

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2018.¹

Executive Summary: In another year of political tumult and economic stress in Brazil, there were no dramatic changes in the IPR protection environment for the copyright industries. Development of this large and potentially thriving market for legitimate content and content delivery services has been hampered by the continuing rampant piracy and a wide range of market access barriers for the creative industries. The coming year, culminating in an election, offers an opportunity for the government to commit to promoting a legitimate Internet marketplace for copyright materials and to take action against the extensive digital piracy operations targeting the Brazilian market. A legitimate Internet marketplace for copyright materials in Brazil continues to develop, and the economic potential of this market is enormous, but pervasive piracy operations targeting the Brazilian market and the lack of ratification of the WIPO Internet Treaties still hamper the healthy growth of e-commerce in creative works. While federal criminal enforcement took down three leading piracy websites in 2016, there were no such enforcement actions in 2017, and prosecution of individuals behind the piracy websites has stalled, with no trial date in sight. The online piracy ecosystem—including the growing phenomenon of “stream-ripping” services, a particular threat to legitimate digital music services—remained undisturbed by Brazilian law enforcement, with no significant enforcement actions. In 2017, illicit streaming devices (ISDs) became an important player in Brazil’s piracy ecosystem; the HTV box, for example, offers unauthorized access to the entire grid of live TV paid channels, as well as a video on demand (VoD) service with illegally sourced movies and TV shows. While there were some raids on notorious physical marketplaces (including in São Paulo) for products and services enabling widespread video game piracy, as well as for counterfeit optical discs, the overall landscape remained unchanged. The main obstacles to an effective anti-piracy response include inadequate resources, insufficient training, jurisdictional frictions among federal and state authorities, and the lack of an overall national implementation strategy. One bright spot demonstrating a new political will to combat piracy came mid-year, when the Minister of Culture announced a new anti-piracy working group, which will deliver recommendations for the National Agency for Cinema (ANCINE). Reportedly, the Ministry is also pushing for criminal enforcement against well-established pirate operators, and encouraging voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. The congressional commission on cybercrime, *CPI do Cibercrime* (CPI), helped promote some of the needed changes to Brazil’s copyright and Internet legislation, including the proposal of a promising site-blocking bill. Early last year another site-blocking bill was presented at the Federal Senate, as a result of the latest campaigns in favor of the online anti-piracy mechanism. The Ministry of Justice’s National Council to Combat Piracy and Intellectual Property Crimes (CNCP) remains an underutilized resource. That could change if, in 2018, CNCP adopts and implements a national strategic plan that gives priority to criminal enforcement against well-established pirate operators, and to active government encouragement for voluntary cooperation among all online players. Exorbitant taxes and escalating duties on imported video games and consoles continue to stunt the development of a legitimate market for video games in Brazil; ANCINE’s recommendations to ease these tax burdens is a promising step forward.

PRIORITY ACTIONS REQUESTED IN 2018

Enforcement

- Implement better border controls against the import of illegal streaming devices, such as the HTV box.

¹For more details on Brazil’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil’s Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



- Build on the success of Operation Blackbeard and ensure that law enforcement agents are properly trained in conducting complex online investigations and have access to the necessary legal tools and framework to launch additional criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so. Support speedy resolution of pending prosecutions against individuals responsible for pirate sites taken down in 2015-2016, seeking strong penalties to raise awareness and deter future violations.
- Ensure that CNCP has the resources and political backing to engage on Internet piracy, and increase its efforts against hard-goods piracy, including continued expansion of the “City Free of Piracy” initiative. Revive that program’s coordinated attacks on retail piracy and distribution chains in some of the nation’s largest cities: São Paulo, Rio de Janeiro, Belo Horizonte, Fortaleza, Curitiba, Porto Alegre and Recife. Work with the National Forum against Piracy (FNCP) and local city governments to enforce local laws and place pressure on market owners to curb sales of pirated goods and electronics designed to support piracy.
- Encourage cross-industry efforts to combat Internet piracy using CNCP resources and the ANCINE anti-piracy working group, and support development of a new CNCP strategic plan, including an effective agenda for Internet anti-piracy actions incorporating feedback from right holders’ groups affected by digital piracy, and stepped up training on ways to combat digital piracy.
- As steps toward a deterrent enforcement system, implement a national program to train judges and prosecutors on IPR law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.
- Clarify jurisdictional issues regarding digital and online piracy for law enforcement, including through public policy decrees from the Ministry of Justice, and if necessary, legislation, to improve inter-agency coordination needed to effectively address online copyright theft.

Legislation and Regulation

- Reinforce the relevance of the National Congress Anti-Piracy Caucus, as a tool to tackle infringement in the region.
- Enact pending legislation authorizing court orders requiring Internet service providers (ISPs) to block access to offshore websites dedicated to criminal activity, including criminal copyright infringement.
- Enact pending legislation to provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and to criminalize signal theft in the home entertainment sector.
- Work to have a bill presented covering intermediary liability and advertisements placed on pirate sites; resist proposals that would undermine right holders’ rights (for example by introducing broad new exceptions and limitations).
- Reduce high tariffs and taxes placed on video game products in order to enable industry growth.
- Mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand; restrain ANCINE efforts to regulate intrusively the digital cinema sector; and relax audiovisual quotas that discriminate against non-Brazilian content.
- Accede to, ratify, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

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Internet Piracy: Internet access continues to grow in Brazil. Broadband access in Brazil is estimated to reach 30.5 million connections by the end of 2017.² Nearly 63% of all households are online, which translates to approximately 102 million Internet users in Brazil. Mobile internet access is now the most common way for Brazilians to access online services and platforms, with 92% of households now connected via mobile.

²All figures from the Brazilian Steering Committee, June 2017, available at: <http://cetic.br/pesquisa/domicilios/>.

Increasingly, these connections are used to access legitimate, licensed sources of copyright materials. According to music industry research, more than two-thirds of urban Brazilian Internet users consume music via smartphone, one of the highest proportions in major world markets. 52% patronized audio streaming services at some point in the last six months, with half using a paid audio streaming subscription.³ Music industry digital revenues in Brazil increased by 45% in 2015, led by streaming revenue, and by 23% in 2016, the growth driven by rapid adoption of audio streaming services such as Spotify and Claro Musica. Revenue from music streaming made up 81.4% of all digital revenue and 63% of all recorded music sales revenues. Digital was the single largest contributor to recorded music industry revenues in Brazil in both 2015 and 2016, making the country the world's eleventh largest music market.⁴ A dozen legal online music services compete to deliver recorded music to Brazilian listeners at compelling price points.⁵ All of these positive developments, however, represent incomplete market recovery: in the mid-1990s, Brazil was the world's sixth largest music market. Since that point, music revenue per capita has fallen from \$8.5 in 1997 to \$1.12 in 2017—a price depression largely attributable to the stifling effect of online piracy on the legitimate online market. Monetizing the digital market for music in Brazil remains difficult in the face of piracy, and per capita spending on music is only 44% of the corresponding figure in Argentina, for instance.⁶ Industry research indicates that some 40% of all Brazilian Internet users access infringing content services on a monthly basis. And even as some high-profile piracy sites have been taken down in well-publicized operations in recent years, as discussed below, many popular and well-monetized sites persist, and new infringing sites have proliferated.

Similarly, at least 40 free or low-cost online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime the most recent entry in the market. Most pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Recent reports estimate that by 2020 the local online content consumption will reach US\$451 million. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network.

Despite this progress, the development of a robust legitimate online marketplace in delivering copyright materials to Brazil's growing population of Internet users continues to be stunted by the prevalence of online piracy. There is an extensive piracy ecosystem in Brazil with multiple different business models, appealing to all tastes and consumer groups. Government and private sector studies described in previous IIPA Special 301 submissions documented the huge volume of Brazilian IP addresses engaged in unauthorized downloads using the BitTorrent Peer-to-Peer (P2P) protocol,⁷ and the shockingly high proportion of Brazilian Internet users who relied on illegal sources for their online music or audiovisual consumption.⁸ While the increasing ubiquity of legal alternatives may have ameliorated these adverse trends, it has hardly eliminated them. A recent motion picture industry report noted “over 400 piracy websites dedicated to the Brazilian market [that] are currently in operation, 57 of which receive over one million visitors per month. Combined, these pages offer over 13,000 national and foreign titles, including movies that are still in theaters, and have recorded 1.7 billion visits” in the 6-month period ending May 2016.⁹ Traffic statistics improved somewhat in 2017, after Operation Blackbeard II in November 2016 targeted the major websites dedicated to the Brazilian market, and accompanying industry outreach efforts to operators. In 2017 only the 47 top websites received over one million visitors per month, and while in 2016 the most popular website received more than 400 million visits, in 2017, the top website didn't reach 200 million visits.

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

⁴IFPI, *Global Music Report* (April 2017), at p. 78, available at <http://www.ifpi.org/recording-industry-in-numbers.php> (“GMR 2017”).

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

⁶GMR 2017 at p. 78.

⁷See the TruOptik study summarized in IIPA's 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”) at p. 67, documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

⁸See Comunicado do Ipea - 2012 - Maio - nº 147, *Download de músicas e filmes no Brasil: Um perfil dos piratas online*, available at http://www.ipea.gov.br/portal/images/stories/PDFs/comunicado/120510_comunicadoipea0147.pdf (unofficial translation on file with IIPA), summarized in IIPA's 2013 Special 301 submission, at p. 106, available at <https://iipa.org/files/uploads/2017/12/2013SPEC301BRAZIL.pdf> (“IIPA 2013”).

⁹Tendências Consultoria Integrada, *The Economic Impact of Brazil's Audiovisual Industry* (October 2016), at pp. 57-59, available at http://www.mpaamericalatina.org/wp-content/uploads/2015/12/MPAAL_10_04_2016-english-fv.pdf.

Internet piracy in Brazil is characterized by three main types of distribution channels. The first involves sites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites). While these sites are nearly all hosted outside Brazil, they are clearly targeted to the Brazilian market. Many appear to have local operators, and rely on local intermediaries (such as advertising providers and payment processors) for monetization channels. A study published in January 2016 found that almost 45 million Brazilians (nearly 41% of all those online) used the cyberlocker link site ecosystem to consume infringing audiovisual material.¹⁰ Another industry study found that the Brazilian user base of such notorious sites providing links to offshore piracy repositories increased 14% in 2016. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent right holders from detecting links to infringing files through automated monitoring. The files to which such sites link are generally stored on offshore hosting sites such as *4shared.com*, identified as a notorious market site in USTR’s 2017 Special 301 Out-of-Cycle Review, and itself one of the 50 sites most visited by Brazilian users.¹¹ One local cyberlocker site, *minhateca.com.br*, hosted more than half a million infringing music files that were reported by the recording industry and removed in 2016. Notable MP3 linking sites, such as *RecantoMp3.com*, *BaixarMusicasGratis.org*, and *BaixarMusicasBR.org* offer downloads of unauthorized music content to users. Finally, the stream-ripping site *PalcoXMP3.com* remains very active.

Infringing Portuguese-language linking sites for illegal video games (*parvenu* and *myboerse.biz*) are expanding their user bases, with the top 15 infringing sites accumulating over 85 million visits in the last year. In 2017, many of the popular infringing websites consolidated, and saw tremendous growth. Their user base rose by an estimated 41% in 2017. These websites provide links to offshore pirate repositories or torrents that “host” infringing copies of video games, and mostly monetize using online payment services, advertisements, and 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 of current and legacy games across multiple platforms. These sites offer free direct downloads of games (from off-shore cyberlockers and torrent sites), and produce monthly revenue ranging from US\$4,000 to US\$30,000 from subscriptions, donations and/or advertising revenue. Brazilians who seek video game content also often turn to local or foreign infringing websites, which remain popular. Examples include: *roxroms.net*, *mandoemu.net*, and *romsup.com*.

The second main channel for Internet piracy in Brazil is file sharing via illicit peer-to-peer (P2P) networks, which continue to thrive and pose a serious threat for the entertainment software industry as well as other sectors. The U.S. video game industry reports that in 2017, for the seventh straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized filesharing of video games on public P2P networks (99 percent of it using the BitTorrent protocol). The video game industry reports that Brazil is among the top ten countries for detected P2P swarms by volume, and may be outranked only by Russia.

Notably, Brazil topped the world’s list for volume of unauthorized file sharing using consoles; it ranked second for PCs and sixth for mobile devices. The most popular torrent sites for Brazilian gamers in search of illegal content include *torrentgames.biz*, *gamestorrents.biz*, and *jogosandroidgratis.com*, with growing levels of access to other P2P services such as *gamesviciantes.net* and *baixargamestorrent.biz*. One private paid torrent forum site focusing on music piracy is *manicomio-share.com*, while free torrent portals such as *Torrentz2* and *Rarbg* remain popular. The most popular such sites for access to infringing movies and TV shows include *comandofilmes.net*, which harvests revenue from advertising and from the sale of premium accounts, and which receives 94% of its over ten million visits per month from Brazil, according to the website audience monitoring service Similarweb.¹² In 2017, the top three most popular illegal movie and TV show streaming websites received approximately 506 million visits in total, while in 2016 the number was 786 million. The most popular streaming site, *redecanaís.com*, received an

¹⁰NetNames 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>.

¹¹USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018) (“USTR NM”), at p. 12 and n. 27, available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

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

average of 15 million visits per month. Overall, the 2016 NetNames report found that “the Brazilian peer-to-peer landscape attracts 32.89 million of the country’s 109.77 million Internet users,” including some using “dedicated Portuguese language sites.”¹³

A third major channel for online piracy is of particular concern to the music industry. “Stream-ripping” websites circumvent technological protection measures and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models both of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. This form of digital piracy, generally monetized through advertising, is growing substantially in the Brazilian market. According to Similarweb, *baixavideos.com.br* received more than 2.5 million individual visits from Brazil between October and December 2017. Brazilian internet users also often turn to stream ripping sites that have a localized version but are hosted outside the country. While the closure of *YouTube-mp3* was a positive improvement, new stream ripping sites surfaced with notable audiences: *Youtubecomtomp3*, *Clipconverter*, *Flvto.biz*, *2Conv*, and *FLvmp3*.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyright works in Brazil. For example, legitimate online audiovisual services have increased in recent years, but still suffer from the pervasive availability of illicit, advertising-supported services that are free to the consumer.¹⁴ Similarly, while robust growth of the legitimate market for online music continues, the fact remains that this marketplace is dominated by illegal sources. For example, the music industry estimates that music tracks valued at \$645 million were downloaded via stream ripping alone in Brazil during 2016, compared to licensed sales revenue worth \$145 million in 2016.

Circumvention Devices: 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*, *aogao.com.br*, and *playtronics.com.br*. Online marketplaces like *Mercado Livre* are also used to obtain infringing game controllers and circumvention devices. These websites rely on non-responsive host sites and torrent link index sites to distribute illegal copies of video games.

Illicit Streaming Devices: 2017 has seen the rise in of Illicit Streaming Devices (ISDs) in Brazil, exemplified by the increased market penetration of an IPTV box called HTV. HTV offers a grid of 170+ live pay-tv channels and also a VoD service that offers TV shows and motion pictures, many sourced through illegal camcording activity. These illicit devices are available at retail in Brazilian marketplaces, but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets. A significant amount of ISDs are sold on the Internet, mainly in online marketplaces such as *Mercado Livre*. The Motion Picture Association of America (MPAA) is working with the Brazilian Pay TV / Telecom Association (ABTA) on a voluntary cooperation agreement with *Mercado Livre* to prevent HTV and other known illegal boxes from being sold on their platform. Moreover, in partnership with ABTA, MPAA launched an HTV investigation in August 2017.

Hard Goods Piracy: Even though Internet piracy is growing faster than physical piracy in Brazil for films, TV programming and video games, online products demand high bandwidth, so strong demand persists for pirate physical copies. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. The HTV box and other ISDs have also entered the hard good piracy market. In the case of video games, hard goods piracy takes several forms. Pre-loaded devices with illegal copies of videogames are readily available, in both online and street markets, including the notorious *Galeria Page* market in São Paulo. Pirate titles for console platforms like Nintendo’s Wii are usually sold on discs that are locally burned and assembled

¹³Supra n. 10 at p. 33.

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

(with inlay cards) on site. For handheld video games, the most common delivery medium is a memory card loaded with hundreds of titles downloaded from pirate Internet sites, bundled with a circumvention device, and sold by street vendors, in shops, or via online marketplaces such as *Mercado Livre*.¹⁵ *Mercado Livre* is the source of a variety of circumvention devices with preloaded games as well as modified consoles. A search for “desbloqueio Nintendo” generates multiple listings of “unlocked” or modified Nintendo consoles, some with installation of games. Despite removal of infringing listings, repeat offenders simply add new infringing listings, with little deterrence. Mass infringement of entertainment software through the sale of flash drives loaded with huge quantities of illegal 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 infringing product enters the Brazilian market through the nation’s relatively porous borders and ports, it is becoming more common for content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes.

Another major feature of the infringement 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 infringing copies of games are produced in Asia and brought into Brazil or delivered through the same channels as modified game consoles. *Santa Ifigenia* Street in São Paulo is a leading retail venue for sales of these circumvention devices, and has approximately 70 vendors that specialize in these illicit products. Typically, sellers of the game copiers also include a memory card with up to 500 game titles that were illegally downloaded from the Internet. These circumvention devices are significant multipliers that exacerbate the levels of online infringement by enabling the use of unauthorized copies of game software.

As Brazil’s largest city, São Paulo is a key hub of national piracy networks for hard goods. Not only are pirate products widely sold in the city, but distributors based there supply many similar retail operations in other parts of the country. Other notorious outlets for infringing video game products (as well as for pirate optical discs bearing movies and TV shows) include *Rua Urugaiana* in downtown Rio de Janeiro¹⁶, the *Feira dos Importados* in Brasília, and the *Feira da Sulanca de Caruaru* in the northeast of the country, which supplies many small markets and street vendors.

Camcord Piracy: Ninety percent of all pirated movies available during a film’s theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem also takes the form of in-theater audio captures, after which the dubbed Portuguese soundtrack is married with high-quality video captures sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well as burned onto DVD-Rs and distributed to Brazil’s many black markets. In 2017, 15 illicit recordings of MPAA member films were traced to Brazilian theaters, down from 31 during the previous year. While this trend is encouraging, Brazil should continue to strengthen its enforcement regime so that gains can be sustainable in the face of ever-changing criminal behaviors. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films and television programming, negatively impacting local, national and worldwide distribution, and hampering the establishment of legitimate online distribution platforms. These camcorded copies continue to feed illegal online sites and businesses, including the sale of streaming boxes with “subscriptions” and apps that provide access to illegal content.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview: Online Piracy

Brazil’s enforcement effort against online copyright crime remains far short of what is needed to combat this serious problem. Even though some Brazilian enforcement authorities have considerable experience in investigating other types of cybercrimes, they have left Brazil’s fastest growing marketplace for copyright piracy—the Internet—

¹⁵For example, a Nintendo Sky3DS is typically offered for sale on *Mercado Livre* with 20 infringing games pre-loaded for BRL279.99 (US\$90).

¹⁶The *Camelodromo Urugaiana* covers four city blocks and includes over 1500 kiosks, many of them selling illicit optical discs.

largely undisturbed. This discouraging trend continued in 2017, with even less enforcement than in 2016. IIPA is aware of no new significant criminal prosecutions against online piracy in Brazil, at either the state or federal level, in 2017. Unlike with respect to hard goods piracy, discussed later in this submission, there is no Internet anti-piracy campaign.

In 2015 and 2016, federal police executed Operation Blackbeard, shutting down three major pirate sites in 2016. While this was a very promising development for enforcement, there were no new prosecutions of pirate sites in 2017. Moreover, IIPA is informed that the resulting prosecutions are proceeding slowly, and no trial dates have been set. In 2018, prosecutors and judges should redouble their efforts to crack down on widespread online piracy. Training, dedication of resources, and infusion of political will among police, prosecutors and judges, along with an overall national strategy for combating this form of cybercrime is needed. Lack of proper training continues to be a major issue preventing Federal and Civil Police from investigating more pirate sites and delivering well-prepared cases to prosecutors. The Ministry of Culture and the CNCP should play a central role in developing training activities with participation of experts in the private sector.

The concurrent jurisdiction of federal and state police and prosecutors over enforcement of the copyright laws online has presented an additional hurdle to enforcement. However, the relationship with federal and state law enforcement has continued to improve in the last year due to more frequent trainings and meetings with law enforcement agencies, hopefully raising their awareness of online infringement. The Belo Horizonte conference in March 2017, a closed law enforcement conference co-sponsored by the U.S. Embassy, provided an opportunity for stakeholders and U.S. Department of Justice's Intellectual Property Law Enforcement Coordinator for Latin America to use Operation Blackbeard as a case study to educate federal and state prosecutors and senior law enforcement authorities about investigation and enforcement of online piracy.

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

Civil enforcement should also be part of the solution, including on the state and even city level. In particular, the power of preliminary injunctive relief has great potential, if orders can be obtained quickly. In several cases, these orders have been used to take down large volumes of infringing content, to require ISPs to block access to a group of pirate music websites, or to seize domain names from pirates. There are also promising signs that U.S.-based hosting providers will honor injunctions issued by Brazilian courts. However, backlogs and delays in the civil justice system diminish the value of this preliminary relief and are insufficient to keep up with the dynamically evolving online piracy landscape.

The logical forum for implementing a coordinated national effort against online piracy is the long-standing CNCP, in which both government and private sector players participate. While in recent years, CNCP has been relatively inactive, likely due to long term unfilled vacancies and unfilled positions on its staff, in 2017 CNCP obtained a new permanent staff. It is essential that CNCP develop a new 3-year strategic plan (the previous plan expired in 2016), and that the new plan give top priority to combatting widespread online enterprises dedicated to copyright

infringement. For example, it is past time for the CNCP's "Cities Free From Piracy" initiative to make the transition to the cyber environment, and to ensure that the local law enforcement agencies and courts, which CNCP has long helped to train in enforcement methods against physical piracy, become fully versed in the techniques and priorities for combating online infringement. CNCP has the opportunity to be the voice of the country regarding IPR issues, and should work to complement Congressional efforts to update legislation in this area.

Perhaps more crucially, the newly re-constituted CNCP should revive its long-dormant priority of encouraging cooperation and partnerships among right holders and other players in the Internet ecosystem, including ISPs, hosting providers, search engines, advertising networks, payment providers, and the like. The majority of international companies operating in Brazil, and a lesser proportion of local ISPs and online marketplaces, are already somewhat responsive when right holders bring infringements to their attention. There are a few informal agreements between certain U.S. companies and local ISPs to remove infringing content. But many 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. While CNCP efforts to provide a forum for inter-industry discussion have foundered in the past several years, such a forum is needed now more than ever, as so much of the piracy that the council was set up to combat has migrated from street corners and shopping malls to the Internet. The recent commitment set by the Minister of Culture to combat piracy might positively weigh in on a national strategy. This could also be improved by admitting the content industry to the Internet Steering Committee (CGI.Br), and encouraging ISP and content industry cooperation. Unhelpfully, the majority of this committee's members are still resistant to any intervention in the Internet, with concerns related to censorship and freedom of expression.

The federal government and some state level administrations have indicated their support of volunteer cooperation among stakeholders and for new public policies regarding IP protection, representing an important shift in this area. The Ministry of Culture, which houses the Office of Intellectual Property, is reportedly pushing for stronger IPR protections and anti-piracy actions in coordination with the private sector. To examine ways to strengthen these initiatives, the Ministry of Culture has created a Working Group within the Audiovisual Board in the Ministry in cooperation with the private sector (specifically the national movie sector but also absorbing all other entertainment industries).

Active government involvement could send a strong message that would help to bring industry players together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. Brazil's government began to acknowledge in 2017 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.¹⁷ The film industry was pleased to see National Cinema Council Resolution 3/2017, creating a working group on anti-piracy which will deliver recommendations for ANCINE. Moving forward, this initiative should be institutionalized as a permanent assignment of that body. Other government agencies, as well as the National Congress Anti-Piracy Caucus, are relevant players that should be energized to help tackle some institutional gaps.

Enforcement Against Hard Goods Piracy: Many Challenges Remain

The copyright industries in general enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. Overall, hard copy raids and enforcement training increased in 2017. The National Forum against Piracy and Illegality (FNCP) has assisted authorities in raids and improved enforcement training efforts and results. In March 2017, FNCP joined forces with the National Institute of Ethical Competitiveness and the legislature's Caucus against Smuggling and Counterfeiting to launch the campaign "The Brazil that We Want" at the

¹⁷See, e.g. TTV Summit: <http://www.todotvnews.com/news-video/Brasil-realiza-dos-grandes-anuncios-en-el-Summit-Antipirateria.html>; Federal Judges Association Colloquium on Digital Piracy: <http://epocanegocios.globo.com/Empresa/noticia/2017/12/brasil-perde-r-130-bilhoes-por-ano-com-pirataria-contrabando-e-comercio-ilegal.html>.

Ministry of Justice. The campaign's goal is to enhance legal markets and create more jobs. During the launch event, the sponsors signed a federal agreement to combat piracy and counterfeiting. IIPA welcomes this coordinated effort to address longstanding IPR challenges in Brazil. Another relevant campaign released by FNCP in 2017 was: "In Defense of the Brazilian Legal Market," with municipalities and other senior officials as signatories.

According to the Brazilian Customs authority, there was a ten percent increase in raids and an 18 percent increase in seizures of counterfeit goods and infringing products in 2017. Also, according to the Customs Authority, there was a 200% increase in the value of "cracked" video game consoles seizures, from BRL4.1 million (US\$1.3 million) to BRL12.3 million (US\$3.8 million). In contrast, there was an approximately 33% decrease in the value of seizures of game devices from BRL2.4 million (US\$733,713) to BRL1.6 million (US\$489,142). However, some video game companies reported there were no seizures by customs of products infringing their video game products in 2017. In 2018, Customs should increase border enforcement against illegal streaming devices, circumvention devices, and other technology that primarily facilitates infringement.

There were a few raids on key markets in the main cities around the country, but the most relevant development in this respect was an awareness campaign generated by FIESP, the Federation of Industries of São Paulo, with the publication of its annual illicit markets report, discussing the size of the hard-goods IP infringement market, tax evasion figures, and other related negative impacts of the illegal trade of pirated goods. This initiative should be a driver to generate new public policies and coordinated actions. Another positive development in São Paulo was the "Beautiful City" initiative, with a slogan that roughly translates to: "Nothing against popular commerce, everything against illegal commerce."

Also in São Paulo, initial meetings with right holders led to a number of raids on the *Rua 25 de Março* markets, and finally a sixty-day closure of the market in September through November 2017, pursuant to a judicial warrant. Federal revenue agents seized 900 tons of contraband and counterfeit goods. The market has since reopened, subject to probationary terms. These positive actions should be followed by civil and criminal prosecutions. IIPA would like to see similar coordinated actions taken against the main electronics markets in the major cities.

But while there have been some instances of constructive cooperation, little has been done to tackle the larger, systemic problems that render Brazil's criminal justice system inadequate in deterring the hard goods piracy that remains a significant problem. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of "experts"; inadequately trained police, prosecutors and judges; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.¹⁸

Ultimately, too much of Brazil's judicial system lacks adequate understanding of intellectual property matters, though there are some exceptions (for instance, the specialized commercial courts in Rio de Janeiro which have jurisdiction over IP matters). Redoubled efforts are needed to modernize Brazil's police and courts, to propagate best practices,¹⁹ and to train judges and prosecutors, before the Brazilian judicial system can play an effective role in addressing piracy.

LEGISLATION AND REGULATION IN BRAZIL

As in years past, the Marco Civil da Internet law and implementation requires continued monitoring to ensure recognition of the importance of protecting copyright in the online environment and to ensure that implementation does not interfere with existing voluntary notice and takedown efforts or other constructive cooperation to combat piracy online. A number of bills remain pending in Congress that would significantly impact the

¹⁸See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

¹⁹For instance, a few courts have taken steps to prevent the storage of vast quantities of seized pirate product from becoming an insurmountable impediment to prompt and cost-efficient prosecutions. IIPA hopes that this development is a harbinger of other steps the courts could take to expedite enforcement dockets, and to reform sentencing practices to deliver some measure of deterrence. For more details, see IIPA 2016 at pp. 71-72.

content industries, for better or worse. The government should take advantage of the first part of 2018, prior to the election, to enact some of the more promising proposed legislation and to ensure the defeat of proposed legislation that would undermine copyright owners' rights.

Site Blocking Bills: One of the most important initiatives grew out of the work of the CPI. Bill 5204/16, introduced in 2016, and still under consideration, would expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to the commission of serious crimes punishable by at least two years of imprisonment, a category that includes criminal copyright infringement. If enacted, the legislation would set clear guidelines for use of an important enforcement tool which has been shown to be highly effective against online infringement in many other jurisdictions. The measure is now awaiting report at the Committee on Science and Technology. Another promising site-blocking bill (no. 169/17), also authorizing court-ordered site-blocking, was introduced in 2017, and it too awaits report at the Committee on Science and Technology (likely to take place in 2018).

A different bill in Brazil's Senate (No. 200/16), as well as one in the Lower House (5130/2016), take a diametrically opposed approach. They would amend the 2014 Marco Civil da Internet law to expressly prohibit site blocking under any circumstances. While IIPA urges that those bills be rejected, its introduction underscores how vulnerable and ideologically driven the enforcement ecosystem in Brazil remains.²⁰ As described more fully in IIPA's 2015 report, the Marco Civil legislation was amended before enactment to exclude copyright cases from the blanket rule that "providers of Internet applications" cannot take down or remove access to material except in response to a specific takedown order issued by a court.²¹ Inclusion under this rule 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 of Marco Civil were spelled out in implementing legislation, namely Decree 8771/2016. Unfortunately and despite some cross-industry efforts, nothing related to combatting online piracy was included. A similar risk exists with regard to implementation of Marco Civil's 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 of any ancillary legislation, including, but not limited to, data protection measures. In this regard, it is encouraging that the pending House Bills 5276/16 and 4060/2012, as well the Senate Bill 330/2013, secure the rights of private organizations, such as right holders groups, to carry out reasonable online monitoring activities to protect copyrighted content. Close attention to the legislative progress of those bills is needed to ensure that voluntary cooperative efforts to keep Brazil's Internet environment free of organized piracy are not thwarted. IIPA urges the U.S. Government to continue to monitor these developments, not only to ensure that there is no adverse impact on current or future inter-industry arrangements to combat online piracy, but also to encourage an appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace.

A number of other bills that could have serious implications for the content industries have been awaiting action for years, and it is unclear whether there will be any movement in 2018, an election year.

The Copyright Reform Bill of 2009 (No. 6117/09) proposes several changes to the Copyright Law that are inconsistent with Brazil's international obligations and would likely deter investment in Brazil's creative industries. This bill is potentially troubling for all right holders. It includes new exceptions and limitations to both authors' rights and neighboring rights that are overly broad and conflict with the widely accepted TRIPS three-step test, as well as a compulsory license that does not comport with Brazil's Berne obligations. The bill also appears to require the

²⁰In a case currently pending before Brazil's Supreme Court, a friend of the court brief asks the court to prohibit any kind of site blocking order. While it is unlikely this case will be resolved in 2018, developments in it should be monitored.

²¹See IIPA 2015 at p. 77.

registration/recordation of all assignment of rights, which would impose undue costs and burdens on assignors and may diminish the ability of assignees to exercise their rights. Further, the bill unnecessarily amends Brazil's current policy of national exhaustion of rights. The bill in its current form was submitted to the Committee of Culture in September 2017, and an extensive rapporteur's report was prepared and revised. Legislative discussion of the bill was expected to start early in 2018, but as of December 2017 various proposed meetings and public hearings had not yet occurred. This bill should be closely monitored, as if it is enacted in its current form, it will be highly detrimental to rights holders. Instead, any copyright reform legislation should effectively address online infringement and explicitly outlaw circumvention of technological protection measures and trafficking in circumvention devices and services.

Bill 2729/03 is a product of cooperative efforts between the copyright industries and the CNCP. It includes a few vital reforms that would address some of the systemic enforcement impediments referenced above. It was approved by the House of Deputies in 2012 and sent to the Senate (now labeled Bill 63/2012), where it received committee approval over three years ago, but still awaits action by the full Senate. Enactment of the bill would streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA continues to urge its passage as soon as possible. IIPA would then encourage Brazilian legislators to turn to other long-overdue and critical enforcement reforms, including some that had to be jettisoned from Bill 2729/03 in an effort to expedite its passage.²²

Camcording: The persistence of the problem of camcording of newly-released feature films in Brazilian cinemas, a leading source for illegal online dissemination of these works, including through unauthorized "subscriptions" for ISDs, requires improved legislation that punishes this criminal conduct without requiring proof of the perpetrator's intent to profit. Bill 6512/16 would accomplish this goal. It awaits a report at the Lower House Committee on Constitution and Justice. Its enactment should be a high priority of the Brazilian Congress.²³

Public Performances: Two bills, nos. 0206/2012 and 3968/1997 propose amendments to existing law to provide for additional exemptions to payments for public performances. These bills would be highly damaging for rights holders. Another bill of concern to the music industry is Bill 2850/2003, which proposes to replace the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella collective management organization (CMO), with a new, government copyright authority named CADDA. The bill also proposes to create a "Fund for Supporting the Composer," taken from CADDA collections. To do so would cause great difficulties for right holders. This is another troubling bill that should not progress.

In 2017, the Superior Tribunal Court (STJ) issued an important decision in the ECAD v. Oi.FM case, regarding certain online uses of recordings.²⁴ The STJ held that interactive and non-interactive streaming (including simulcasts) are separate acts, each requiring the separate consent of the right holder. This aspect of the decision is positive for right holders because it confirms that online streaming (including simulcasting) requires a separate license for interactive and non-interactive services. However, the STJ also held that both interactive and non-interactive streaming (including simulcasts) involve the public performance right, which as a default falls under ECAD's rights management mandate. This portion of the decision goes against the accepted interpretation of existing law: interactive streaming is deemed to involve acts which fall within the producers' exclusive distribution right. Thus, this decision may undermine right holders' freedom to license their exclusive rights. An appeal of the decision is pending before the Constitutional Court.

²²Among 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.

²³A proposed bill for penal code reform would also create a new criminal offense to punish the camcording of audiovisual works and/or soundtracks in movie theaters. But the same legislation would further erode the enforcement framework for Brazil's creative industries because it lacks effective punishment for copyright infringement. Action on this bill appears unlikely in the near future.

²⁴ECAD v Oi.FM (Special Appeal No 1.559.264 – RJ (2013/0265464-7)).

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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

MARKET ACCESS AND RELATED ISSUES

High Tariffs, Taxes and Barriers on Entertainment Software: Brazil's high tariffs and taxes on video game products have long plagued the entertainment software industry, and remained a challenge in 2017. They act as a significant barrier to legitimate market entry, as a spur to the market for infringing games, and as an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, deliver innovative content to fans and consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement. Under a 2013 interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since, of course, pirate copies, whether smuggled across the border or burned within the country, do not pay these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. We urge that this interpretation be reconsidered. In addition, taxation on imported video game consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately, and has resulted in at least one major game publisher withdrawing from the Brazilian market. ANCINE has recommended that some taxes, like IPI (tax on manufactured products) and ICMS (tax on the distribution of goods and services) should be reduced for the video game market production chain, and, in 2017, made recommendations in a report that can be implemented through legislation or presidential decree. Government agencies should begin a collaborative process on possible ways to reduce the tax burden on the video game industry in order to stimulate the development of local talent and creativity.

Finally, Law 157/2016 of December 2016 authorizes a tax on all digitally-delivered content services for the first time in Brazil. This law opened the door for local bills implementing an optional tax on content and digital services, which include online video games, mobile apps, and online audiovisual works. Under this optional tax, municipalities can apply a two percent increase on these online services, which has the ultimate effect of raising overall prices. In September 2017, São Paulo and Rio de Janeiro became two of the first municipalities to implement the tax. While this new tax also applies more broadly to delivery of "audio, video, image and text content by means of the Internet," it provides additional discouragement for development of the legitimate market for online video games in Brazil.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector: Effective September 2011, Law 12.485/2011 imposes local content quotas for pay television, requiring every qualified channel (those airing films, series and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime. Moreover, half of this content must originate from independent local producers. Additionally, one-third of all qualified channels included in any pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. Lawsuits challenging the constitutionality of these local content quotas, and the powers granted to ANCINE, are pending before Brazil's Supreme Court.

Video on Demand (VOD) Tax: The provisional measure which creates ANCINE also establishes the VOD tax, as part of a broader tax regime on film and television content called CONDECINE. The taxes represent a unique and serious threat to the growth of the VOD market. As set forth in Provisional Measures 2228/2001, the taxes apply

to films, advertising, pay-TV and “other segments” which ANCINE considers to be VOD content. CONDECINE taxation levels are re-set every five years, and in 2016, the government proposed eliminating any cap on these adjustments. Fortunately, the proposal was amended to limit increases to the national inflation index (IPCA), a change that increases legal security for all players involved. CONDECINE is burdensome if levied over VoD services, and will limit the choices available to Brazilian consumers in the nascent online content market. The MPAA and other stakeholders have prepared an alternative proposal for VOD taxation that promotes, rather than impedes, the growth and development of Brazil’s VOD market and robust content choices for consumers; we urge ANCINE and the Ministry of Culture to give it favorable consideration. The Ministry of Culture is expected to send draft legislation on VOD taxation to the legislature by March 2018.

Digital Cinema Regulation: Yet another ANCINE regulatory initiative launched in April 2014 threatens to create debilitating uncertainty in the audiovisual sector, to the detriment of the Brazilian economy. The agency announced its intent to regulate digital distribution of motion pictures for exhibition, including by forbidding non-Brazilian companies or companies affiliated with distributors or exhibitors from transferring or encoding digital content or monitoring digital projectors. The announcement was coupled with proposals to further expand the existing screen quotas to restrict the exhibition of non-Brazilian titles on multiple screens. As a first step, ANCINE demanded that film industry participants disclose their commercial terms for digital cinemas, including their Virtual Print Fee agreements. This intrusion into legitimate commercial relations exceeds ANCINE’s statutory authority. Faced with widespread opposition, ANCINE is not currently pressing for access to confidential contracts. The agency now has a new President, known to be a moderate and with a pro-market mindset. We encourage the new agency leader to continue working with industry to continue working with the new leader to oppose damaging interventions in the marketplace.

Screen Quotas: The most recent Presidential Decree on Screen Quotas imposes quotas for 2018 similar to prior years: it would require between 28 and 800 days of screening of local content, depending on the number of theaters in the theater complex. The Decree also continues to specify that a widely-released title exhibited in complexes may be limited to exhibition on 30% of the screens. Brazil’s screen quota is facing a constitutional challenge at the Supreme Court, and competing legislative proposals have been introduced that would either loosen or tighten the restrictions. Quotas limit consumer choice, and have the adverse effect of pushing consumers toward illegitimate content sources. They should be relaxed.

Accessibility in Theaters: In 2016, ANCINE sought public comment on a draft ruling to mandate audio description, closed-captioning, and sign language interpretation in Brazilian cinemas. The U.S. film industry supports measures to broaden access to its productions and to better serve special needs patrons, and appreciates ANCINE’s agreement to extend the sign language deadline and to form a technical committee of key stakeholders, including MPAA companies, to facilitate timely and effective implementation of these accessibility tools. While the MPAA member companies acknowledge the lack of a security standard for those features to function, the organization continues to collaborate with the regulator and other affected parties to ensure timely and effective implementation of these accessibility tools in Brazilian theaters, preserve economic rights, and provide high-quality content for the targeted audience.