

# **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

## **2002 SPECIAL 301 REPORT**

# **BRAZIL**

### **EXECUTIVE SUMMARY**

---

The Brazilian government has made numerous commitments to U.S. government officials over the years – most recently in March 2001 – to address the core problems of extremely high piracy rates and inadequate enforcement. And yet there has been little concrete action by Brazil to address these issues. A year has passed since the U.S. government commenced its GSP review against Brazil in January 2001. The Interministerial Committee to Fight Piracy (IMC), which was created as a response to the GSP petition, has taken no tangible action. Meanwhile, copyright piracy in Brazil worsens.

Increasingly, Brazilian pirates have turned to domestic production of pirate materials, and much of the importing activity now relates to the smuggling of blank CD-Rs, onto which the content is burned locally in Brazil. Organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products. Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, still crosses Brazilian borders and harms the local markets. While a few Brazilian police units have conducted a substantial number of raids (an exception rather than the rule), these raids have resulted in only a very few criminal prosecutions, and in those few cases, the judgments have not been deterrent. To make matters worse, legislative efforts to improve processing of criminal cases have resulted in more defendants in copyright infringement cases being released (via suspended sentences) instead of serving jail time. In civil infringement cases where the business software industry has achieved some success, Brazilian courts require extremely high expert fees and bond requirements.

Brazil is simultaneously one of the largest markets in the world for legitimate copyrighted materials, and home to one of the globe's largest pirate markets. The cultural dimensions of piracy in Brazil are perhaps unequalled given the tremendous stake of Brazilian creators, and would-be creators. In some areas, such as music for example, Brazilian record companies, performers, songwriters, composers, music publishers and musicians bear the brunt of piracy – more than 70% of the piracy in Brazil is of Brazilian creations. In addition, Brazil has a large legitimate computer software/informatics sector, as well as by far the largest and most active Internet sector in Latin America, which would also benefit enormously from strong action against piracy. Even though our industries continue to increase their anti-piracy investigations, foster public awareness through educational campaigns, and expand their local

presence, piracy continues to grow. Estimated trade losses due to copyright piracy of U.S. products in Brazil escalated to at least \$739 million in 2001.

In summary, there has been no tangible progress in reducing piracy in Brazil. Brazilian government promises to take coordinated action at the national level have not been implemented. IIPA therefore requests that the U.S. government determine that Brazil fails to afford "adequate and effective" protection to U.S. copyright owners, and take the next steps to suspend Brazil's GSP benefits and/or eligibility as a beneficiary country under the GSP trade program, unless Brazil takes immediate steps to address this problem and successfully reduces current piracy levels. IIPA also requests that Brazil be placed on the Special 301 Priority Watch List this year.

**BRAZIL: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 - 2001**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	33%	120.0	33%	120.0	35%	125.0	40%	110.0	30%	100.0	35%
Sound Recordings / Musical Compositions <sup>1</sup>	302.0	55% MC99% CD47%	300.0	53% MC98% CD35%	300.0	MC95% CD35%	290.0	MC95% CD30%	110.0	MC60% CD 3%	80.0	MC50% CD 3%
Business Software Applications <sup>2</sup>	303.1	58%	264.1	58%	319.3	58%	298.8	61%	315.7	62%	366.7	70%
Entertainment Software	NA	99%	248.2	94%	116.2	90%	103.2	89%	99.1	87%	92.5	82%
Books	14.0	NA	18.0	NA	18.0	NA	20.0	NA	26.0	NA	27.0	NA
<b>TOTALS</b>	<b>739.1</b>		<b>950.3</b>		<b>873.5</b>		<b>837.0</b>		<b>660.8</b>		<b>666.2</b>	

## BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

### Brazilian Commitments in the Mid-1990s

During the early and mid-1990s, Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool.<sup>3</sup> On April 30, 1993,

<sup>1</sup> RIAA reports that the recording industry's 55% piracy level estimate for 2001 reflects an amalgamated rate of a 99% audiocassette piracy level and a 47% music CD piracy level in Brazil. Similarly, the 2000 rate of 53% factors in both the CD and audiocassette levels for that year.

<sup>2</sup> BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$269.8 million at 57% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

<sup>3</sup> For more details on Brazil's Special 301 history, see appendices D and E of this filing.

the U.S. Trade Representative designated Brazil as a Priority Foreign Country. As a result of the ensuing Section 301 investigation, in a February 1994 diplomatic agreement the Brazilian government committed to take certain concrete steps to improve its IPR regime, including the early implementation of TRIPS, improving protection for computer software, addressing certain tax issues affecting computer software, and improving copyright enforcement in general. Over the next few years, Brazil's placement on the Special 301 lists seesawed between the Special Mention list and the Watch List.

As piracy grew in the late 1990's, USTR outlined several concerns and issued requests for improvement, all to no avail. USTR put Brazil back on the Watch List in April 1999, noting that "the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. Piracy rates have continued to climb over the past year, and the sound recording industry saw its losses double in 1998. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove police authority to engage in *ex officio* searches and seizures on their own initiative. We look to the government of Brazil to take decisive action to reduce piracy rates, focusing on the major markets currently being devastated by piracy. We also look to the Brazilian government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000."<sup>4</sup>

The 2000 deadline came and went, without any meaningful action. Despite IIPA's recommendation in February 2000 that Brazil be elevated to the Priority Watch List, USTR kept Brazil on the Watch List that year, noting: "... Progress has not been sufficient on Brazil's commitment to increase effective enforcement actions, from raids through judicial decisions, against intellectual property infringement; the rate of CD piracy in Brazil continues to worsen. Failure to address this problem could lead to the collapse of the market for legitimate CDs in Brazil. We look to Brazil to significantly increase its enforcement efforts against video, music CD, video game, as well as other piracy in the coming year, consistent with its WTO obligations. We hope that the newly formed inter-ministerial IPR task force will prove effective in this regard."<sup>5</sup> [Note that the interministerial task force promised in 2000 is not the same one as that established in 2001.]

In April 2001, USTR noted that "[t]he serious copyright piracy problem shows little sign of abatement and no significant enforcement actions were taken in the past year to combat this alarming problem. We are, however, pleased to see the establishment of an Inter-Ministerial Committee to Fight Piracy pursuant to the Presidential Decree of March 2001. We look to the Government of Brazil to develop and implement an effective

---

<sup>4</sup> Press Release, Office of the U.S. Trade Representative, April 30, 1999.

<sup>5</sup> Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

action plan to allow this Committee to take concrete, significant action to reduce and deter piracy in Brazil."<sup>6</sup> Brazil currently is on the Special 301 [Watch List](#).

## **The 2001 GSP IPR Review on Copyright**

IIPA and its members looked to Brazil to increase its enforcement efforts against copyright piracy. However, the lack of progress being made by Brazil to enforce its copyright law through the first half of 2000 led IIPA to file a petition against Brazil on August 21, 2000, responding to USTR's invitation for interested parties to "submit petitions to have the status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria" in the 2000 Annual GSP Country Eligibility Practices Review. Section 502(c)(5) of the Trade Act of 1974, as amended, requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."<sup>7</sup> IIPA's petition asked the President to (1) review the eligibility of Brazil as a GSP beneficiary developing country, and, if Brazil fails to achieve swift improvements, then (2) the President should suspend or withdraw GSP benefits of Brazil, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.<sup>8</sup>

The U.S. government commenced its GSP IPR review against Brazil on January 10, 2001. On March 9, 2001, IIPA was joined by two of its member associations to testify at the GSP hearing on Brazil's copyright practices. We all described the lack of Brazilian government participation in anti-piracy action, compared with other Latin American governments, and requested improved industry-government coordination. By Presidential Decree, on March 13, 2001, Brazil established an Interministerial Committee to coordinate copyright enforcement efforts with private sector organizations that have anti-piracy experience. This GSP review is ongoing.

## **THE BRAZILIAN GOVERNMENT'S ORGANIZATIONAL EFFORTS AGAINST PIRACY IN 2001**

---

### **At the Federal Level, the Inter-Ministerial Committee has Failed to Produce and Implement Any Coordinated National Anti-Piracy Plan**

---

<sup>6</sup> Press Release 01-25, Office of the United States Trade Representative, "USTR Releases Reports Emphasizing Enforcement Priorities," April 30, 2001.

<sup>7</sup> See GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 [codified at 19 U.S.C. 2462(c)(5)].

<sup>8</sup> In 2000, \$2.1 billion of goods from Brazil entered the United States under the duty-free GSP code, accounting for 15% of its total imports to the U.S. For the first 11 months of 2001, \$1.8 billion of Brazilian goods (or 13.6% of Brazil's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.9% decrease over the same time period last year.

The copyright industries were initially heartened by the increased attention the Brazilian government gave to the problem of copyright piracy, especially after IIPA's GSP petition was filed in August 2000. The most tangible step taken by Brazil was the March 13, 2001, publication of the decree implementing the Inter-Ministerial Committee to Fight Piracy (IMC).<sup>9</sup>

**Establishing the IMC:** IIPA and its members noted (at the March GSP hearing and in our April post-hearing brief) that it was imperative that inter-agency coordination be established immediately in order to take swift action to combat widespread copyright piracy and improve enforcement across the responsible Brazilian agencies. We urged that the IMC should establish itself quickly and begin its work. On April 23, 2001, the IMC coordinator was identified.

Regrettably, the IMC has not produced any document, has not taken any action, nor has it manifested any indication that it intends to take any action. Indeed, the only thing that we have heard from the commission is that it needs considerably more time to develop its ideas. This lackadaisical attitude in the face of debilitating piracy is simply not tolerable, and should not be countenanced. The private sector has plenty of ideas about actions that the government could take that would begin to address the piracy situation. The IMC cannot be permitted to ruminate indefinitely.

If the IMC is to proceed with any degree of effectiveness, the Ministry of Justice needs to be given a stronger leadership role in the IMC, including the ability to make decisions if other agencies do not actively participate. In the alternative, the number of agencies in the IMC should be drastically reduced so that it can move forward more effectively. Above all, the IMC coordinator needs to be a full-time executive with authority to coordinate raids and prosecute cases. The IMC itself has no power to decide on any important matter, but only to recommend to public agencies on piracy issues. Merely changing the formation of the IMC will not be sufficient to make it produce concrete results.

**Action Is Key:** IIPA and its member associations note that such interagency coordination would be a major, laudable achievement for the Brazilian government. Members of the GSP Subcommittee stated at the GSP hearing that Brazil's creation of such a coordinating body, in and of itself, does not solve the existing problem of piracy. In fact, the GSP Subcommittee Chairman indicated at the hearing that the ultimate question is whether this Committee will be "effective." To date, its level of effectiveness – especially in producing a coordinated national anti-piracy plan and implementing such – has been nonexistent. Important elements of the ongoing review include the IMC's development and implementation of a government strategy to fight piracy and

---

<sup>9</sup> The Inter-Ministerial Committee is led by the Ministry of Justice, and is composed of three representatives from the Ministry of Justice, two from the Ministry of Science and Technology, two from the Ministry of Culture, two from the Ministry of Development, Industry and Foreign Trade, two from the Ministry of Treasury, and two from the Ministry of Foreign Affairs.

the need for immediate actions to be taken by existing enforcement authorities (police, customs, courts) to fight piracy.

To assist the government of Brazil in developing a comprehensive and effective anti-piracy operation, several of the IIPA member associations that are actively engaged in on-the-ground enforcement around the world compiled a list of action-oriented recommendations which we included in our public April 2001 GSP post-hearing comments.<sup>10</sup> IIPA believed, and continues to believe, that those recommendations would be useful to the Government of Brazil, and we outlined an initial blueprint of actions which the Inter-Ministerial Committee and/or its participating agencies could take in the immediate future. Unfortunately, our detailed suggestions have not been implemented in practice.

**IMC to Work with Private Industry:** Also at the March GSP hearing, the GSP Subcommittee Chairman asked the Brazilian representative to address how the IMC will work with, or involve, the private sector.<sup>11</sup> Brazil's public post-hearing brief did not respond to this inquiry.

Several IIPA members have met individually and in small groups with the IMC chairman, as well as other senior Brazilian officials, including the Minister of Justice. A list of suggested actions was presented to the IMC chairman; however, the IMC never implemented these suggestions. The industry has never met with all members of the IMC. The industry has never received any official communication from the IMC regarding any of its decisions or actions, although informally, the copyright industries were advised that no decisions were made and nothing was planned. In sum, the IMC has not shown any willingness to work with the private sector or the U.S. government. Furthermore, the IMC chairman promised enforcement actions in October and November 2001, but nothing was done. The IMC has no agenda for 2002, as far as the industries are aware.

**Industry Efforts:** Our industries have not stood idly by during this GSP review. Here are a few salient examples of involvement and advocacy. First, several of the IIPA member associations compiled a list of action-oriented recommendations which was appended to our GSP post-hearing brief (as mentioned above) with the objective of assisting the Brazilian government and the IMC in developing a comprehensive and effective anti-piracy operation. The proposals covered four areas: general objectives of the IMC, enforcement coordination, specific enforcement actions, and a legislative agenda.

---

<sup>10</sup> The details of our proposed "action plan" are contained in Appendix B to IIPA's April 6, 2001 Post-GSP Hearing Brief, available in full on the IIPA website at [http://www.iipa.com/gsp/2001\\_Apr6\\_GSP\\_Brazil.pdf](http://www.iipa.com/gsp/2001_Apr6_GSP_Brazil.pdf).

<sup>11</sup> Article 4 of the decree states that the IMC may invite representatives from the private sectors to participate, as consultants, in order to contribute to the improvement of the performance of the IMC's activities.

Second, the copyright industries arranged for a public event to disseminate the news of the formation of the IMC. The local copyright industries<sup>12</sup> (which include many of the same companies represented by IIPA member associations) hosted an April 22 luncheon in honor of Brazil's Minister of Justice and "International Intellectual Property Day" (as declared by the World Intellectual Property Organization, WIPO).

Third, an IPR seminar in September 2001 was organized by the U.S. Consulate in São Paulo with the support of the copyright industries. Only the IMC chairman and one other IMC member agreed to attend this event. While the press from this conference helped make the Brazilian public aware of the existence of the IMC and its role, no actual operational actions were taken by IMC as a result of that seminar.

### **Unlike the Lack of Progress at the Federal Level, There Have Been Some Positive Efforts Taken at State and Local Levels, and in Particular, in the State of São Paulo and City of Rio de Janeiro.**

The state government of São Paulo has created a specialized police unit for piracy cases, the DEIC, part of the Organized Crime Office. This allows industries to coordinate directly with specific police and prosecutors who will become familiar with the industry entities and intellectual property rights, instead of attempting to coordinate with the general police/prosecutor infrastructure. It is notable that this is a state (not federal) level effort, yet it is a groundbreaking move that provides a model for other states. The motion picture industry has reported good cooperation in its initial anti-piracy efforts with this police unit. Industry colleagues believe it is a bit too early to tell if this São Paulo force will be competent and effective in the long term. Unfortunately, this São Paulo unit has not yet received proper resources (economic/ personnel) to conduct a continuous anti-piracy effort in the state.

There is no relation between the IMC and the creation of the specialized police in São Paulo. Other Brazilian states and municipalities might consider looking at the initiative and action taken by the State of São Paulo in order to gear up their anti-piracy efforts across their respective investigative agencies. Adding specialized police resources to existing police units, in a nonexclusive manner, may help in bolstering anti-piracy efforts. For example, there could be value if other States' *Delegacias de Defraudacoes* were given responsibilities to combat piracy. Other states are encouraged to make similar, tangible progress in anti-piracy.

MPA also reports positive action from the Rio de Janeiro municipal authorities against street piracy. Municipal authorities have begun to take action against street

---

<sup>12</sup> The hosts for the April 23 event included: ABC (Associação Brasileira Cinematográfica, the Brazilian Film Distributor Association), UBV (União Brasileira de Vídeo, the Brazilian Video Union (MPA member companies), ABPD (Associação Brasileira de Produtores de Discos, the Brazilian Record Producer Association), ABDR (Associação Brasileira de Direitos Reprográficos, the Brazilian Book Publishers Association), ABEM (Associação Brasileira dos Editores de Música, the Brazilian Music Publishers Association), ABPDEA (Associação Brasileira para Proteção dos Direitos Editoriais e Autorais, the Brazilian Book and Publishers Association) and BSA (the Business Software Alliance).

pirates, especially in the Camelodromo market, by closing booths and fining owners for violating municipal ordinances against the unlicensed sale of unauthorized product and the failure to pay proper taxes in the original purchase of the unauthorized goods.

Last year, the copyright industries worked closely with the U.S. Consulate in São Paulo to support and participate in a consulate-sponsored event on intellectual property, as mentioned above. This two-day event, held on September 19-20, 2001, contributed positively toward creating public awareness. However, the lack of active participation of the IMC and the lack of interest and attention by the rest of the Brazilian government was evident.

It is worth noting that some of the improvement from local and federal enforcement authorities is due to the importance that the U.S. Consulate in São Paulo has given IPR issues. The Consulate has organized seminars and social interaction events for enforcement authorities and industry, as well as proactively seeking meetings with government officials to explore improvements in enforcement and coordination with industry. The Consulate should be commended for its effective effort.

## **COPYRIGHT PIRACY IN BRAZIL**

---

Brazil's copyright enforcement deficiencies are not just an issue between the U.S. and Brazil. As a member of the World Trade Organization, Brazil is currently obliged to provide the standards of copyright protection found in the TRIPS Agreement. Given the wide range of deficiencies in its enforcement system, Brazil fails to meet its current TRIPS enforcement obligations in several ways, including: its failure to impose deterrent criminal penalties (TRIPS articles 41 and 61); to avoid unwarranted delays in criminal and civil cases (TRIPS articles 41 and 61); to avoid unnecessarily costly procedures (TRIPS articles 41 and 50.3); and to provide effective border measures (TRIPS articles 41, 51-60).

### **Optical Media Piracy Continues to Undermine the Brazilian Market for Legitimate Copyrighted Materials**

Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, continues to cross the porous Brazilian borders, devastating the local markets. There is also rapidly escalating, local manufacture of pirated optical media product within Brazil. Organized crime elements, both within Brazil and outside, exercise control over the production and distribution of infringing copyrighted products.

Music CD piracy exploded in Brazil in 1998, leading to dramatic increases in losses for U.S. and Brazilian recording companies, music publishers, film companies, book publishers, and publishers of entertainment software and business software. Over the past three years, the CD piracy problem has continued to grow, greatly undermining the economic viability of the entire industry. Unlike the situation a few years ago, most of pirate product today is manufactured in Brazil. Countries in Asia (primarily Taiwan) and Paraguay continue to be significant sources of pirate product, duplication equipment and smuggled blank CD-Rs, but most of the reproduction

facilities are within Brazilian frontiers. (See further discussion in the next piracy section, below.)

Yet another problem is the large-scale distribution networks in Brazil, whether these involve thousands of street vendors and established facilities (such as gas stations) which blanket the major highways in Brazil, or the nonestablished facilities in *camelodromos* (flea markets), or on the streets, and finally, the large quantities of blank recordable compact disks (CD-Rs) which are being imported as contraband into Brazil. There are also growing numbers of small duplication facilities which assemble CD burners; in turn, these facilities can produce a significant amount of pirate CDs each day.

Replication of pirate optical discs sold in Brazil, whether on a large scale such as found in Southeast Asia, or small scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. The videogame industry has seen both Asia-source counterfeits as well as locally manufactured discs find their way to Brazilian street markets. MPA has noted the beginnings of optical disc piracy, previously not present in Brazil. The legitimate DVD market is growing rapidly and pirate product is beginning to fill some of the new demand. Although the incidence is still low, MPA has taken action in street markets in São Paulo and Rio de Janeiro and has begun a new investigative effort for pirate optical disc imports along the Paraguay border.

## **Piracy Continues at Unacceptably High Levels for All Copyright Sectors**

Piracy levels in Brazil have remained high for years, with many of the copyright industries estimating levels above 50%, meaning that more than half of each market is composed of pirate products which are generally available at a fraction of the price of legitimate product.

### **The recording industry remains overwhelmed by worsening levels of music piracy in CD format; the audiocassette market was lost to pirates years ago.**

During 2001, recording piracy has further deteriorated. RIAA reports that pirate products are increasingly manufactured locally on CD-Rs rather than imported from Asia, shortening the window in which legitimate CDs can be sold prior to the market being flooded by pirate copies.<sup>13</sup> In 2001, the overall music market decreased by 25 percent in units, mostly due to the increase in CD-R piracy. The level of music CD piracy rose to 47% last year, meaning that almost half the market had become pirate. The cassette market in Brazil remains entirely dominated by piracy, as it has been for the past several years. The situation with pirate CDs is growing bleaker. Piracy has changed from an international industrial profile to a domestic semiprofessional effort — the distribution of product, however, remains highly organized. Record stores all over

---

<sup>13</sup> Tom Gomez, "Brazilian Music Market Sees Sales Drop 40%," *Billboard*, Sept. 15, 2001.

Brazil are closing down due to piracy. Record companies have fired personnel in order to cut costs, and are limiting the number of releases and artists on their labels. Companies have only a few weeks to sell their products, because once the market is filled with piracy, sales fall to zero. Records that sell 500,000 units in the first month sell only 5,000 in the second. All the major labels have released very inexpensive CDs in an attempt to fight piracy, but these efforts have not been successful. The sales picture is devastating. Estimated losses due to piracy of sound recordings and music, in both compact disc and audiotape format, amounted to an alarming \$302 million in 2001.

The chief reasons for the rapid increase in music CD piracy are: (1) the lack of a strong and coordinated action by the Brazilian government, as well as the lack of a high-ranking Brazilian official accountable for copyright enforcement and empowered to coordinate the efforts of other enforcement agencies, the judiciary, and the local and state police, against unrestricted imports, distribution centers and street vendors; (2) the regional CD and CD-R problem, caused mainly by neighboring Paraguay, and unrestricted imports via airports and seaports in Brazil and its links to Southeast Asia; (3) the lack of proper legislation and judicial guidelines to allow the judiciary to proceed definitively against the suspect infringers; (4) the lack of convictions and judicial sentences which deter piracy; and (5) the emergence of local illegal replication through the use of CD burners. The CD and CD-R piracy problem is so sophisticated that it makes investigations and actions very difficult to accomplish without the full intervention and commitment of the federal government, using all its enforcement agencies. For example, rising CD piracy caused commercial sales of legitimate product in Brazil to fall 20% in 1998 (compared to 1997) and 15% in 1999 (compared to 1998). When the legal recording market sales dropped 30% in the first four months of 1998, the industry pleaded with the Brazilian government for action, but to no avail. The market fell 47% in 1999 against the prior year. There was a slight recovery in sales figures for recorded music for 2000 but it was short lived, since the market in 2001 decreased by 25 percent.

In addition to the growing presence of locally replicated illegal CD-Rs, pirate and bootleg music cassettes and CDs enter Brazil mainly from Paraguay via Foz de Iguazu, Corumba, Uruguaiana, Salto de Guai ra and Ponta Pora, and also through the ports of Santos, Paranagua, Recife and Salvador, as well as at the airports at Manaus, Rio de Janeiro, S o Paulo (Congonhas, Guarulhos and Viracopos) and Foz de Iguazu. Paraguay acts as a bridge to deliver pirate CD product from Taiwan, Korea, Thailand, Singapore, and China, as well as from emerging CD plants in Paraguay and elsewhere. Brazilians take advantage of the lack of border controls and install manufacturing, assembly and printing facilities on both sides of the border, bringing their products back and forth without any kind of control. During 1999, the recording industry found and dismantled two huge CD plants in Ciudad del Este which were targeting the Brazilian market. Amazingly, the CD plants entered Paraguay from Brazil, with no restrictions at all. In 2000, the pirates seemed to change their strategy by shifting into CD-R replication. Thirty-four million CD-Rs were imported into Paraguay without any restriction; the industry believes that Brazil was the ultimate destination of all these CD-Rs. Also, the industry's efforts in Paraguay located two huge CD-R replication facilities in Ciudad del Este, no doubt conveniently located to serve the illegal Brazilian market. The industry reports that Paraguay has just installed yet another CD-R plant. In

addition, Paraguay reports that 104 million blank CD-R's were imported in 2001 which more than likely will be used for piracy purposes.

For the last five years, Brazil's audiocassette market has been completely lost to pirates. For 2001, cassette piracy accounts for 99% of the cassette market. For years, pervasive audiocassette piracy has simply destroyed the legitimate Brazilian market for cassettes. In the southern cities and in the interior, the pirate cassette market is still strong. Based on the industry's past experience, this market is gradually switching toward selling pirate CD-Rs, which will totally undermine the legitimate music CD market. Almost 75% of this pirate product in Brazil affects Brazilian repertoire. The industry believes that this fact alone would suggest that the Brazilian government should be even more concerned in addressing the piracy problem.

In response to piracy, the recording industry introduced a hologram seal of authenticity for placement on all legitimate CDs. In December 1998, the Brazilian government issued a decree to establish an official, numbered stamp, issued and sold exclusively by the government, to be affixed to IPR goods, including sound recordings, videos and books, and grant authenticity to them. The recording and audiovisual industries remain concerned that if this stamp is not properly implemented, it could be used against these industries by spawning an entirely new counterfeit stamp industry. This stamp program was implemented on March 15, 2000. The Brazilian Video Union (UBV) filed a legal action on behalf of all of its member distributors (MPA member companies included) against the stamp. The UBV member companies have agreed to continue to oppose the stamp implementation legally and politically, not only because it constitutes an additional financial burden, but also because of administrative problems in its supply by the government, and its possible "promotion" of piracy by rerecording pirates. Since this government-issued stamp confers authenticity by the Brazilian government to the VHS physical support bearing it, pirates will be able to rerecord pirate films over the original films contained in a VHS physical support bearing the stamp. In a separate legal action, the recording industry (ABPD) also filed suit against the Receita Federal in order to avoid the use of this stamp. The industries will continue to watch the implementation of this stamp closely. UBV obtained a preliminary injunction suspending the use of the stamp pending a final court decision. The parties are waiting for a decision of the court. There are concerns that this stamp is nothing more than a tax, with no value as an anti-piracy tool.

### **The motion picture industry continues to face widespread video piracy and growing threats of VCD and DVD piracy.**

According to the Motion Picture Association (MPA), annual losses to the U.S. motion picture industry due to audiovisual piracy in Brazil are estimated to be \$120 million in 2001. Video piracy in Brazil remains MPA's primary concern. Such piracy has reached a high degree of integration into the video market. Although the overall percentage is lower than other Latin American countries (approximately 33% of all video product distributed in Brazil is pirate), the overall volume is much higher because of the size of the market. The piracy rate in some areas in São Paulo is low, given that MPA has devoted significant time and resources to these areas. However, there

continues to be substantial piracy in the peripheral urban areas, such as the east zone of São Paulo, as well as in the smaller population centers such as São Paulo state, Rio de Janeiro, Minas Gerias and the many centers spread throughout southern Brazil.

**Business software industry continues to suffer from traditional forms of software piracy, as well as the increasing utilization of the Internet to offer pirate software for sale.**

The Business Software Alliance (BSA) reports that its preliminary estimated trade losses due to business software piracy in Brazil reflect an increase over the past year, with losses rising to \$303.1 million in 2001. The estimated level of business software piracy remained constant, at 58% in 2001. Brazil has a very large informatics/software development and distribution industry which contributes positively to the Brazilian economy.

During 2001, the business software industry continued to engage in civil judicial actions (search and seizure) and criminal police actions orchestrated by the industry association, ABES. BSA focuses its anti-piracy activities in the following states: Minas Gerais, Paraná, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, São Paulo, Goiás and the Federal District of Brasilia. Software piracy continues to exist in its traditional forms in Brazil, including illegal reproduction/duplication of software programs both for commercial (i.e., sale) and noncommercial (i.e., use) ends, illegal use by end-users, hard-disk loading of illegal software by computer resellers, and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience, and for the unauthorized electronic distribution of illegal software. Although Brazilian Internet pirates have been responsive to cease and desist letters sent by BSA and its member companies, many of these pirates simply close down one Website and open up an identical Website undetected (with a different Universal Resource Locator [URL] or Web address). The Internet may well eclipse other media for advertisement and distribution of illegal software in the near future. With respect to end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against large and medium-sized companies, which has had some impact on the level of piracy. However, there still exists a considerable medium- and small-business segment in Brazil that has far from legalized. In addition, the press, particularly in São Paulo, has reacted negatively to certain actions brought by BSA against corporate end users, despite evidence of illegal software in use by these entities.

**The entertainment software industry suffers from optical media piracy entering Brazil from sources in the Far East, as well as locally produced product.**

The biggest problems for the interactive entertainment software industry in Brazil remain the lack of border controls and the general tolerance for the high level of videogame piracy. According to the Interactive Digital Software Association (IDSA), videogame piracy overwhelmed the Brazilian market last year. The estimated level of piracy of entertainment software (including videogame CDs and cartridges, personal

computer CDs and multimedia products) in Brazil jumped from 94% in 2000 to 99% in 2001. Pirate game products are available in Brazil for as low as US\$ \$4.00. Estimated losses due to piracy in 2001 are not presently available.

A significant portion of illegal software for all entertainment software platforms is made in Asia (Hong Kong, Macau, the People's Republic of China, Taiwan, Thailand, Malaysia or Singapore) and is shipped to Paraguay, or, increasingly, other transshipping countries, and then Brazil. Pirated videogames in cartridge format, produced in Southeast Asia, enter the Brazilian market, often via Paraguay where they are assembled. Pirate CD-ROMs containing entertainment software products are mixed in with other shipments of optical media directly from Southeast Asia. For example, piracy of products for Sony PlayStation is 100% because Sony is not in the market. All of this material is industrially produced (silver discs) and imported from the Far East; very little is coming in from Paraguay now. A large number of these consoles are grey-marketed by tourists returning to the country or products smuggled into Brazil. As a result, a huge videogame counterfeit channel has been established, and this is damaging to all other consoles' game sales. Reports indicate that there is an organized crime element involved in videogame piracy, and this makes it very difficult to engage local authorities in this fight. In addition, parallel imports (which are legitimate products from other markets) from Asia also enter Brazil, thus harming the ability of copyright owners and their licensees to distribute locally.

The retail videogame industry in Brazil continues to experience serious piracy problems, with stores having large quantities of counterfeit cartridges and videogame software for sale. Videogame pirates have gone from imported silver industrial CDs to widespread gold-disc burning operations, run by organized crime. Gold discs are recordable discs, called *tostadas* in Brazil. Piracy levels for some gold-run games for PC (personal computers) comprise a pirate market where 75% of the software is infringing copies. These burning operations are very profitable. Interestingly, almost all the pirate software is copied on erasable media; there does not yet appear to be professional-level CD pressing of game software within Brazil.

A variety of pirate fronts require attention. One is the sale of pirate game software through advertisements offering games, placed in newspapers and other sources. The customer calls and orders are taken in a fly-by-night telephone room, and the product is delivered to another location. The disc is then burned (made to order), and taken to yet another location, where it is given to a delivery person, who often makes the delivery on a Moped. These kinds of *tostada* operations are very difficult to investigate and track back, up the chain of command, to those directing and managing the infringing activities. Reports indicate that police are reluctant to arrest the delivery people, who are often teenagers and children. Another method is pirate outlets, called *promocenters*. These are small retail booths, renting space in larger markets and galleries, which sell piratical and counterfeit goods. Street vendors are also a point of sale of all types of piratical game software, including gold CDs, silver CDs and cartridges. Pirate videogames, especially PC-based game products, are frequently found in flea markets. Console pirates' products tend to be in the normal retail trade channel. In addition, piracy over the Internet appears to be growing in Brazil. "Warez" is popular source of pirated game software. There is a large number of

Internet sites offering pirate game software for sale, in addition to such software being offered on auction sites (such as Ibazar, Arremate, and Lokau).

### **Books remain vulnerable to widespread unauthorized photocopying.**

The publishing industry reports that unauthorized photocopying of English Language study materials and individual lessons and chapters from textbooks, as well as entire books, continues to be the major form of book piracy in Brazil. AAP indicates that photocopying on university campuses remains rampant, despite the combined efforts over the years of local publishers and the Camara Brasileira do Livro (the local publishers association) to address this problem. Many university texts used are *apostilas*, anthologies made up of chapters from various books copied illegally, both in English and in translation. Imported educational materials are commonly photocopied, due in part to their high price. Some of the largest universities are discussing legitimizing the photocopying that goes on in their libraries; there are, however, only a few contracts signed between the universities and the ABDR (Associação Brasileira de Direitos Reprograficos). More unauthorized photocopying occurs in the northeastern states of Brazil, compared to São Paulo, Rio de Janeiro, Minas Gerais and Porto Alegre.

There is, however, an increasing public awareness in Brazil that photocopying is illegal, thanks to the work of the Brazilian Book Chamber and universities' staff. The potential problem in the near future may be unauthorized translations, as U.S. publishers begin to enter that specific market in Brazil. Estimated trade losses due to book piracy in Brazil dropped to \$14 million in 2001. This decline is due primarily to the fact the all Brazilian universities were on strike for half of 2001, thus reducing unauthorized photocopying, as well as a shrinking in the market for the sale of legitimate products. Losses would have been higher if the universities had been operating on a normal schedule.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

---

In general, the glaring problem with Brazilian enforcement efforts has not been the ability to achieve police raids and actions (and of course much more can be done in that regard), but the failure of Brazilian enforcement authorities to emphasize serious prosecution and deterrent sentencing. There is a general lack of interest, and delays hamper effective enforcement of the copyright law throughout the criminal enforcement system, especially with judges and prosecutors. Police activity has been moderately successful at the raiding level, but the actions rarely reach conclusion in the courts. The business software industry -- the only industry to use civil litigation in Brazil -- has experienced better results on the civil enforcement side.

### **The Brazilian Criminal Justice System Is Ineffective and Fails to Deter Piracy**

Brazil continues to exhibit a general lack of interest and unacceptable delays hamper effective enforcement of the copyright law throughout its criminal system. While isolated police efforts have been moderately successful at the raiding level, the actions they take rarely reach conclusion in the courts. There is still a lack of clear and direct instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Policia Federal, Policia Civil, Policia Militar, Policia Fazendaria, Alfandega) to act against instances of copyright infringement.

**Police raiding activities against piracy are inconsistent, good in some cities and nonresponsive in others.**

The level of police attention to piracy varies throughout the country. Certain industries are able to achieve adequate cooperation with police officials, often depending on the region and on personal contacts. Most enforcement efforts in Brazil are commenced by investigations conducted by the copyright industries themselves, and are usually not the result of any major Brazilian government or law enforcement initiatives. Because Brazil has many different police corps, the rivalry among them, with some few exceptions, negatively impacts their ability to conduct effective and efficient raids.

The police, prosecutors, and judges have demonstrated a lack of understanding of IPR issues in many instances. Copyright enforcement is simply not a priority. Right holders may initiate criminal actions with either federal or state police officials to obtain search orders based on proof of copyright infringement. The federal police and judiciary are not considered to be effective in copyright enforcement. Federal police officials have jurisdiction over the types of crimes that are generally viewed as producing large-scale corruption (such as border controls and drug trafficking). Most industry-led enforcement efforts end up being handled by state and local police officials.

Several industry groups believe there should be a centralized unit that could work the most important cases, and specific guidelines should be given to the police corps (for example, the Policia Fazendaria, regarding tax evasion cases) to take the lead in executing a centralized plan.

The local recording anti-piracy association, APDIF do Brasil, has been very active for more than five years, working primarily in the states of São Paulo, Paraná, Minas Gerais, Goiás, Bahia and Rio de Janeiro. In 2001, for the second year in a row, the number of actions decreased. For the year, the recording industry brought 577 actions (versus 724 actions in 2000 and 777 for 1999), which resulted in the seizure of 2.6 million CDs and 422,000 cassettes, as well as 312,000 blank CD-Rs. These statistics reflect only a very small portion of the entire pirate market. The number of CDs and CD-Rs seized is low, compared to a market of some 78 million legal units versus 96 million pirate units (69 million illegal CDs and 27 million pirate cassettes).

This downward spiral is happening because there is a lack of clear guidelines and direction from senior Brazilian officials, in addition to jurisdictional problems

between different police corps and different *delegacias*. In those rare cases where the police were helpful and took action, the cases got bogged down with the prosecutors, who with few exceptions are unwilling to bring cases. Evidence of the lack of enforcement can be found in the following areas where music piracy thrives openly: São Paulo City (the surroundings of the 25 De Marco Street, 12 de Outubro Street), the downtown of São Paulo, Camelodromos of Campinas, Riberão Preto, Porto Alegre, as well as throughout the cities of Brasília, Florianópolis, Curitiba, Goiânia, Cuiabá, Feira de Santana, Vitória de Conquista, Teresina, Natal, Caruaru. These are just a few examples of the locations where piracy exists with impunity. As other countries, one of the only ways to deter piracy is to affect their revenue stream (by using tax evasion laws), and to impose serious jail terms against convicted pirates.

MPA has been successful in obtaining police raids (over 7,500 in the last three years) and in initiating criminal cases (over 5,000 cases pending). Improvement has also been seen with arrests (33 arrests in 2001, compared with 16 in 2000 and only four in 1999) and sentencing (13 convictions, including four of over two years' imprisonment, suspended for probation, in 2001, compared with only four in 2000 and none prior to that). Nevertheless, MPA has been frustrated in its effort to develop a deterrent impact because there is no focus on key cases of organized reproduction and distribution; there are 327 recidivists among the pending cases.

MPA reports an increase in the number of training seminars given to police and prosecutors in an attempt to increase understanding and priority for IPR enforcement and reports consequent good results from them. MPA, in coordination with other institutions, including the Brazilian Magistrates Association and the U.S. Consulate, organized seventeen such training sessions in 2001, compared with nine in 2000 and only one in 1999. MPA encourages more federal involvement in organizing such events.

The business software industry, BSA, in collaboration with the ABES (Associação Brasileira das Empresas de Software (ABES--the local software association), was successful in getting the police to bring 273 criminal actions against resellers in Brazil in 2001. Of these actions, 11 were against small stores where 122,569 CDs were seized, 262 actions were brought against street resellers where 229,375 CDs were seized, and one action was brought against an individual offering pirate software for sale in newspapers, where 1,643 CDs were seized. A total of 351,944 illegal CDs have been seized as a result of these actions (an increase from 2000 criminal reseller actions of 139,046). However, despite these statistics, there have still been no cases to date in which BSA has been involved where an individual has served a jail term for software piracy. In addition, while there have been examples in prior years of the police (particularly the consumer affairs police) bringing actions mostly on their own initiative, there were no such actions in 2001.

After years of effort, the Brazilian software industry, with the support of the U.S. software industry, succeeded in obtaining a "fiscal crime" provision in the Software Law enacted in February 1998. Under the Software Law (Article 12, section 3, paragraph II), tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as an independent public action. With the exception of a limited number of actions by tax authorities in the Federal District of Brasília and the state of

Bahia in 1999, two and one-half years into the new software law, it is clear that the Brazilian IRS (Receita Federal) and the respective state tax authorities are dedicating no resources to pursue this kind of tax evasion. The basis of these actions is that the state is suffering great losses due to the sale of illegal software, as pirate resellers are not collecting the applicable tax from purchasers upon such sale. BSA was extremely hopeful that this type of tax evasion case would have a big impact on the level of piracy in Brazil, especially by medium-sized and large companies. This is still the case, and has been since 1999.

**Brazilian prosecutors pursue very few criminal copyright cases, despite the high numbers of complaints filed and raids conducted. In those few cases which reach judgment, nondeterrent sentences are issued.**

Prosecutions are ineffective; few cases reach the courts, and those few that do fail to impose deterrent penalties. Unfortunately, this pattern has continued for years, without improvement. Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Case backlogs constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities in the law and a general lack of resources. Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence. A major problem has been the low penalties imposed in the few criminal copyright infringement cases which have been decided by the courts. This problem may be alleviated if the penal code is reformed to index penalties for inflation and if the courts actually impose deterrent levels of penalties in copyright cases. Regulations aimed at reducing the backlog of court cases further undermine and weaken deterrence. Courts usually suspend jail terms for first offenses, thus returning defendants to the streets to return to their illicit activities.

One advance was made in 2001 by the federal prosecutors in the state of Rio de Janeiro. They created a specialized unit for prosecuting criminal copyright infringements. This unit coordinates directly with the head of the IMC.

In 2001, the recording industry promoted actions against 577 targets. Of these 577 cases, more than 70 percent were suspended and only 19 people from the 1,187 arrested were indicted. Of those indicted, seven persons have been in jail for over 30 days, only because of immigration irregularities.

With respect to audiovisual cases, MPA reports that the pattern of no deterrence at the prosecutorial and judicial levels continues, despite some increase in arrests and sentencing. MPA reports thirteen convictions for copyright violations in 2001, including four of over two years' imprisonment, suspended for probation, compared with only four in 2000 and none prior to that. Despite the increased number of convictions, most are for 3-4 months and all are immediately suspended with probation.

As for business software actions, BSA's criminal campaign against resellers is focused on seizures and publicity, conducting actions with the state police. In 2001 there were 273 criminal complaints filed in Brazil relating to the piracy of business software (these actions were brought in collaboration with ABES). No criminal verdicts have been issued in any of these actions.

**CRIMINAL COPYRIGHT ENFORCEMENT  
STATISTICS IN BRAZIL for 1998, 1999, 2000 and 2001**

<b>ACTIONS</b>	<b>Recording Industry 1998 (1999) [2000] {2001}</b>	<b>Motion Picture Industry 1998 (1999) [2000] {2001}</b>	<b>Business Software Industry 1998 (1999) [2000] {2001}</b>	<b>Totals 1998 (1999) [2000] {2001}</b>
Number of complaints filed with police	530 (409) [724] {577}	1,320 (832) [1,957] {1,750}	34 (118) [134] {273}	1,884 (1,359) [2,815] {2,600}
Number of raids conducted	680 (777) [724] {577}	2,381 (1,671) [1,535] {1,354}	34 (118) [134] {273}	3,095 (2,566) [2,393] {2,204}
Number of pirate copies seized	2.85 million (2.86 million) [4.63 million] {3.4 million}	243,581 (212,063) [220,878] {225,785}	NA (NA) [212,898] {351,944}	+3.09 million (+3.07 million) [5.06 million] {3.97 million}
Number of cases suspended or dismissed	NA (18) [131] {NA}	148 (235) [146] {87}	(0) (0) [0] {0}	+148 (253) [277] --
Number of defendants convicted (including guilty pleas)	5 (3) [9] {NA}	1 (0) [2] {13}	0 (1) [0] {0}	6 (4) [11] --
Criminal sentence issued	Minimal fines (1-year jail term, commuted to small minimal fines) [sentences commuted to small fines - \$260] {NA}	Community service (None) [Community service {up to 2 years, all given probation}]	None (2 years' probation plus fine <\$600) [None] {None}	Minimal (Minimal) [Minimal] {Minimal}
Ratio of convictions to the number of raids conducted	0.7% (0.8%) [1.2%] {NA}	0.04% (0%) [0.09%] {--}	0% (0.8%) [0%] {0%}	0.19% (0.16%) [0.46%] {--}

## Notes

- Statistics in this chart are provided by IFPI Latin America (IFPI), the Motion Picture Association (MPA), and the Business Software Alliance (BSA).
- The suspensions or dismissals cited above are the result of judicial decisions under Law 9099-95, which permits judges to sentence first-time offenders with up to two years' probation and monetary damages.

NA = Not available.

## **Delays by Police, Prosecutors and Judges, are Unwarranted**

For those rare criminal cases that do make their way to court, the time to complete a case is very long. Delays in criminal copyright infringement cases can take as long as two to three years in the courts of first instance. Not surprisingly, there is a tremendous backlog of cases in the Brazilian courts. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case. One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters (see discussion, below).

## **Brazilian Border Measures are Ineffective**

In 1999, the copyright industries requested that the Brazilian government focus on improving border enforcement. There seemed to be little progress made on this problem. Because of the lack of coordination of the actions of Brazilian customs and federal police, border controls are lax and must be tightened to stop the massive amounts of pirated and counterfeit product (including piratical CDs, audiocassettes, videocassettes, and videogames) entering Brazil from Paraguay, particularly at the cities mentioned above, among these being Foz do Iguazu, Corumba, Campo Grande and Maringa. Bolivia and Uruguay are also potential sources of counterfeit production for the Brazilian market.

Brazil promised the U.S. years ago that it would work with the Paraguayan government on border issues, but only recently have a few enforcement efforts been observed at the Brazilian border. Brazilian airports are also a significant source for pirate shipments around the country. While coordination efforts may be underway, they have resulted in only limited tangible improvement on the ground. According to the Brazilian government, they do implement a "red traffic light" system in the major seaports with Paraguay.

IDSA reports one case in which a large container full of counterfeit Nintendo videogame products was stopped by Santos Port Customs in Brazil; the authorities seized over 13,000 counterfeit Game Boy cartridges. The investigation remains underway.

BSA reports one case in which large containers full of counterfeit business software and videogames were stopped by agents of the Treasury Department at the

Paranaguá Port; the authorities seized over 550,000 counterfeit CDs and the investigation remains underway.

## **Unwarranted Delays are Prevalent in Civil Cases**

The civil court system in Brazil is notoriously overloaded, inefficient, and slow. In São Paulo, judges may be responsible for 3,000 or more cases in a year. Cases usually take from 18 months to four years to come to trial. Moreover, defendants have many grounds for appeal, and this process regularly takes three years before a judgment is issued by the relevant superior court. Incredibly, BSA has cases in São Paulo dating back to 1991 and 1992 that have still not received a judgment from the relevant superior court.

The business software industry also uses civil actions in its anti-piracy campaign in Brazil, in addition to criminal enforcement. BSA continues to bring civil search and seizure actions, followed up in most part (unless the defendant settles within 30 days of the search and seizure) with the filing of civil damages suits. In 2001, BSA members acting through BSA brought 59 civil actions against software pirates (compared with 53 civil actions in 2000), and the business anti-piracy hotline received 30,626 calls in 2001 (compared with 23,624 in 2000), which produced 1,834 leads of suspected piracy (compared with 1,337 in 2000).

Nonetheless, in two civil cases in the State of São Paulo, BSA has received two very favorable judgments for multimillion-dollar sums. The judges in these cases applied Article 103 of the Copyright Act of 1998 (Law No. 9.610/98) ordering the defendants to pay damages of 3,000 times the retail value of the illegal software seized. Most recently, in October 2001, a multimillion-dollar judgment against a São Paulo-based company represented the fifth such judgment awarded in a BSA case applying the 1998 copyright law. The level of damages awarded in these cases is unprecedented worldwide with respect to software copyright infringement suits.

## **CRIMINAL CODE AND REGULATIONS**

---

### **The Brazilian Criminal Code Fails to Provide Effective Deterrence Proposed Amendments Have Been Pending for Years, Without Progress**

The Brazilian penal code was amended in 1993. Unfortunately, those amendments failed to include procedural provisions which would have permitted the police to seize all infringing copies (instead of just the amount of product necessary for evidentiary purposes) and implements used for reproduction which are found during an anti-piracy raid. The legislation should be amended to provide this seizure authority. In addition, the levels of fines in the 1993 amendments have been overwhelmed by inflation, and should be tied to the indexing system in the general provisions of the Brazilian penal code. The Brazilian government promised to make best efforts by June 1994 to pass legislation to ensure that the range of higher penalties available under the indexing system in the general provisions of the penal code applied to copyright infringement. This has not been achieved.

It is important to know that a criminal procedure regulation was issued in 1995 to alleviate serious court overcrowding. Law No. 9099-95 provides for the suspension of proceedings, with a two-year probation for first-time offenders, requiring the defendant to redress monetary damages as a condition to granting the suspension. When the regulation first went into effect, the copyright industries were hopeful that it could have a positive impact on piracy, because it requires the defendant to pay damages as a condition to granting the suspension, and the accused remains on probation for a period of two years. As the courts have begun issuing these suspensions, there is growing concern that these regulations are not supporting the creation of a system which has expeditious and deterrent penalties. As detailed above, most copyright cases are cycled through this system. Many offenders receive suspended sentences or very low fines, community service, or no sentences at all. This leniency clearly does not deter piracy.

Two amendments to the current Brazilian penal code have been pending for years. The first is Bill No. 2.681/96, which has strong copyright industry support. This bill proposes changes to Article 530 of the Criminal Procedures Code to assure that copyright violation is a matter of public criminal action, allowing actions *ex officio*, allows seizure of all offending product as well as supporting material (reproduction machinery, coversheets, etc.), and allows the representatives of the titleholders to actively participate in the prosecution of the case. It would also amend Article 184 of the penal code to include unauthorized rental of a work or sound recording for profit. This bill has been waiting to be included in the agenda of the Plenary of the lower house (the Chamber of Deputies). If approved by the Plenary, it will be sent to the committees in the Senate for analysis and approval.

The second proposal, Portaria 232/98 proposed by the Ministry of Justice, reflects a substantial revision of the entire penal code. The concern here is that this proposal would lower the level of criminal penalties and remove the authority of the police to initiate searches and seizures on their own initiative (*ex officio*), and instead would make them available only upon judicial warrants. The copyright industries oppose this proposal. Our industries' experience around the world has been that the only way to deter piracy effectively is to increase the criminal penalties for copyright infringement and impose these deterrent sentences on the defendants.

## **COPYRIGHT LAW AND RELATED ISSUES**

---

### **The Copyright Law and the Software Law (as Amended in 1998)**

Under its 1994 agreement with the U.S., Brazil promised to enact legislation on computer software and to pass amendments to its copyright law by making "best efforts" to accomplish this by January 1, 1995. These bills were finally enacted by February 1998. The software bill (PL 200/96) passed both houses, and was signed in its entirety, without amendment, by President Cardoso, and entered into effect on February 20, 1998. On February 19, 1998, President Cardoso signed into law

amendments to the 1973 copyright law (Law No. 9.610), which entered into effect on June 20, 1998. Although these laws provide goods levels of substantive protection, they are not enforced in practice (see discussion, above). The copyright law even includes some provisions of the WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

## **Specialized IPR Courts with Copyright Jurisdiction Should be Considered**

The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which would significantly improve intellectual property rights enforcement. Our reports indicate that these courts are restricted to industrial property matters. Although no specific action has been taken to create these courts, the Brazilian Judicial Commission has assigned the issue as a specific agenda item (Number 15) in its list of pending actions. We would welcome consideration of this remedy as one that might help ameliorate the sorry state of anti-piracy enforcement in Brazil.

## **Government Software Management**

The Brazilian government should consider stronger efforts to support government software management in its public ministries and agencies. The Brazilian government has done less to reduce government software theft (piracy) than perhaps any other major Latin American government. The President has never enacted a decree ordering federal agencies to buy legitimate software. Moreover, public entities are required by law to appeal any decisions against them to the end of the appeals process, with the result that software piracy actions against government agencies involve costly legal battles that last for many years. BSA remains concerned that little progress on this issue may be made in 2002 because it is an election year in Brazil.

At the March 2001 GSP hearing, the GSP Subcommittee Chairman asked the Brazilian representative to address the report of the business software industry that Brazilian ministries and agencies are engaged in the use of unauthorized copies of business applications programs. The Brazilian government did not respond publicly to this request of the committee.

## **NON-TARIFF BARRIERS**

---

### **Temporary Measure No. 2,228-1/01 for the Development of the National Film Industry**

Established by Presidential decree in September 2000, the Executive Group for the Development of the Film Industry (GEDIC) was charged with presenting proposals for the development of the Brazilian film industry. Of particular concern to the MPA was the lack of transparency and secretive nature of the GEDIC process.

On September 10, 2001, the Brazilian Government issued Temporary Measure 2,228-1/01, which established a number of provisions aimed at bolstering the local film industry, including tax and non-tax components impacting on theatrical, home video, broadcast and pay-TV channel divisions sectors. The Temporary Measure has the immediate effect of law upon publication, although it must eventually be approved by Congress, a process which is still pending.. The most onerous provisions of the Temporary Measure are listed below:

- Establishment of a fixed and percentage CONDECINE levies (Art. 32). The fixed CONDECINE is due per title and for each market segment. The 11% CONDECINE applies to the credit, remittance and payment to producers or distributors derived from the commercialization of films and TV works. However, Article 49 establishes that when Article 3 of the Law No. 8,685/93 is used, the payment of the 11% CONDECINE is not required;
- The existing theatrical screen quota was extended for 20 years;
- The existing home entertainment title quota was also extended for 20 years;
- Existing local printing obligations on theatrical prints were continued and local printing obligations were extended for home video entertainment. There are only two printing laboratories in Brazil for theatrical prints, which cannot supply the growing demand for prints in Brazil due to the increasing construction of multiplex theaters. In order to supply the Brazilian market with the number of prints required and to increase competition and promote modernization of printing labs in Brazil, Brazil should allow the importation of prints manufactured abroad.
- A burdensome system of information and monitoring of the film and video industries was established, including mandatory reports for exhibitors, home entertainment distributors and outlet; obligatory indelible identification mark; and mandatory contract registration;

#### The Impact of the Temporary Measure:

- In the **theatrical sector**, the 11% CONDECINE on distribution tends to reduce diversity in the supply of films.
- For the **home entertainment segment**, the fixed CONDECINE paid per title, independent of turn-over, signifies a reduction in the supply of films in video outlets.
- The **Pay-TV sector** – including programmers and content distributors – is most affected by the Temporary Measure. The impact of both CONDECINES on the

Pay-TV sector, based on initial estimates using approximately 2/3 of simulations of channels, would reduce more than 50% of the revenues, and of half of these, the total taxation would exceed the channels' revenues. Preliminary estimates show that only the fixed per title payment would generate potentially more than R\$ 170 million (US\$71.73 million) in revenues. Thus, the tax burden on this sector would provoke the closure of at least 2/3 of channels, and sales in the sector would fall by about 1/3. For those channels that could manage to survive in this environment of narrow margins, the CONDECINE would be passed on to cable operators, who would pass it along to final consumers.

- The **Broadcast TV sector** was also affected by the Temporary Measure, especially the fixed CONDECINE levies on films and series. Series will be assessed on a per title and episode basis.

## Remittances and Computer Software and Tax Barriers

Pursuant to the last modification of the Central Bank's regulation on overseas remittances relating to software purchases/licenses, per Circular No. 2682 of September 1996, the financial institution conducting the currency exchange operation still requires all documentation listed in Circular No. 2682 of May 1996, which includes: (1) the agreement signed with the exporter of the software (import license); (2) a certificate from the Government Bureau of Computer and Automation Policy (part of the Ministry of Science and Technology), approving the software license agreement or the assignment of rights in any software sales/distribution agreement; (3) copies of the invoices reflecting the sale of software; and (4) a declaration of liability.

Brazil has eliminated most of the non-tariff barriers that afflicted the computer software industry. At last report, the Central Bank is still requiring (per Circular No. 2685 of May 1996) that an agreement duly registered with the Ministry of Science and Technology (including the registration certificate) be presented to the financial institution conducting the currency exchange operation as a prerequisite to remitting overseas payments. In addition, the Brazilian entity seeking to make the remittance must also present an import license, an invoice from the (foreign) supplier, and an invoice that the Brazilian entity has issued to the purchaser of the program.

Recently, Law 10.332 has imposed an additional 10% tax called "CIDE" (*Contribuição de Intervenção no Domínio Econômico*) to be applied to international payments for technology and royalties of any nature. BSA indicates that the application of this tax is still unclear, but it could push taxes on foreign remittances of royalties, etc., to 25%, as there is currently a withholding tax of 15% on the remittance of payments related to software licenses.