national and foreign titles, including movies that are still in theaters, and have recorded 1.7 billion visits” in the 6-month period ending May 2016.⁸ Monetizing the digital market for music in Brazil remains difficult in the face of piracy, and per capita spending on music remains very low, 64% below the corresponding figure in Argentina, for instance.⁹ Industry research indicates that some 40% of all Brazilian Internet users access infringing content services on a monthly basis. And even as some high-profile piracy sites have been taken down in well-publicized operations in recent years, as discussed below, many popular and well-monetized sites persist, and new infringing sites have proliferated.

Internet piracy problems in Brazil feature three main kinds of distribution channels. The first involves sites targeted to the Brazilian market that link to infringing distribution hubs (sometimes called “cyberlocker” services). While these sites are nearly all hosted outside Brazil, they are clearly targeted to the Brazilian market. Many appear to have local operators, and rely on local intermediaries (such as advertising providers and payment processors) for monetization channels. A study published in January 2016 found that almost 45 million Brazilians (nearly 41% of all those online) used the cyberlocker link site ecosystem to consume infringing audiovisual material.¹⁰ Another industry study found that the Brazilian user base of such notorious sites providing links to offshore piracy repositories increased 14% in 2016. 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 files to which such sites link are generally stored on offshore hosting sites such as *4shared.com*, identified as a notorious market site in USTR’s 2016 Special 301 Out-of-Cycle Review, and itself one of the 50 sites most visited by Brazilian users.¹¹ One local cyberlocker site, *minhateca.com.br*, hosted more than half a million infringing music files that were reported by the recording industry and removed in 2016.

Infringing Portuguese-language linking sites for illegal video games available for download in Brazil mostly monetize using online payment services and/or advertisements. These site operators also generate revenue through the resale and distribution of online video game accounts. There has also been an increase in the number of Brazilian-based sites offering free direct downloads across multiple platforms of current and legacy games. Brazilian sites that offer free direct downloads of games (from off-shore cyberlockers and torrent sites) produce monthly revenue ranging from US\$4,000 to US\$30,000 from subscriptions, donations and/or advertising revenue. The top 20 sites generate over 40 million monthly visits. Examples of these types of sites include: *roxroms.net*, *mundoeu.net*, and *romsup.com*. An increasing number of Brazilian sites offer so-called video game copiers and other circumvention devices, aimed at nullifying access control technologies used by copyright owners. These devices enable the play of pirate video games on modified consoles (the great majority of game consoles in the country have been so modified). Examples of sites offering circumvention devices include: *r4ds.com.br*, *modplay.com.br* and *aogao.com.br*.

The second main channel for Internet piracy in Brazil is file sharing via illicit P2P networks, which continue to thrive and pose a serious threat for the entertainment software industry as well as other sectors. The Entertainment Software Association (ESA) reports that in 2016, for the sixth straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Notably, Brazil topped the world’s list for volume of unauthorized file sharing using consoles; it ranked second for PCs and fifth for mobile devices. The most popular torrent sites for Brazilian gamers in search of illegal content include *torrentgames.biz*, *gamestorrents.biz*, and *jogosandroidgratis.com*, with growing levels of access to other P2P services such as *gamesviciantes.net* and *baixargamestorrent.biz*. Private paid torrent forum sites focusing on music piracy include *cpturbo.org*, *manicomio-share.com* and *speed-share.com*, while the most popular such sites

⁸Tendências Consultoria Integrada, *The Economic Impact of Brazil’s Audiovisual Industry* (October 2016), at pp. 57-59, available at (http://www.mpaamericalatina.org/wp-content/uploads/2015/12/MPAAL_10_04_2016-english-fv.pdf).

⁹GMR 2016 at p. 57.

¹⁰NetNames Ltd., *South American Television Piracy Landscape for Alianza Contra La Piratería de Televisión Paga*, at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

¹¹USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) (“USTR NM”), at p. 7 and n. 12. available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

for access to infringing movies and TV shows include *comandofilmes.net*, which harvests revenue from advertising and from the sale of premium accounts, and which receives over 10 million visits per month, 94% of them from Brazil, according to the website audience monitoring service Similarweb.¹² Overall, last year's NetNames report found that "the Brazilian peer-to-peer landscape attracts 32.89 million of the country's 109.77 million Internet users," including some using "dedicated Portuguese language sites."¹³

A third major channel for online piracy is of particular concern to the music industry. "Stream ripping" websites circumvent technological protection measures and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models both of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. This form of digital piracy, generally monetized through advertising, is growing substantially in the Brazilian market. According to Similarweb, Brazilian stream ripping site *Baixartube.com.br* received more than two million individual visits from Brazil between October and December 2016. Brazilian internet users also often turn to stream ripping sites that have a localized version but are hosted outside the country. For instance, *YouTube-mp3.org* offers a Portuguese interface, and received more than 24 million individual visits from Brazil in December 2016 alone.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyright works in Brazil. For example, legitimate online audiovisual services have increased in recent years, but still suffer from the pervasive availability of illicit, advertising-supported services that are free to the consumer.¹⁴ Similarly, while robust growth of the legitimate market for online music continues, the fact remains that this marketplace is dominated by illegal sources. For example, the music industry estimates that music tracks valued at \$645 million were downloaded via stream ripping alone in Brazil during 2016, compared to a licensed market worth \$247 million in 2015.

Hard Goods Piracy: Even though Internet piracy is clearly growing faster than physical piracy in Brazil for films, TV programming and video games, online products demand high bandwidth, so strong demand persists for pirate physical copies. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. In the case of video games, hard goods piracy takes several forms. Pre-loaded devices with illegal copies of videogames are readily available, in both online and street markets, including the notorious Galeria Page market in São Paulo, identified by USTR in its latest Out-of-Cycle Review.¹⁵ Pirate titles for console platforms like Nintendo's Wii are usually sold on discs that are locally burned and assembled (with inlay cards) on site. For handheld video games, the most common delivery medium is a memory card loaded with hundreds of titles downloaded from pirate Internet sites, bundled with a circumvention device, and sold by street vendors, in shops, or via online marketplaces such as Mercado Livre.¹⁶ Piracy of entertainment software through the sale of pen drives loaded with huge quantities of pirate video games is also common, especially in the specialized pirate video game markets such as Santa Ifigenia Street in São Paulo. While some of this pirate product enters the Brazilian market through the nation's relatively porous borders and ports, it is becoming more common for content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes.

Another major feature of the piracy landscape for video games in Brazil is the prevalence of game copiers and mod chips. These devices for circumventing access controls and enabling the play of pirated copies of games are produced in Asia and flown into Brazil or delivered through the same channel as for modified game consoles. Santa Ifigenia Street in São Paulo is a leading retail venue for sales of these circumvention devices, targeting consoles such as PS2, Wii, 3DS and Xbox 360, and for R4 devices and other game copiers. Typically, sellers of the

¹²The same attributes, and similar levels of visitor volume, characterize a leading Brazilian illicit streaming site for infringing films, *filmeseriesonline.net*.

¹³Supra n. 10 at p. 33.

¹⁴The new video on demand tax, and other market access barriers discussed later in this submission, also play a role in retarding the growth of the legitimate online audiovisual market.

¹⁵USTR NM at pp. 17-18.

¹⁶For example, a Nintendo Sky3DS is typically offered for sale on Mercado Livre with 20 infringing games pre-loaded for BRL279.99 (US\$90).

game copiers also include a memory card with up to 500 game titles that were illegally downloaded from the Internet. Such a copier-and-card bundle can be purchased for about BRL140 (about US\$45). These circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software.

Along with the many Galeria Page vendors who traffic in pirated games, game circumvention devices, and game consoles that have been modified to play pirated games, more than 70 shops in São Paulo's Santa Ifigenia street specialize in these illicit products. As Brazil's largest city, São Paulo is also a key hub of national piracy networks for hard goods. Not only are pirate products widely sold in the city, but distributors based there supply many similar retail operations in other parts of the country. Other notorious outlets for infringing video game products (as well as for pirate optical discs bearing movies and TV shows) include *Rua Urugaiana* in downtown Rio de Janeiro¹⁷, the *Feira dos Importados* in Brasília, and the *Feira da Sulanca de Caruaru* in the northeast of the country, which supplies many small markets and street vendors.

Camcord Piracy: Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem also takes the form of in-theater audio captures, after which the dubbed Portuguese soundtrack is married with high-quality video captures sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well as being burned onto DVD-Rs, and then distributed to Brazil's many black markets. The Motion Picture Association of America (MPAA) identified 16 video and 15 audio camcords of its member companies' films sourced to Brazilian theaters in 2016. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films and television programming, negatively impacting local, national and worldwide distribution, and hampering the establishment of legitimate online distribution platforms. An encouraging development was the arrest by the Civil Police of Mato Grosso do Sul state of five members of the CorumbaFTP criminal group, a clearly commercial camcording operation. Over 200 DVD-R burners were seized along with 18,000 DVD-R discs with infringing content. However, the case is still pending trial.

Counterfeit Decoders and Illicit Streaming Devices: Like many other markets, Brazil is experiencing increased trafficking in devices that circumvent access controls and enable unauthorized access to encrypted pay TV services, online games, and other copyright content online. Like circumvention devices for video game consoles, these illicit devices are available at retail in Brazilian marketplaces, but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview: Online Piracy

Brazil's enforcement effort against online copyright crime remains far short of what is needed to combat this serious problem. Even though some Brazilian enforcement authorities have considerable experience in investigating other types of cybercrimes, they have left Brazil's fastest growing marketplace for copyright piracy—the Internet—largely undisturbed. With one major exception, this discouraging trend continued in 2016.

The notable exception involved Operation Blackbeard II, in which federal police built on the success of the 2015 takedown of the major audiovisual piracy portal *megafilmesHD.net*. In October 2016, federal police executed seven search warrants in four states, made five arrests, and shut down three major pirate sites. *Filmesonlinegratis.net*, discussed in past IIPA submissions, had been in operation since 2009, and attracted 36 million visitors per month.¹⁸ The other two sites, *megafilmeshd20.org* and *armagedomfilmes.biz*, had each offered thousands of film and TV titles for free streaming without authorization, monetized through advertising. Altogether,

¹⁷The Camelodromo Urugaiana covers four city blocks and includes over 1500 kiosks, many of them selling illicit optical discs.

¹⁸See IIPA 2016 at p. 68.

the three sites had received about three-fourths of a billion visits per year, 85% of them from Brazilian Internet users. Coupled with last year's takedown, Operation Blackbeard demonstrates the viability of coordinated federal law enforcement action against criminal enterprises engaged in systematic and pervasive piracy. The resulting prosecutions should be closely watched to see what progress is made in 2017 and whether deterrent punishments are ultimately imposed.

While the Blackbeard actions are encouraging, they remain isolated bright spots in an otherwise bleak digital enforcement landscape; IIPA is aware of no other significant criminal prosecutions against online piracy in Brazil in 2016. Clearly, before it can be said that Brazilian law enforcement has gotten off the sidelines and truly taken the field against criminal enterprises engaged in online copyright theft, much more needs to be done. Training, dedication of resources, and infusion of political will among police, prosecutors and judges determined to crack down on widespread online piracy are all deficient. Indeed, an overall national strategy for combating this form of cybercrime is sorely lacking.

The concurrent jurisdiction of federal and state police and prosecutors over enforcement of the copyright laws online presents an additional hurdle. So far, most of the handful of successful prosecutions in recent years have taken place in federal courts, where it is more likely to encounter police and prosecutors with the training and resources to handle these cases effectively. Federal cases also proceed more quickly than in the states. However, bringing the state law enforcement institutions into the fray against online piracy enterprises in a coordinated manner would be a force multiplier, especially if more state police and prosecutors received state-of-the-art training against cybercrime. But the power of law enforcement and courts of a given state to handle these cases, which concern violation of federal laws and which by their nature involve activities not confined to one jurisdiction, has been called into question. The decision of Brazil's Supreme Court in the long-running *Woloski* case, which could come this year, could provide guidance on these jurisdictional issues. Even though that case arose from importation of DVD-Rs containing infringing material, the issue it presents—whether Brazil's international obligations under the WTO TRIPS Agreement are sufficient to establish a federal jurisdictional nexus for infringement cases—has relevance to any copyright cases with an international component, including those arising from Internet piracy. A favorable outcome in *Woloski* could enable a more efficient federal effort, with assistance on the state level, in tackling online piracy through criminal prosecutions.

Civil enforcement should also be part of the solution, including on the state level. In particular, the power of preliminary injunctive relief has great potential, if orders can be obtained quickly. In several cases, these orders have been used to take down large volumes of infringing content, to require ISPs to block access to a group of pirate music websites, or to seize domain names from pirates. A similar injunction was issued against a now defunct P2P service called KLite Nitro. However, if effective preliminary relief cannot be obtained, then backlogs and delays in the civil justice system greatly reduce the value of civil enforcement in the online environment. For example, in 2015, the recording industry body in Brazil (ABPD) filed civil actions against eight notorious Brazilian pirate sites offering thousands of links to unauthorized music files. The actions, filed in Rio de Janeiro, seek compensation and injunctive relief against massive violations of copyrights committed through those sites. However, two years later, the cases are still in the judicial queue waiting for resolution by a first instance judge.

One potential route for mobilizing the needed political, fiscal and other commitments against online piracy is the CPI do CyberCrime, the legislative branch investigative commission formed in July 2015. After spotlighting the online piracy problem in one of its initial public sessions, the CPI developed a legislative proposal (discussed below) to enhance the legal remedies available to block access to websites dedicated to the commission of serious crimes, including criminal copyright infringement. A sustained focus from this commission on these issues could lead not only to needed legislative reforms, but also to progress on practical enforcement issues, such as deconfliction of overlapping jurisdictions of enforcement agencies, and essential cooperation between the government and the private sector to disrupt the funding base of rogue websites.

The logical forum for implementing a coordinated national effort against online piracy is the long-standing CNCP, in which both government and private sector players participate. Unfortunately, the CNCP seems never to have fully recovered the vigor and resources that marked some of its initiatives prior to a 2012 reorganization. The year ahead presents yet another opportunity for CNCP to reverse this trend. CNCP underwent a reorganization in late 2016, and now has new members from both the government and the private sector. Its first order of business in 2017 will be to develop a new 3-year strategic plan (the previous plan expired in 2016). It is essential that the new plan give top priority to combatting widespread online enterprises dedicated to copyright infringement. For example, it is past time for the CNCP's "Cities Free From Piracy" initiative to make the transition to the cyber environment, and to ensure that the local law enforcement agencies and courts, which CNCP has long helped to train in enforcement methods against physical piracy, become fully versed in the techniques and priorities for combating online infringement.

Perhaps more crucially, CNCP should revive its long-dormant priority of encouraging cooperation and partnerships among rights holders and other players in the Internet ecosystem, including ISPs, hosting providers, search engines, advertising networks, payment providers, and the like. While CNCP efforts to provide a forum for inter-industry discussion have foundered in the past several years, such a forum is needed now more than ever, since so much of the piracy that the council was set up to combat has migrated from street corners and shopping malls to the Internet.

The majority of international companies operating in Brazil, and a lesser proportion of local ISPs and online marketplaces, are already somewhat responsive when rights holders bring infringements to their attention. But many of these players lack the procedures and interfaces to enable processing of high volumes of infringement notices; even the international companies are less responsive in Brazil than they may be in European or North American markets. In any case, this ad hoc approach is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials. Furthermore, this cooperation does not extend to working together to fight the pervasive piracy carried out via P2P services.

Active government involvement could send a strong message that would help to bring industry players together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. Whether through the CNCP vehicle or otherwise, this is the year for Brazil's government 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.

Enforcement Against Hard Goods Piracy: Many Challenges Remain

The copyright industries in general enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. But while there have been some instances of constructive cooperation, little has been done to tackle the larger, systemic problems that render Brazil's criminal justice system inadequate in deterring the hard goods piracy that remains a significant problem. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of "experts"; inadequately trained police, prosecutors and judges; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.¹⁹ Even in cities that are at least formally engaged in the CNCP "City Free of Piracy" program, enforcement efforts have yet to make a real impact on the most notorious pirate marketplaces. This is especially true in São Paulo, the nation's largest city, where enforcement retrenchments by the city government over the past four years mean that retail piracy is resurgent not only there, but in other markets around the country that are supplied from São Paulo. To reverse this trend, local laws that impose liability on the owners and administrators of properties used to carry out the illicit trade must be enforced; this could have a significant disruptive impact on the retail piracy ecosystem. Overall, however, too much of Brazil's judicial system lacks adequate understanding of intellectual property matters, though there are some exceptions (for instance, the specialized commercial courts in Rio de Janeiro which have jurisdiction over IP matters).

¹⁹See, e.g., IIPA 2015 report, at p. 76, <http://www.iipawebsite.com/rbc/2015/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

Redoubled efforts are needed to modernize Brazil's police and courts, to propagate best practices²⁰, and to train judges and prosecutors, before the Brazilian judicial system can play an effective role in addressing piracy.

LEGISLATION AND REGULATION IN BRAZIL

In a year of political turmoil in Brazil, it is not surprising that little legislation of significance to the copyright industries was acted upon in 2016.²¹ The upheavals in the federal government following on the presidential impeachment process have contributed to the lack of forward movement. However, several important bills affecting copyright enforcement were presented to the legislature in 2016, and action may be taken on some of these this year.

Enforcement Legislation: One of the most important new initiatives grew out of the work of the CPI. Bill 5.204/16 would expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to the commission of serious crimes punishable by at least two years of imprisonment, a category that includes criminal copyright infringement. If enacted, the legislation would set clear guidelines for use of an important enforcement tool, which has been shown to be highly effective against online infringement in many other jurisdictions. The measure is now pending in the lower house of Congress, which should be encouraged to act on it as swiftly as possible.

A different bill in Brazil's Senate (no. 200/16) takes a diametrically opposed approach. It would amend the 2014 Marco Civil da Internet law to expressly prohibit site blocking under any circumstances. While IIPA urges that this bill be rejected, its introduction underscores how vulnerable the enforcement ecosystem in Brazil remains to improper implementation and elaboration of the Marco Civil legislation.²² As described more fully in IIPA's 2015 report, the Marco Civil legislation was amended before enactment to exclude copyright cases from the blanket rule that "providers of Internet applications" cannot take down or remove access to material except in response to a specific takedown order issued by a court.²³ This would have eliminated the voluntary notice and takedown activities engaged in by many Brazilian ISPs with regard to hosted infringing content today, a limited but critical example of the inter-industry cooperation against online infringement that is so essential to tackling pervasive online piracy.

As could be expected for such sweeping legislation, many critical details remain to be spelled out in implementing decrees. Some of these details have the potential to undercut the clear legislative intention to leave existing voluntary cooperative measures against piracy undisturbed, pending the possibility of disposition through future amendments to the copyright law. For example, care must be taken to avoid the risk that implementing regulations regarding net neutrality provisions under Marco Civil could undercut security measures, whether undertaken by court order, law enforcement request, or voluntarily, against well-known illegal sites and networks. A similar risk exists with regard to data protection and retention requirements; the ability of criminal enforcement authorities and civil stakeholders to obtain access to information needed for their legitimate efforts must be preserved. Careful review is thus required, both of proposed implementing decrees to be presented to the President under Marco Civil, and of any ancillary legislation, including, but not limited to, data protection measures. In this regard, it is encouraging that the pending Bill 5.276/16, as introduced, secures the rights of private organizations, such as rights holders groups, to carry out reasonable online monitoring activities to protect copyrighted content. Close attention to the legislative progress of the bill is needed to ensure that voluntary cooperative efforts to keep Brazil's Internet environment free of organized piracy are not thwarted. IIPA urges the U.S. Government to continue

²⁰For instance, a few courts have taken steps to prevent the storage of vast quantities of seized pirate product from becoming an insurmountable impediment to prompt and cost-efficient prosecutions. IIPA hopes that this development is a harbinger of other steps the courts could take to expedite enforcement dockets, and to reform sentencing practices to deliver some measure of deterrence. For more details, see IIPA 2016 at pp. 71-72.

²¹While Brazil's 1998 Copyright Law remains seriously outdated, there seems to be no current progress toward positive reform. See IIPA 2015 at p. 78 for a brief summary of the outstanding issues.

²²In a case currently pending before Brazil's Supreme Court, a friend of the court brief asks the court to prohibit any kind of site blocking order. While it is unlikely this case will be resolved in 2017, developments in it should be monitored.

²³See IIPA 2015 at p. 77.

to monitor these developments, not only to ensure that, in fact, there is no adverse impact on current or future inter-industry arrangements to combat online piracy, but also to encourage an appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace.

The persistence of the problem of camcording (recording audiovisual works or soundtracks in movie theaters) of newly-released feature films in Brazilian cinemas, a leading source for illegal online dissemination of these works, requires improved legislation that punishes this criminal conduct without requiring proof of the perpetrator's intent to profit. Bill 6512/16 would accomplish this goal. Its enactment should be a high priority of the Brazilian Congress.

Bill 2729/03 is a product of cooperative efforts between the copyright industries and the CNCP. It includes a few vital reforms that would address some of the systemic enforcement impediments referenced above. Bill 2729/03 was approved by the House of Deputies in 2012, and was sent to the Senate (now labeled Bill 63/2012). It received committee approval over three years ago, but still awaits action by the full Senate. Enactment of the bill would 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 continues to urge its passage as soon as possible. IIPA would then encourage Brazilian legislators to turn to other long-overdue and critical enforcement reforms, including some that had to be jettisoned from Bill 2729/03 to expedite its passage.²⁴

“Normative Instruction on Collective Management in the Digital Environment”: Under the former government, Brazil's Ministry of Culture issued a decision empowering ECAD, the umbrella collective management organization (CMO), to license digital music services without authorization from the rights holders. This authority undermines direct licensing and causes major interference with the commercial aspects of rights licensing. This unjustified intervention in the market raises serious questions regarding consistency with international copyright treaties (which recognize the exclusive nature of the right to license on-demand services), with Brazil's constitutional law, and with industry practice. IIPA urges that the “Normative Instruction” be repealed as soon as possible by the new Ministry of Culture.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

While Brazil is not a party with the United States to any bilateral or regional agreements that include obligations with respect to copyright law or enforcement, it is a member of the Berne Convention and of the WTO. The main areas of possible incompatibility with WTO TRIPS standards lie in the enforcement sphere, and specifically whether in practice Brazil provides civil and criminal enforcement that meets the minimum standards of TRIPS Articles 41 and 61. Brazil is not a member of either the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty, though it certainly should be encouraged both to join these treaties and to bring its law into full compliance with them.

MARKET ACCESS AND RELATED ISSUES

High Tariffs, Taxes and Barriers on Entertainment Software: Brazil's high tariffs and taxes on video game products have long plagued the entertainment software industry, and remained a challenge in 2016. They act as a significant barrier to legitimate market entry, as a spur to the market for infringing games, and as an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, deliver innovative content to fans and consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement. Under a 2013 interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed “copyright value” of a video game title itself (i.e., the distribution and marketing fees paid to the copyright

²⁴Among other improvements, various pending bills would 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; and facilitate removal of infringing material from Internet sites.

holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since, of course, pirate copies, whether smuggled across the border or burned within the country, do not pay these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. We urge that this interpretation be reconsidered. In addition, taxation on imported video game consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately, and has resulted in at least one major game publisher withdrawing from the Brazilian market. Finally, Bill 366/2013, which became law on December 30, 2016, imposes a tax on all digitally-delivered content services for the first time in Brazil. While this new tax also applies more broadly to delivery of “audio, video, image and text content by means of the Internet,” it provides additional discouragement for development of the legitimate market for online video games in Brazil.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector: Law 12.485 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 push consumers towards illegitimate sources of content. Under the implementing regulations, only works in which local producers own the majority share of intellectual property rights are included as Brazilian works; co-productions between Brazilian and foreign producers are excluded if they fail to meet this criterion. This exacerbates the harm inflicted on the Brazilian pay-TV market. Lawsuits challenging the constitutionality of the quotas and powers granted to ANCINE remain pending before Brazil's Supreme Court.

Video on Demand (VOD) Tax: The provisional measure which creates ANCINE also establishes the VOD tax, as part of a broader tax regime on film and television content called CONDECINE. The taxes represent a unique and serious threat to the growth of the VOD market. As set forth in Provisional Measures 2228/2001, the taxes apply to films, advertising, pay-TV and “other segments” which ANCINE considers to be VOD content. CONDECINE taxation levels are re-set every five years, and in 2016, the government proposed eliminating any cap on these adjustments. Fortunately, the proposal was amended to limit increases to the national inflation index (IPCA), a change that increases legal security for all players involved. CONDECINE is burdensome, amounting to as much as US\$25 million in charges in the case of large collections of VOD titles, and will limit the choices available to Brazilian consumers in the nascent online content market and through other VOD services. The MPAA and other stakeholders have prepared an alternative proposal for VOD taxation that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers; we urge ANCINE and the Ministry of Culture to give it favorable consideration.

Digital Cinema Regulation: Yet another ANCINE regulatory initiative was launched in April 2014, when the agency announced its intent to regulate digital distribution of motion pictures for exhibition, including by forbidding non-Brazilian companies or companies affiliated with distributors or exhibitors from transferring or encoding digital content or monitoring digital projectors. The announcement was coupled with proposals to further expand the existing screen quotas to restrict the exhibition of non-Brazilian titles on multiple screens. As a first step, ANCINE demanded that film industry participants disclose their commercial terms for digital cinemas, including their Virtual Print Fee agreements. This intrusion into legitimate commercial relations exceeds ANCINE's statutory authority. Faced with widespread opposition, ANCINE is not currently pressing for access to confidential contracts; but this could change. Overall, the ANCINE regulatory proposal creates debilitating uncertainty in the audiovisual sector, to the detriment of the Brazilian economy. Industry continues to oppose this initiative and seeks to reclaim its legitimate rights.

Screen Quotas: The most recent Presidential Decree on Screen Quotas imposes quotas for 2017 similar to prior years: it would require between 28 and 800 days of screening of local content, depending on the number of theaters in the theater complex. The Decree also continues to specify that a widely-released title exhibited in complexes may be limited to exhibition on 30% of the screens. Brazil's screen quota is facing a constitutional challenge at the Supreme Court, and competing legislative proposals have been introduced that would either loosen

or tighten the restrictions. Quotas limit consumer choice, and have the adverse effect of pushing consumers toward illegitimate content sources. They should be relaxed.

Accessibility in Theaters: In 2016, ANCINE sought public comment on a draft ruling to mandate audio description, closed-captioning, and sign language interpretation in Brazilian cinemas. While the U.S. film industry supports measures to broaden access to its productions and to better serve special needs patrons, it objected to some of the unrealistic deadlines initially proposed. ANCINE agreed to extend the sign language deadline and to form a technical committee of key stakeholders, including MPAA companies, to facilitate timely and effective implementation of these accessibility tools. These developments should be monitored.