

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

BRAZIL

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Brazil remain on the Special 301 Priority Watch List in 2003. High levels of copyright piracy, compounded by inadequate criminal enforcement throughout the Brazilian system, indicate that Brazil fails to provide adequate and effective copyright protection to U.S. copyright owners. We encourage the U.S. government to quickly reach out to the Lula Administration so that it is immediately aware of the political and economic stakes associated with its success or failure in addressing the copyright piracy and enforcement problems. IIPA requests that the review of Brazil's copyright practices under the Generalized System of Preferences (GSP) trade program remain ongoing and that a public hearing be scheduled in the coming months.

Overview of key problems: Copyright piracy in Brazil worsened over the past year, and the declining Brazilian economy only exacerbated matters. Brazilian pirates have increasingly turned to local domestic production of pirate materials, with much of the blank CD-R materials being imported or smuggled from abroad. Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, still enters the Brazilian market. Internet piracy is on the rise, compounding the long-time problems associated with the more traditional forms of hard goods piracy. Organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products.

Although a few Brazilian police units have conducted a substantial number of raids, these raids have resulted in very few criminal prosecutions. Over the last five years, the ratio of convictions to the number of raids run each year is less than 1%. In those few cases that reach judgment, the sentences are not deterrent. The Inter-ministerial Committee, formed in early 2001, has taken very little concrete, organized anti-piracy actions to-date. 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. One area of success involves civil copyright infringement cases where the business software industry has obtained significant civil damages in litigation, in part because the Brazilian copyright law contains a deterrent level of statutory damages. This success on the civil side must be tempered by the long time it takes to resolve a civil case and the fact that the courts require costly expert fees and court bonds. Civil copyright infringement cases related to business software take many years to be adjudicated (currently more than 200 civil cases are awaiting judgment). It is important to keep in mind that the victims of piracy include Brazilian creators, performers and companies who produce and distribute legitimate copyright product. Sadly, piracy continues to grow even as the industries continue to increase their anti-piracy investigations and foster public awareness through educational campaigns. Estimated trade losses due to copyright piracy of U.S. products in Brazil amount to \$771.4 million in 2002. The Brazilian government needs to make copyright protection and enforcement a top priority.

Measures which could be taken by the Brazilian government in 2003: The

copyright industries hope that the new administration of President Luiz Inácio Lula da Silva will usher in a reinvigorated, national approach to reducing copyright piracy, a plague which is harming Brazilian cultural and economic development as well as threatening foreign investment. The appointment of Brazilian singer/songwriter Gilberto Gil as Minister of Culture, could be viewed as a sign of the importance the government places on protecting Brazilian culture, and a key way to enhance culture is to enforce the copyright law. The Cardoso administration simply failed to address rampant piracy in Brazil. In fact, that administration made numerous commitments to U.S. government officials over the years—such as the March 2001 creation of the Interministerial Committee to Fight Piracy (IMC)—to address the core problems of extremely high piracy rates and inadequate enforcement, without tangible results.

The industries realize that a short period of time is needed for the new administration to identify its priorities. President Bush met with President-elect da Silva in December 2002, and both agreed to a bilateral “common agenda.” Copyright piracy and effective enforcement have long been near the top of the bilateral trade agenda, and we hope that the new Brazilian administration will embrace this important economic and cultural issue. IIPA and its members hope that the new Brazilian administration will take swift action to engage and address these challenges so that the scourge of copyright piracy will diminish.

Invigorating a concerted, national plan to tackle copyright piracy and improve enforcement is a necessary first step. Toward that goal, we outline a list of key objectives which require national focus. The industries stand ready to work with Brazilian officials in taking the needed actions to meet these broader objectives. For example, elements of an effective national anti-piracy plan in Brazil should address the following goals/objectives—

- Manufacturing / distribution: Investigate and raid illegal domestic manufacturing sources, major distribution channels, and key distributors.
- Transshipment / distribution: Investigate and intercept transshipments of illegal products via import channels of contraband.
- Broad enforcement action: Plan, dedicate the necessary resources, and implement comprehensive enforcement measures that create effective and efficient law enforcement work performed by several federal and state authorities, including the police, customs authorities, tax authorities as well as the judiciary.
- Statutory framework: Initiate legislation that strengthens the Brazilian enforcement framework against infringement of copyrights, and consider acting against the tax evasion that always accompanies such violations.
- Best practices: Establish a few priority government actions that have the potential to demonstrate how the Brazilian government acts successfully against identified targets with competent investigation, case development, timely prosecution, and deterrent sentencing.
- Private sector engagement: Achieve efficient coordination among the several public agencies while at the same time including the private sector affected by piracy and counterfeiting.
- Government legalization: The federal government (and with its encouragement, state and municipal governments) should implement measures to ensure that all use of intellectual property such as computer software within its agencies and instrumentalities is properly licensed, and should enact a decree requiring lawful use within government agencies.

In addition, there are several specific anti-piracy actions which would support effective enforcement efforts, such as:

- Customs (Receita Federal) should dedicate resources to establish tougher controls in major transshipment points including border crossings, ports, and airports. Imports from certain countries or corporations known to be the source of counterfeit or pirated products should be thoroughly screened. Products from Paraguay, and products shipped to Brazil's free ports of Santos and Paranagua, should always be inspected and documented thoroughly.
- Officials in border areas should be trained, directed, and managed (with performance measured) to devote a substantial amount of their time to the transshipment of pirated and counterfeit IPR products. The main target areas are: Foz do Iguaçú—Ciudad del Este; Guaíra—Saltos de Guaíra; Ponta Porã—Pedro Juan Caballero (BR-PY); Corumbá—Puerto Suarez (BR-BO); Uruguaina—Paso de los Libres (BR-AR); Santana do Livramento—Rivera (BR-UR). Major airports and seaports (Santos, Paranagua) also should be included.
- The federal police should be immediately assigned to investigate major criminal operations in a number of high priority and potentially high impact cases.
- Copyright law and enforcement-skills training and seminar programs should be implemented broadly and immediately among the various segments of public enforcement officials with the cooperation of the private and education sectors. This would include judicial training on copyright law and procedures, in both the criminal and civil cases.
- The judiciary should consistently apply Law 9.099/95 such that the defendant is required to pay damages as a condition for granting suspension of prosecution.
- On legislative matters, legislation designed to strengthen Brazil's legal environment vis-à-vis piracy should be introduced and adopted. For example, additional amendments should be made to the long-pending Bill No. 2.681/96. In addition, the committee should analyze the issues, draft, and propose legislation supporting the following goals:
 - For street vendors who are first-time offenders, evaluate the convenience of recommending the reduction of current imprisonment terms, provided that, if the judge suspends a case or converts a sentence and thereby applies an alternative sanction, such alternative sanction must be applied effectively.
 - Increase the criminal prison term and monetary fines applicable to those pirates who operate in a venue or on a scale other than as street vendors. Special emphasis should be given to adequate punitive sanctions for the manufacturers, importers, contrabandists and distributors (in a venue or on a scale other than simple street vendors) of pirate goods.
 - The payment of damages to the victims of the crimes should be effectively pursued and the laws reviewed to assure that the specific provisions can be executed accordingly.
 - Allow the immediate disposal of counterfeit product with the existence of: an expert report declaring the illegality of the product; an itemized report specifying all of the product to be destroyed (for court, evidentiary and damages purposes), and the authorization of the judge.
 - Create laws that reflect the principle that medium- and large-scale piracy falls within the definition of an organized crime scheme.
 - Include provisions in the penal code that knowingly supply raw materials for the purpose of piracy is a punishable offense.

These recommendations are illustrative of the large-scale effort needed at the national level to begin to reduce copyright piracy in Brazil.

BRAZIL
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	35%	120.0	33%	120.0	33%	120.0	35%	125.0	40%
Records & Music ²	320.4	53%	302.0	MC99% CD47%	300.0	53% MC98% CD35%	300.0	MC95% CD35%	290.0	MC95% CD30%
Business Software Applications ³	317.0	55%	272.3	56%	264.1	58%	319.3	58%	298.8	61%
Entertainment Software	NA	NA	NA	99%	248.2	94%	116.2	90%	103.2	89%
Books	14.0	NA	14.0	NA	18.0	NA	18.0	NA	20.0	NA
TOTALS	771.4		708.3		950.3		873.5		837.0	

Note that the estimated losses for 2002 may likely underestimate total losses due to the severe fiscal decline of the Brazilian economy last year.

BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

Special 301: Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool.⁴ In April 1993, 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

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² 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.

³ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$303.1 million at 58% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ For more details on Brazil's Special 301 history, see Appendices D and E of this filing.

computer software, and improving copyright enforcement in general. Over the next few years, Brazil's placement on the Special 301 lists see-sawed between the Special Mention list and the Watch List. 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 action plan to allow this Committee to take concrete, significant action to reduce and deter piracy in Brazil."⁵

In April 2002, USTR took the step of elevating Brazil to the Priority Watch List. Ambassador Zoellick noted: "Despite having adopted modern copyright legislation that appears largely to be consistent with TRIPS, Brazil has taken no serious enforcement actions against increasing rates of piracy....Intermittent, localized antipiracy and anticounterfeiting campaigns are an inadequate substitute for a planned, systemic, and consistent approach to domestic and border enforcement activity and the application by the Brazilian legal system of deterrent penalties."⁶

Generalized System of Preferences: Because of the lack of progress being made by Brazil to enforce its copyright law through early 2000, the IIPA filed 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.⁷ 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.⁸ 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. There the industry representatives described the lack of Brazilian government participation in anti-piracy actions, compared with other Latin American governments, and requested improved industry-government coordination. This GSP review is ongoing. IIPA recommends that another GSP hearing on Brazil be held in the coming months.

⁵ Press Release 01-25, Office of the United States Trade Representative, "USTR Releases Reports Emphasizing Enforcement Priorities," April 30, 2001, at <http://www.ustr.gov/enforcement/special.pdf>.

⁶ Press Release 02-48, Office of the United States Trade Representative, "USTR Releases Annual Special 301 Report on Global Intellectual Property Protection," April 30, 2002, at <http://www.ustr.gov/reports/2002/special301-report.pdf>.

⁷ 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. See 19 U.S.C. § 2462(c)(5).

⁸ For the first 11 months of 2002, \$2.0 billion of Brazilian goods (or 13.5% of Brazil's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 6.6% increase over the same time period in 2001.

BRAZILIAN GOVERNMENT'S ANTI-PIRACY EFFORTS in 2002

The Inter-Ministerial Committee (IMC) has failed to implement any coordinated national anti-piracy plan.

Created in 2001: It appears that the most tangible step taken by Brazil toward addressing a national anti-piracy plan was the March 13, 2001, publication of the decree implementing the Inter-Ministerial Committee to Fight Piracy (IMC).⁹ 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. There we urged that the IMC should establish itself quickly and begin its work. On April 23, 2001, the first IMC coordinator was identified. However, the only thing that the locally based copyright industry heard from the IMC in 2001 was that it needed considerably more time to develop its ideas. Simply put, USTR's April 2001 expectation that Brazil would prepare an integrated action plan was not met.

In the first quarter of 2002, the IMC coordinator was replaced and some action was promised by the IMC. Meetings between the IMC and several IIPA member associations and other copyright groups were held in the second half of 2002 and an anti-piracy plan was debated. However, the only substantive step taken by the IMC in 2002 was the request by it for some criminal police enforcement actions to be taken against copyright pirates. This was a positive step; however, it goes nowhere near far enough to make an effective impact in reducing the piracy level in Brazil. While one of the aims of the IMC should be to recommend enforcement actions, there are many others set forth in the decree implementing the IMC, including the debate of ideas to reduce piracy, and the creation and effective implementation of a plan to reduce substantially the level of piracy in Brazil. The fact that the IMC indicates that it has made some progress as it has requested a small number of police actions in 2002 actually shows that the IMC lacks any determined focus on the primary goals of its mandate or sincerity of purpose.

It is not yet known how the da Silva administration will direct the IMC. 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 (the Minister of Justice has given almost no attention to 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 noted at the GSP hearing 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

⁹ 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.

coordinating body, in and of itself, does not solve the existing problem of piracy. In fact, it is important to repeat in this country report that 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 virtually nonexistent. Important elements of the ongoing review include the IMC’s development and implementation of a government strategy to fight piracy and 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.¹⁰ We are hopeful that the new Brazilian administration will take a renewed approach toward listening to industries’ suggestions and input.

IMC and 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.¹¹ 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. For example, in 2001, industry representatives presented a list of suggested actions to the IMC chairman, none of which were implemented by the IMC. In fact, the industry has never met with all members of the IMC at once, nor has the industry ever received any official communication from the IMC regarding any of its decisions or actions. In sum, the IMC to-date has not shown sufficient willingness to work with the private sector.

Actions at certain state and local levels have been encouraging.

São Paulo: 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 and did not come from the IMC, yet it is a groundbreaking move that provides a model for other states. The motion picture industry industries have reported good cooperation and good results 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 continuous anti-piracy efforts in the state. As IIPA has noted before, much 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 (it should also be noted that the

¹⁰ The details of IIPA’s proposed “action plan” was contained in Appendix B to IIPA’s April 6, 2001 Post-GSP Hearing Brief, available on the IIPA website at http://www.iipa.com/gsp/2001_Apr6_GSP_Brazil.pdf.

¹¹ 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.

personnel responsible for this effort have transferred to other duty assignment and are no longer at the consulate).

Rio de Janeiro: The state announced the creation of a special anti-piracy task force mid-2002. Unfortunately, that task force has not been formed yet. However, MPA reports positive action from the Rio de Janeiro municipal authorities against street piracy. Municipal authorities have begun to take administrative action against street 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. Sadly, IFPI reports that at least 42 stands still exist in the camelodromo that sell pirate music CD-Rs. Again, it should be noted that this effort did not come from the federal government or the IMC.

Other states: Other Brazilian states and municipalities might consider looking at the initiative and action taken by the State of São Paolo in order to gear up their anti-piracy efforts across their respective investigative agencies. MPA notes that the municipality of Porto Alegre in Rio Grande do Sul has also established a municipal effort to fight piracy administratively that may serve as a model for other municipalities, along with the Rio effort noted above. MPA has developed a short white paper describing the legal fundamentals for such action and is currently talking with several municipalities, encouraging them to establish such an effort. 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.

COPYRIGHT PIRACY IN BRAZIL

Brazil is currently obliged to provide the standards of copyright protection found in the WTO 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, 50.3); and to provide effective border measures (TRIPS Articles 41, 51-60).

Optical media piracy undermines the market for legitimate products.

Replication of pirate optical discs sold in Brazil, whether on a large or small scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. 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. (See further industry-by-industry discussion in the next piracy section, below.) Some industries report indicate that there are nine CD plants, with 11 lines, in Brazil.

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. In the last five years, sales of

recorded music has declined 30%. 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 music product, duplication equipment and smuggled blank CD-Rs, but most of the reproduction facilities are within Brazilian frontiers.

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 non-established facilities in *camelódromos* (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.

The videogame industry has seen both Asia-source counterfeits as well as locally manufactured discs find their way to Brazilian street markets. The legitimate DVD market grew rapidly in 2002 and pirate product is beginning to fill some of the new demand. 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.

Internet piracy is on the rise.

All the industries report that the Internet is increasingly being used in Brazil as a means to distribute pirated product. The number of Brazilian users has risen dramatically, with some 23 million users as of 2002. For 2002 IFPI reports that 9,232 web pages with pirate music have been removed and 8,991 notifications have been sent to ISPs regarding pirate sites or pages. Since September 2002, the MPA has been able to remove or block 295 websites offering pirated audiovisual products; in total, MPA's Brazilian campaign resulted in the removal of 58,830 copies of film titles from the Internet. BSA reports positive response to date to its campaign of cease and desist letters.

The Internet is still used primarily as a tool for advertising burn-to-order operations or pirated entertainment software products already available in the market. Direct Internet downloads are not yet a predominant problem, although with increased Internet access, it will only be a matter of time before this too becomes a significant concern. In the last quarter of 2002, IDSA and ABES started monitoring online auction sites. During this period, a total of 1,626 auction "announcements" (about 237 users) were removed as a result of "take down" requests made to the auction sites. There is also a large number of infringing videogame product appearing on Portuguese language auction sites such as Arremate.com and Mercadolivre.com. But in many of the cases handled through ABES, the compliance rate for requests for take down of infringing product has been quite satisfactory.

Organized crime.

During 2002, the business software industry introduced a campaign showing the relationship between piracy and other organized crime. This sought to increase public awareness of the nature and repercussions of piracy in Brazil. This campaign has had a significant effect, at least in the minds of government prosecutors. Prosecutors of organized crime-related cases now include piracy on their agenda (along with narcotics, money laundering, etc.), such as at their national meeting February 18, 2003 in Porto Alegre.

Piracy continues at unacceptably high levels in Brazil.

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.

CD piracy continues to decimate the recording industry.

Brazil is the world's third-largest producer of pirate music, trailing only China and Russia. Because of rampant piracy, Brazil was the 12th largest market in 2001, having been the 6th largest market three years prior. With the continued assault on the legitimate market by pirate product, it is possible that Brazil will continue to fall in market ranking. The local record industry commissioned a professional market survey that places piracy at 53% of the total music market in units. This volume represents 103 million pirate units. Estimated trade losses due to sound recording piracy, in both compact disc and audiotape format, in Brazil amounted to \$320.4 million, with a piracy level of 53%.

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.¹² In 2001, the overall music market decreased by 25 percent in units, and an additional 3.5% in 2002 mostly due to the increase in CD-R piracy. The level of music CD piracy rose to 53% last year, which means that more than 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 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.

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, continues to be a major problem. In addition, local illegal replication through the use of CD burners 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. 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; the market shrunk by 25% in 2001 and fell again by 3.5% in 2002.

In addition to the growing presence of locally replicated illegal CD-Rs, pirate and bootleg music cassettes and CDs still enter Brazil mainly from Paraguay via Foz de Iguazu, Corumba, Uruguaiana, Salto de Guaira 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, São Paulo (Congonhas, Guarulhos and Viracopos) and Foz de Iguazu. Paraguay acts as a bridge to

¹² Tom Gomez, "Brazilian Music Market Sees Sales Drop 40%," *Billboard*, Sept. 15, 2001.

deliver blank CD-Rs intended for piracy and some pirate CD product from Taiwan 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-Rs were imported in 2001 which more than likely will be used for piracy purposes. To stem the flow of this product, IFPI and Phillips have presented in 2002 a joint petition to the Customs Central Coordination (COANA) requesting a number of measures which include creation of a specific line item for blank CD-Rs, checking imports for undervaluations and monitoring entry of known pirate CD-R labels. Unfortunately, nothing has been done yet.

Brazil's audiocassette market has been completely lost to pirates for years. For 2002, 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.

Video piracy continues, with more and more 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, with an overall audiovisual piracy rate of 35% for 2002. Optical disc (CD-R and DVD-R) piracy is rapidly increasing in Brazil, affecting the developing DVD market and the existing VHS market. With the impressive growth of optical disc hardware, especially in the middle class population, this illegal competition will inevitably have a negative impact. (DVD player households in Brazil have grown considerably over the last three years, with the user base growing to an estimated one million in mid-2002 from only 5,000 in 1999.) There are two sources of optical disc piracy in Brazil, neither related to the other. Sales of low-quality CD-Rs are growing quickly in the street markets in urban centers. CD-R and DVD-R are also available in Ciudad del Este Paraguay, on the Brazilian border, for illegal introduction into Brazil. MPA estimates that its OD piracy rate is 10%, but unfortunately steadily increasing, in Brazil.

MPA is also concerned about the growth of sales of optical discs over the Internet. The number of users of Internet services has grown from 7% of the population in 1999 to 19% (23 million users) in early 2002 and Internet access is generally available to all social levels. MPA has tracked a steady increase in the incidence of Internet sites for hard goods sales, including CD-R recordings of its member company product, along with business software and videogames.

VHS piracy also continues in video stores, amounting to an approximately 33% piracy level. Pirate videos are primarily those titles in current home video release. Estimates of the

types of piracy in the retail market are: back-to-back copies, 60%; organized reproduction of better quality tapes, 25%; small-scale reproduction of low quality tapes, 15%. Organized pirate manufacturing of VHS and, recently, optical disc continues to threaten the market, and MPA is very concerned that without consistent efforts by enforcement authorities, it may continue to develop into highly organized systems related to other organized crime. With current enforcement cooperation, MPA has been successful in forcing the source piracy system into smaller, less coordinated, systems. However, MPA's investigation continues to uncover evidence of organized distribution to video stores and cross-border capabilities, probably the result of closer links to organized crime. Most organized reproduction takes place in the state of São Paulo. São Paulo pirate product is also distributed throughout the country. Pirate CD-R and VHS is also distributed via street vendors.

Business software piracy continues in a variety of formats.

Brazil has a very large informatics/software development and distribution industry, which contributes positively to the Brazilian economy. 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 \$317.0 million in 2002. The estimated level of business software piracy dropped a little from 56% in 2001 to 55% in 2002. During 2002, the business software industry introduced a campaign showing the relationship between piracy and other organized crime. This campaign had the support of, among others, all IIPA members and sought to increase public awareness of the nature and repercussions of piracy in Brazil.

In 2002, BSA continued to engage in civil judicial actions (search and seizure) and criminal police actions promoted by the local industry association, ABES. BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Parana, São Paulo, Rio de Janeiro, Minas Gerais, Espírito Santo, Bahia, Pernambuco, Ceara, Goias, Mato Grosso do Sul, 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 medium-sized and small 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. An upside in the year of 2002 was the reaction of the press, particularly in São Paulo, that has for some years reacted negatively to certain actions brought by BSA against corporate end users (despite evidence of illegal software in use by these entities) and has now started to react differently, pointing to the number of jobs and taxes lost due to piracy. In civil infringement cases, where the business software industry has achieved some success, Brazilian courts continue to require extremely high expert fees and bond requirements. Further, due to unacceptable delays within the judicial system and the lack of attention of judges to copyright protection, civil infringement cases related to the business

software take many years to be adjudicated (currently more than 200 civil cases are awaiting judgment).

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

The biggest problems for the interactive entertainment software industry in Brazil continue to be poor border enforcement and the lack of police action against high levels of videogame piracy, according to the Interactive Digital Software Association (IDSA). In its efforts to address the unabated piracy problems in the country, the IDSA launched a joint anti-piracy campaign with ABES in late 2002.

The predominant form of entertainment software piracy in the country continues to be CD-burning, which accounts for about 80-90% of pirate product in the market. Although there continues to be a prevalence of factory-produced pirate products (so-called "silver disk" piracy) in the Brazilian market, there are no known underground factories producing pirated optical media in the country. Factory-produced pirate console discs are usually produced in Asia (China, Taiwan, and Malaysia) and exported to Brazil through Paraguay, or increasingly through other transshipping countries. Large quantities of these factory-produced discs appear in the "Promocenters," which are small retail booths renting space in larger markets and galleries. Their products are almost exclusively pirated or counterfeit goods.

Pirated videogames in cartridge format are usually shipped to Paraguay, sometimes assembled in this country before being transported across the border into Brazil. In two instances, the Brazilian authorities seized hundreds of counterfeit Nintendo videogame products at two raids conducted at major Brazilian airports. In both cases, the products reportedly were shipped from Hong Kong and China.

As mentioned in last year's Special 301 report, there are several venues through which pirated products are sold. For the CD-burning operations, advertisements of pirated products are usually placed in newspapers or on the Internet, with the customer calling in to place their "orders." Last year, ABES made significant strides in São Paolo, where it succeeded in obtaining agreements from local newspapers to cease publishing advertisements for pirated product. The group is working towards replicating these agreements in other cities and regions, where such advertising continues unabated. However, while the Internet continues to be primarily an advertising medium for CD-burning operations in the country, there are a number of "warez" sites that are a popular source of pirate game software. IDSA members also note that with growing Internet access in the country, it is only a matter of time before Internet piracy becomes a significant problem. There is also a large amount of infringing videogame product appearing on Portuguese language auction sites such as Arremate.com and Mercadolivre.com. But in many of the cases handled through ABES, the compliance rate for requests for takedown of infringing product has been quite satisfactory

Promocenters, flea markets and street vendors continue to be sources of pirate products. But given the lack of a fixed location for these operations, enforcement against such vendors becomes rather difficult particularly in tracing them back to the bigger operations that supply them with illegal products. The police have shown reluctance in taking action against these vendors, particularly where they are minors and possibly where there are links to organized crime.

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. Imported educational materials are commonly photocopied. Many university texts used are *apostilas*, anthologies made up of chapters from various books copied illegally, both in English and in translation. Some professors make photocopied compilations of materials before the first date of classes, which gives the booksellers no chance to import or sell the books before classes. Some estimates place that the annual number of unauthorized photocopies range from 3 to 5 billion pages. 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 Reprográficos). 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 were constant at \$14 million in 2002.

COPYRIGHT ENFORCEMENT IN BRAZIL

The major criminal enforcement problem in Brazil has been failure of Brazilian 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 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. Rightsholders 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. In some cases, the federal police have refused to act on complaints presented by the recorded music industry alleging that their central command in Brasilia has not listed IPR violations as a priority.

Some 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, Goias, Bahia and Rio de Janeiro. In 2002, due mainly to increased activity in São Paulo and Bahia, the total number of raids increased compared to 2001. For the year, the recording industry along with state police forces brought 870 actions (versus 577 actions in 2001 and 724 for 2000), which resulted in the seizure of 3.7 million CDs, 177 thousand cassettes and 8.6 million 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 79 million legal units versus 113 million pirate units (103 million illegal CDs and 10 million pirate cassettes). Pirate sales represented 53 percent of the total music market in 2002.

The gap between the number of units seized and the pirate market is a clear reflection of a lack of clear guidelines and direction from senior Brazilian officials, in addition to jurisdictional problems between different police corps and different *legacies*. 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 Octubre Street), the downtown of São Paulo, Camelodromos of Campinas, Riberao Preto, Porto Alegre, as well as throughout the cities of Brasilia, Florianopolis, Curitiba, Goiania, Cuiaba, Feira de Santana, Vitoria 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.

Although MPA has been successful in obtaining police raids (over 7,000 in the last four years) and in initiating criminal cases (over 5,000 cases pending), efforts to develop deterrence has been frustrating due to the lack of prosecution and sentencing (there is no focus on 25 key cases of organized reproduction and distribution or on the 350 recidivists among the pending cases, for example). 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 36 arrests in 2002 (33 in 2001, 16 in 2000, 4 in 1999), 13 convictions for copyright violations in 2002 (13 in 2001, 4 in 2000 and none prior to that). Despite the increased number of convictions in 2001 and 2002, most are for 3-4 months and all are immediately suspended with probation.

The business software industry, BSA, in collaboration with the ABES (Associação Brasileira das Empresas de Software, the local software association), was successful in getting the police to bring 253 criminal actions against resellers in Brazil in 2002 (IDSA participated with ABES in actions taken during the fourth quarter 2002). Of these actions, 13 were against small stores where 185,406 CDs were seized, 238 actions were brought against street resellers where 162,398 CDs were seized, and two actions were brought against two individuals offering pirate software for sale in newspapers, where 7,352 CDs were seized. A total of 355,156 illegal CDs have been seized as a result of these actions. 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 2002.

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 1998 Software Law. 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. BSA was hopeful that this type of tax evasion case would have a significant impact to lower software piracy in Brazil, especially by medium-sized and large companies. However, with the exception of a limited number of actions by tax authorities in the Federal District of Brasilia and the state of Bahia in 1999, 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.

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, non-deterrant 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. For the last 5 years, the ratio of convictions to the numbers of raids run is less than 1%. 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.

In 2002, the recording industry promoted along with local and state police forces actions against 870 targets. Of these 870 cases, more than 70 percent were suspended and only 12 people from the 847 arrested were indicted and spent more than 30 days in jail.

Although MPA is pleased with the very modest increase in arrests and sentences (33 and 13, respectively, in 2002), the prosecution effort appears to be *ad hoc*. MPA employs two full-time attorneys to follow up on cases, acting as the victims' representative and offering assistance and recommendations to prosecutors. Nevertheless, MPA has not seen notable interest by prosecutors in seeking suspensions for small first-time cases (they generally sit unprosecuted for years) or in pursuing important cases for sentencing. The use of suspensions as a modest deterrent is still ineffective; MPA reports 144 suspensions in 2002, all for non-deterrent conditions.

As for business software actions, BSA's criminal campaign against resellers is focused on seizures and publicity, conducting actions with the state police. In 2002, BSA filed 240 criminal complaints relating to the piracy of business software (these actions were brought in collaboration with ABES). However, no criminal verdicts have been issued in any of these actions.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN BRAZIL for 1998-2002

ACTIONS	Recording Industry 1998 (1999) [2000] {2001} -2002-	Motion Picture Industry 1998 (1999) [2000] {2001} -2002-	Business Software Industry 1998 (1999) [2000] {2001} -2002-	Totals
Number of complaints filed with police	530 (409) [724] {577} -412-	1,320 (832) [1,957] {1,750} -1,825 -	34 (118) [134] {273} -253-	1,884 (1.359) [2,815] {2,600} -2,490-
Number of raids conducted	680 (777) [724] {577} -870-	2,381 (1,671) [1,535] {1,354} - 1,640 -	34 (118) [134] {273} -253-	3,095 (2,566) [2,393] {2,204} -2,763-
Number of pirate copies seized	2.85 million (2.86 million) [4.63 million] {3.4 million} -4.1 million-	243,581 (212,063) [220,878] {225,785} -253,805 VHS, 56,037 OD-	NA (NA) [212,898] {351,944} -355,156-	+3.09 million (+3.07 million) [5.06 million] {3.97 million} -4.76 million-
Number of cases suspended or dismissed	NA (18) [131] {NA} -29-	148 (235) [146] {87} -144-	(0) (0) [0] {0} -0-	+148 (253) [277] {NA} -173-
Number of defendants convicted (including guilty pleas)	5 (3) [9] {NA} -8-	1 (0) [2] {13} 13	0 (1) [0] {0} -0-	6 (4) [11] {NA} -21-

ACTIONS	Recording Industry 1998 (1999) [2000] {2001} -2002-	Motion Picture Industry 1998 (1999) [2000] {2001} -2002-	Business Software Industry 1998 (1999) [2000] {2001} -2002-	Totals 1998 (1999) [2000] {2001} -2002-
Criminal sentence issued	Minimal fines (1-year jail term, commuted to small minimal fines) [sentences commuted to small fines - \$260] {NA} -8-	Community service (None) [Community service] {up to 2 years, all given probation} - community service, probation -	None (2 years' probation plus fine <\$600) [None] {None} -None-	Minimal (Minimal) [Minimal] {Minimal} -Minimal-
Ratio of convictions to the number of raids conducted	0.7% (0.8%) [1.2%] {NA} -.9%-	0.04% (0%) [0.09%] {--} -1%-	0% (0.8%) [0%] {0%} -0%-	0.19% (0.16%) [0.46%] {NA} -0.76%-

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 in criminal cases

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. As a result, 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).

Ineffective border measures

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. According to the Brazilian government, they do implement a "red traffic light" system in the major seaports with Paraguay. 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. To matters worse, Roberto Requião, new governor of Parana state which includes the city of Foz de Iguazu, has been reported to say that he will not promote any measures to stop the smuggling from Paraguay carried out by individuals coming across the border even though it is widely recognized that this activity is a major source of pirate product.

Civil actions: Significant damage awards have been issued, but lengthy delays and high bond requirements still pose problems.

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. Due in large to these unacceptable delays and the lack of attention of judges to copyright protection, BSA currently reports that more than 200 civil cases are awaiting judgment. Civil infringement cases related to the business software take many years to be adjudicated.

The business software industry 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 2002, BSA members, acting through BSA or individually, brought 210 civil actions against software pirates (compared with 145 civil actions in 2001), and the business anti-piracy hotline received 39,514 calls in 2002 (compared with 30,626 in 2001), which produced 3,015 leads of suspected piracy (compared with 1,834 in 2001).

In one civil case in the State of São Paulo and another civil case in the State of Rio Grande do Sul, BSA received two very favorable judgments for multimillion-dollar sums, the sixth and the seventh judgments of this nature under the 1998 Copyright Law and Software Law. The judges in these cases applied Article 103 and Article 104 of the Copyright Act of 1998, ordering the defendants to pay damages of 3,000 times the retail value of the illegal software seized. The level of damages awarded in these cases is unprecedented worldwide with respect to software copyright infringement suits.

Brazilian courts continue to require extremely high expert fees and bond requirements. In some BSA cases during 2002, for instance, bond requirement of US\$ 50,000 to US\$100,000 were required and BSA had no option but to terminate the cases without seizure the defendant. On the average, BSA has paid up to US\$5,000 for experts fees and up to US\$25,000 as bonds. However, there have been other cases in which the bonds were so excessively high that the BSA could not afford to continue the case.

Also of note, a September 2002 judgment issued by a São Paulo civil court required two Brazilian CD manufacturers to pay record companies over US\$1 million. One company manufactured pirate stampers (the metal discs used in CD manufacturing) which were then used by the second company to reproduce tens of thousands of pirate music CDs featuring music by international artists. This judgment followed a three-year investigation by police and industry representatives.

CRIMINAL CODE AND REGULATIONS

The Brazilian Criminal Code simply fails to provide effective deterrence.

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.

Problems with suspension: In 1995, a criminal procedure regulation was issued for the purpose of alleviating serious overcrowding of the court dockets. 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.

Criminal code reform: Legislation to reform the criminal code has been pending for years. The first package 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, drafted 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. Finally, both bills were enacted in 1998. The software bill (PL 200/96) entered into effect on February 20, 1998 and the amendments to the 1973 copyright law (Law No. 9.610) 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). In addition, the Brazilian government unfortunately has refused, apparently for reasons involving regional trade leverage, to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, despite the fact that its national law is quite strong.

Specialized IPR courts with copyright jurisdiction are needed.

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

We encourage the government of Brazil to continue its efforts to implement effective software asset management practices in its public ministries and agencies. This will allow it not only to ensure all of its software is licensed, but will also help it make the most out of its investments in information technology. Good software asset management practices can best be achieved through active public-private sector partnership. We urge the government of Brazil to work closely with the private sector in this regard.

NON-TARIFF BARRIERS

Remittances, computer software and tax barriers

Although Brazil has eliminated most of the non-tariff barriers that afflict the computer software industry, several issues still remain. These non-tariff market access barriers, if corrected, could increase additional foreign investments in the technology sector and help further develop the technology industry in Brazil.

One of the main issues deals with a law passed by the previous administration. Law 10.332 imposes an additional 10% tax called "CIDE" (Contribuição de Intervenção no Domínio Econômico) on international payments for technology and royalties of any nature. CIDE essentially raises 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. The constitutionality of CIDE is also questionable as it is currently being challenged in court by several Brazilian and international software companies, based upon the argument that CIDE was enacted under the wrong procedure (the Brazilian Constitution, article 146, section 3, demands a complementary law to impose the "CIDE", and Law No. 10.332 is an ordinary law).

A second market access concern involves a Central Bank's requirement (per Circular No. 2685 of May 1996), which requires 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. The Central Bank of Brazil currently requires all documentation listed in Circular No. 2682 of May 1996 of the Central Bank. Furthermore, 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, among other documentation. Such burdensome paper requirements further impedes and discourages foreign investment and trade and we urge the new administration to correct the mistakes of the old and start Brazil on a new path to economic investment and development.