

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2016.¹

Executive Summary: As broadband access in the country continues to grow, progress is being made toward the development of a legitimate Internet marketplace for copyright materials in Brazil. However, pervasive piracy operations that target the Brazilian market continue to hamper the healthy growth of e-commerce in creative works. The first criminal prosecutions against significant online pirates was an encouraging development in 2015. The challenge for 2016 is to build on this first sign of progress to institute a more comprehensive and coordinated effort, including both broader criminal enforcement against well-established pirate operators, and active government encouragement for voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. The National Council to Combat Piracy and Intellectual Property Crimes (CNCP) is an underutilized resource that could make an important contribution this year on both these fronts, as well as continuing its efforts against the still significant problems of hard goods piracy. Courts should be encouraged to continue to implement their own solutions to some of the systemic bottlenecks in the enforcement system, in default of effective legislative responses. While the Marco Civil da Internet (“Marco Civil”) legislation, as enacted in 2014, preserves space for voluntary notice and takedown for copyright infringement and other inter-industry cooperative efforts, its implementation remains in doubt and must be carefully monitored. Although 2015 was a year of legislative stasis on copyright issues, legislative issues need more attention in 2016, including completion of action on long-delayed enforcement reform legislation (including criminal penalties for camcording), and scrutiny of long-delayed copyright reform efforts; the latter must fill the serious gaps in Brazil’s current law and deal effectively with online infringement, while resisting excessively broad exceptions and limitations to copyright protection. 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. Proliferating market access barriers for the audio visual sector, from the VOD tax to content quotas to threatened regulation of digital cinemas, should also be addressed.

PRIORITY ACTIONS REQUESTED IN 2016

Enforcement

- Launch 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.
- Bring the resources of the CNCP to bear on encouraging cross-industry efforts to combat Internet piracy.
- Ensure that CNCP has the human and financial resources, and political backing, to ramp up its efforts, including extending its training and coordination activities to the fight against Internet piracy.
- As steps toward a deterrent enforcement system, implement a national program to train judges, prosecutors, and police officers on intellectual property rights (IPR) law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact
- Effectively enforce the current Penal Code to address illegal camcording in theaters.

¹For more details on Brazil’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Brazil’s Special 301 placement, see <http://www.iipa.com/pdf/2016SPEC301HISTORICALCHART.pdf>.



Legislation and Regulation

- Monitor implementation of the Marco Civil Internet law to ensure there is no interference with voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Enact pending legislation to streamline copyright prosecutions and to clarify criminal remedies, and to provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit.
- Ensure that any copyright reform legislation proposed is consistent with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), to which Brazil should accede, and effectively addresses online infringement and explicitly prohibits circumvention of technological protection measures and trafficking in circumvention devices and services.
- Reduce high tariffs and taxes placed on video game products, 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 audio visual quotas that discriminate against non-Brazilian content.

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Internet Piracy: Internet access continues to grow in Brazil. According to the International Telecommunications Union, 57.6% of Brazilians used the Internet in 2014, and there were 89.6 broadband subscriptions (the vast majority of them for mobile access) per 100 inhabitants.² As the potential market grows rapidly, legitimate services for online delivery of copyright materials are gaining an increasing foothold in Brazil. Music industry digital revenues in Brazil increased 30.4% in 2014, enough to offset a steep decline in sales of physical product and accomplish modest overall growth in the Brazilian recorded music market, the world's ninth largest. Major international digital music subscription services such as Deezer and Napster have partnered with Brazilian telecommunications companies, media conglomerates, and banks to deliver recorded music to Brazilian listeners at compelling price points (including for free, in the case of advertising-supported streaming services, by far the fastest-growing segment of the digital music marketplace).³ Similarly, there are at least twelve free or low-cost online platforms that offer legal viewing options to Brazilian television and film audiences, including Crackle, Netflix, HBO, Globo Video, Mundo Fox, and iTunes/Apple Brazil. Online access to legitimate video game play is available through Xbox Live, PlayStation Network, and Nintendo eShop. But despite all 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.

A new study quantifies how deeply entrenched one form of digital piracy has become in the Brazilian online environment: unlicensed downloading of copyright material via peer-to-peer (P2P) traffic. This global study measures by country the retail value of content exchanged via BitTorrent networks, nearly all of which is unlicensed. Brazil topped the list with almost US\$100 billion of such “unmonetized demand,” far ahead of more populous markets such as India, or those with higher levels of Internet penetration, such as the U.S. or Western Europe. The 1.17 billion Brazilian downloads measured, and the 71.2 million Brazilian IP addresses engaged in this activity, both ranked second to the U.S., a far larger market. In particular, the study highlights the voracious appetite of Brazilian users of the BitTorrent protocol for free copies of video games: some 373 million P2P downloads of game titles were observed in 2014, involving 52.5 million IP addresses, far more than for any other country in both metrics. But the problem is not confined to the games market; Brazilian IP addresses ranked second worldwide in the ranking of those engaged in unlicensed P2P downloads of TV content, third for movies, and third for music.⁴ This data buttresses earlier studies, including one conducted for the Brazilian Government showing that 81% of Brazilians who

²ITU, “Measuring the Information Society Report 2015” (Dec. 2015), at 222, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>.

³IFPI, *Recording Industry in Numbers: 2015 Edition*, at page 103, available at <http://ifpi.org/recording-industry-in-numbers.php>; IFPI, *Digital Music Report 2015*, at p. 27, available at <http://ifpi.org/digital-music-report.php>.

⁴See TruOptik Data Corp., “Digital Unmonetized Demand and Peer-to-Peer File Sharing Report: 2014 Review,” available at <http://truoptik.com/digital-media-unmonetized-demand-and-peer-to-peer-file-sharing-report-2014>.

downloaded music or films from the Internet, including individuals from all economic classes, regions, age brackets, and levels of education, did so exclusively from illegal sources.⁵

Internet piracy problems in Brazil feature two 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, many appear to have local operators, and are clearly targeted to the Brazilian market. Link sites to infringement hubs account for the majority of online music piracy, and a comparable share of the Internet piracy cases involving audio visual works like movies and TV programs. 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 audio visual material.⁶ One very popular site in this category changed its name from *degracaemaisgostoso.org* (“free is much better”) to the terser *degraca.org*, but maintains the same basic business model it has followed for nine years: providing unauthorized access to infringing copies of international and local music repertoire, as well as books, games and movies. Links are refreshed daily and the audience for this Portuguese-language site is overwhelmingly Brazilian. A similar Portuguese-language site, *sobaixar.com* (formerly known as *Baixeturbo.org*), is even more popular, and boasts 53,000 “likes” on Facebook. Both these sites harvest revenue from advertising and from the sale of premium accounts. The files to which such sites link are generally stored on offshore hosting sites such as *4shared.com* (itself the 75th most accessed site by Brazilian users), *Mega*, and *uploaded.to*.

Other linking sites to infringement hubs that specifically cater to the Brazilian market include *teleona.org*, which features camcordered first run motion pictures, with Portuguese audio captured from a local theatre or with Portuguese subtitles added; *Filmesonlinegratis.net*, active since 2009 and ranked 101st in Brazil by Alexa; with thousands of links to infringing music and other content, available only in Portuguese; *Hitsmp3.net*, with some 11,000 links to infringing albums; and *Sapodownloads.net*, another blog site specializing in links to infringing music. These links also continue to be propagated massively through social networking communities. 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. (As discussed more fully below, exemplary efforts of Brazil’s Federal Police led to the shutdown in 2015 of *megafilmeshd.net*, which had provided links to thousands of films, TV series, and concerts, much of it in Portuguese.)

Infringing linking sites for illegal video games available for download in Brazil, which each may reach as many as 500,000 users monthly, 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) generate monthly revenue ranging from US\$4,000 to US\$30,000 from donations and/or advertising revenue. Examples of these types of sites include: *roxdownload.net*, *roxroms.net*, *mundemu.net*, *emulator.info*, and *romsup.com*. The majority of the above-mentioned sites are in Portuguese.

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 as noted above stands out as a growing threat for the entertainment software industry in particular, making pirated video

⁵See 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/index.php?option=com_content&view=article&id=14071 (unofficial translation on file with IIPA), summarized in IIPA’s 2013 Special 301 submission, available at <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> at 106 (“IIPA 2013”).

⁶NetNames Ltd., “South American Television Piracy Landscape for Alianza Contra La Pirateria de Television Paga,” at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

games widely available. The Entertainment Software Association (ESA) reports that in 2015, for the fifth 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, among illegal downloads to consoles only (excluding PC games), Brazil once again ranked first in the world. The most popular torrent sites for Brazilian gamers in search of illegal content include *torrentz.eu*, KAT (KickAss torrents), and The Pirate Bay, with growing levels of access to other P2P services such as *cpturbo*, *vitorent*, and *bj2*. At least nine other torrent sites receive more than half a million visitors from Brazil each month. The recent 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.”⁷

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.⁸ Similarly, while robust growth of the legitimate market for online music continues, the fact remains that this marketplace is dominated by illegal sources, with only a small minority of Brazilian online consumers patronizing authorized services.

Hard Goods Piracy: Even though Internet piracy is clearly growing faster than physical piracy in Brazil for films, TV programming and video games, these products demand high bandwidth. For the audio visual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains an issue. In the case of video games, 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.⁹ 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.¹⁰ 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 it to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes. Vendors also burn discs on demand, or load memory cards, from a library of video game content stored on PCs.

Finally, a 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 R4 devices and other game copiers. Typically, sellers of the 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\$35). These circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software.

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. The Galeria Page, with 170 vendors, (some specializing in pirated video games, video game circumvention devices, and modified video game consoles), is the epicenter of hard goods piracy in São Paulo, but vendors in the nearby Shopping 25 de Março mall, and in other high-profile areas in that city, also participate.

⁷*Id.* at 33.

⁸The uncertainties regarding the new video on demand tax, and other market access barriers discussed in this submission, also play a role in retarding the growth of the legitimate online audiovisual market.

⁹Industry efforts in 2015 resulted in two criminal raids and the seizure of over 5,500 burned Wii game discs.

¹⁰For example, a Nintendo Sky3DS is typically offered for sale on Mercado Livre with 20 infringing games pre-loaded for BRL279.99 (US\$70).

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 being burned onto DVD-Rs and then distributed to Brazil's many black markets. The Motion Picture Association of America (MPAA) identified 35 member company films stolen in this way from Brazilian theaters in 2015. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films and television programming, negatively impacting worldwide distribution and preventing 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. The case is still pending.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview: Online Piracy

For many years, there has been virtually no criminal enforcement against serious online copyright crime in Brazil. 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 — almost completely undisturbed. In 2015, a few cases provided reason to hope that this policy of seeming indifference to the widespread and economically damaging digital theft that distorts Brazil's Internet marketplace might be ending. The challenge for 2016 and beyond will be to build on these isolated steps forward and to institutionalize a governmental commitment to get off the sidelines and take the field against online criminal copyright enterprises in a significant way.

The first case was brought in the federal courts in Vitoria, capital of Espirito Santo state in 2014, though it was not publicly disclosed until 2015. Using online search tools as a key part of the investigation, authorities arrested, charged and convicted the operators of music piracy linking sites *cdportatil.com* and *baixarcdmp3gratis.org*. These were the first such criminal infringement cases ever successfully prosecuted in Brazil's federal courts that did not involve delivery of physical products. A second successful case led to the sentencing, in July 2015, in the federal court in Sorocaba, São Paulo state, of defendants related to the website *filmescomlegenda.net*. This case took five years to conclude.

In November 2015, federal police arrested the alleged operators of one of Brazil's most successful illicit audio visual streaming portals, *megafilmesHD.net*. Luxury cars and cash were seized and numerous search warrants executed. The site remains down; the federal judge assigned to the case ordered the Federal Police to retain custody of it. With 12 million unique visitors monthly, and monthly revenue estimated at BRL80,000 (US\$20,250) from advertising alone, the shuttering of this site removed a major piracy player from the marketplace. The well-publicized enforcement action was recognized in USTR's 2015 Out-of-Cycle Review of Notorious Markets, where the site had been listed the previous year.¹¹

While these federal actions are encouraging, they remain isolated bright spots in an otherwise bleak landscape. Clearly, before a more meaningful criminal enforcement effort can be mounted in this sphere, much more needs to be done in terms of training, dedication of resources, and infusion of political will among police, prosecutors and judges determined to crack down on widespread online piracy. Indeed, an overall national strategy for combating this form of cybercrime is sorely lacking.

¹¹USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), at 3-4, available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>

One potential new route for mobilizing the needed political, fiscal and other commitments presented itself last year. A new investigative commission, the CPI do CyberCrime, was formed in the legislative branch in July 2015. It quickly spotlighted the problem in a public session focused on how the government and the private sector could join forces to exclude rogue sites from advertising networks and disrupt their funding structures. 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.

Civil enforcement should also be part of the solution. 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, the cases are still in the judicial queue waiting for resolution by a first instance judge.

The logical forum for implementing a coordinated national effort against online piracy is the long-standing National Council to Combat Piracy and Intellectual Property Crimes (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, and 2015 was no exception. The year ahead presents an opportunity for CNCP to reverse this trend, and to ensure that its next multi-year strategic plan (the current one expires in 2016) fully reflects the need to give top priority to combatting widespread online enterprises dedicated to copyright infringement. For example, as the CNCP's "Cities Free From Piracy" initiative gradually approaches its goal of signing up all major municipalities, it is time for it to make the transition to the cyber environment, and to ensure that the local law enforcement agencies and courts, which it 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, and the like. While CNCP efforts to provide a forum for inter-industry discussion have foundered in the past, 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.

A significant level of informal cooperation already exists, including in the voluntary notice-and-takedown policies that were spared threatened extinction when crucial amendments to the Internet civil rights bill (Marco Civil) were adopted. Many international companies operating in Brazil are cooperative, and some local ISPs and online marketplaces also have open communication channels and some level of technology to support IPR protection. 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 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

A couple of promising developments in 2015 in efforts against physical piracy are worthy of mention.

While the problem of storing vast quantities of seized pirate product throughout the protracted pendency of criminal cases remains a huge impediment to effective prosecutions, some proactive local courts have fashioned at

least a partial solution. In Recife (Pernambuco state), where the anti-piracy police chief threatened to deposit future seizures in the courthouse unless he was allowed to conduct forensic analyses on a sample of seized items and destroy the rest, the state court ruled unanimously that such samples could be used to prove infringement. Since then, authorities in Recife have followed this practice (sampling, and destruction of the remainder) and have been able to manage storage of seized material in a way that does not impede new enforcement actions. This example makes clear that the courts have the authority to manage the storage issue more rationally (as the National Judicial Council has encouraged them to do), and courts in other jurisdictions are considering taking similar steps. 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.

A pending case before the Supreme Court could open the doors of the federal courts to more copyright infringement cases. The case arose from importation of DVD-Rs containing infringing material, and the lower court held that Brazil's international obligations under WTO TRIPS are sufficient to establish a federal jurisdictional nexus for infringement cases. The challenge of proving such a nexus in domestic infringement cases has been a significant barrier to the federal courts, and the case has the potential to establish federal jurisdiction over copyright infringement cases with an international component, including those arising from Internet piracy.

However, even though the copyright industries in general enjoy good (in some cases, excellent) working relationships with enforcement agencies, and even though 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 piracy. 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.¹² In particular, the disappointing drop-off in government enforcement activity in São Paulo has continued, although some success has been reported in civil suits brought against market landlords to evict pirate tenants.

LEGISLATION AND REGULATION IN BRAZIL

Although 2015 saw the launching of at least two legislative caucuses with copyright piracy in their purview, very little progress was made on enactment of any relevant legislation. Brazil's 1998 Copyright Law remains seriously outdated and needs updates to reflect today's copyright protection and enforcement challenges. But since the most recent official draft amendments were released by the Ministry of Culture in March 2011, on which IIPA submitted detailed comments, no further progress has been reported.¹³ Similarly, although a plethora of bills to improve copyright enforcement in Brazil have been presented to the legislature, few have progressed.¹⁴

The most important recent legislative development was the enactment in 2014 of the Marco Civil, an ambitious project to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil.” As described more fully in IIPA's 2015 report, the 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. 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

¹²See, e.g., IIPA 2015 report, <http://www.iipa.com/rbc/2015/2015SPEC301BRAZIL.pdf> at 76.

¹³See, e.g., IIPA 2013 report, <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> at 112-13. The key issues were also summarized in IIPA 2015 at 78.

¹⁴Some of the most salient proposals are summarized in IIPA 2015 at 78.

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 voluntary security measures 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 such as the pending Privacy Protection Bill (PLS 181/14), 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 monitor these developments, first to ensure that, in fact, there is no adverse impact on current or future inter-industry arrangements to combat online piracy (including but not limited to notice and takedown), as well as to encourage an appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace. Especially in view of Brazil's increasingly prominent role in global discussions about Internet governance, its handling of this critical issue in its national law demands careful scrutiny.

Proposed Legislation Related to Enforcement: 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 identified above. For instance, the bill would allow expert reports in infringement cases to be based on a sampling of the goods seized, and would authorize the destruction of all pirate product seized in a criminal case. 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 two years ago, and still awaits action by the full Senate, with no progress reported in 2015. Once enacted, this bill will streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA 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.¹⁵

Throughout 2015, committees of Brazil's Senate continued to consider amendments to the Criminal Code (Bill 236/12) that would have significant impacts on criminal copyright enforcement. The final Senate report on the legislation incorporates important improvements. One amendment would create a new criminal offense for camcording (recording audio visual works or soundtracks in movie theaters), thus giving law enforcement a necessary new legal tool for combating a serious piracy problem. IIPA strongly urges that this provision be retained as the legislation moves forward. A second amendment in the same report corrects a problem in earlier versions of the legislation, by retaining the status of copyright offenses as public criminal actions which can be initiated *ex officio*. IIPA urges the U.S. Government to closely monitor further developments on this legislation as it moves toward action by the full Senate and then the House of Representatives, to preserve the progress made recently and to try to correct remaining negative aspects of the bill. These include repeal of the catch-all provision in the chapeau of Article 184, providing a penalty for criminal copyright violations that are not otherwise specified; this repeal could significantly reduce the effectiveness of criminal enforcement in a fast-changing technological environment. IIPA also remains concerned about reports that Bill 236/12 would substantially reduce penalties for some basic copyright violations, including unauthorized reproduction for profit and infringement on the Internet, thus sending precisely the wrong message to a Brazilian society that already deprecates the significance of copyright infringement, and to a legal system that in practice provides impunity from criminal penalties in most cases. We urge lawmakers instead to seek ways to support Brazil's creative economy by strengthening effective copyright enforcement.

Proposed Regulation of Collective Management Organizations (CMOs). Brazil's Ministry of Culture is seeking to introduce new regulations to empower CMOs to establish new rates for digital music services. Such authority would undermine direct licensing and unnecessarily interfere with the commercial aspects of rights licensing. This intervention in the market is not justified.

¹⁵Among 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.

MARKET ACCESS AND RELATED ISSUES

High Tariffs 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 2014. They are a significant barrier to legitimate market entry, a spur to the pirate market, and an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, benefit the national economy, create jobs, and generate tax revenues that are now being lost to piracy. 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 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. Finally, a bill recently approved by the House of Representatives (366/2013) would have included digital content services, including games distributed online, as subject to taxes on services under the 2003 ISS law (116/2003). If enacted, this measure would further discourage development of the legitimate market for online video games in Brazil.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector (Law 12.485): This law 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. Currently, the tax is assessed per title, varying from US\$100 to US\$3000, payable every five years during which a title remains in the VOD window (and when a title is licensed to multiple VOD outlets, the tax must be paid for each outlet). 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. We understand that ANCINE has acknowledged the threat this tax poses to the VOD market, and is engaging in discussions with industry stakeholders on possible changes to its approach. We encourage ANCINE to continue these efforts and to seek a reasonable solution that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers.

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, and its proposal for regulation creates debilitating uncertainty in the audiovisual sector, to the detriment of the Brazilian economy. Industry continues to oppose this initiative and to seek to reclaim its legitimate rights.

Screen Quotas: The most recent Presidential Decree on Screen Quotas imposes quotas for 2016 similar to the last year: 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 exhibitors have separately brought litigation against it. Quotas limit consumer choice, and have the adverse effect of pushing consumers toward illegitimate content sources. They should be relaxed.