

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2019.¹

Executive Summary: A legitimate Internet marketplace for copyright materials in Brazil continues to develop, but sustainability and growth of the market are hampered by the lack of enforcement action against the continuing rampant piracy, idiosyncratic rulings in copyright cases, and a wide range of market access barriers for the creative industries. With a new administration comes the opportunity for the government to take renewed measures to foster a legitimate Internet marketplace for copyright materials, which would fuel reinvestment in Brazilian content, as well as foreign content production, and to take action against the extensive digital piracy operations targeting the Brazilian market. Most importantly, with the change of administration, there is a hope that Brazil will embrace a pro-copyright outlook and connect to the network of 98 countries that have already ratified the WIPO Internet Treaties. The lack of ratification of the WIPO Internet Treaties hinders the development of a healthy online marketplace for creative works and makes the legal environment in Brazil less legally predictable for rights holders and their business partners. While there were no criminal enforcement actions against pirate websites in 2017 or 2018² and prosecution of individuals behind the piracy websites has stalled, in January 2019 the Brazilian federal authorities launched “Operation Copyright” and executed raids against the administrators for *Speedshare* and the private server service *speedboxBR*, which resulted in both services being taken offline along with at least twelve other illegal file-sharing sites. Prior to this development, the online piracy ecosystem—including the growing phenomenon of music “stream-ripping” services, Piracy Devices (PDs), and other online pirate websites and services—remained undisturbed by Brazilian law enforcement. The main obstacles to continuing such efforts and ensuring effective anti-piracy response include inadequate resources, insufficient training, jurisdictional frictions among federal and state authorities, and the lack of a national implementation strategy. Moreover, under the previous administration, there was an attitude of permissiveness towards copyright-infringing services online and a level of skepticism regarding the merits of copyright enforcement. Yet, in order to sustain investment in creative content and artists, it is essential that the private property rights of copyright holders be respected and effectively enforced. This would also contribute to the further development of the legitimate online marketplace and thus, state revenues.

Brazil is demonstrating a new political will to combat piracy, as the cinema regulator (ANCINE) created an anti-piracy chamber and the Ministry of Justice's National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has been reinvigorated. ANCINE's anti-piracy chamber is expected to implement a national strategic plan. Reportedly, both ANCINE and CNCP are 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. Moreover, Brazil should support the development and implementation of disruptive online anti-piracy actions by law enforcement agencies on the state and federal level, including the exchange of expertise on initiatives in place in other countries.

With respect to the legislative agenda, it is yet to be seen which, if any, of the legislative proposals from the last congress will be taken up by the new administration. While many troubling copyright bills have been on the legislative docket for years, there are also several promising bills, including some site-blocking bills, which can have significant positive impact on copyright enforcement. Lastly, the exorbitant taxes and escalating duties on imported

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/2019/02/2019SPEC301HISTORICALCHART.pdf>.

²The last notable online enforcement action was in 2016, against three of Brazil's notorious online marketplaces.



video games and consoles continue to stunt the development of a legitimate market for video games in Brazil, but ANCINE's recommendations to ease these tax burdens is a welcomed step forward.

PRIORITY ACTIONS REQUESTED IN 2019

Enforcement

- Put in place a clear structure, with a high degree of political backing, for the development of copyright policies and copyright enforcement coordination across the country.
- Build on the success of Operation Copyright 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.
- Ensure that CNCP is relaunched with broad rights holders' membership and has the resources and political backing to engage in cross-industry efforts on Internet piracy and develop a national strategic plan.
- Implement a long-term national program to train judges and prosecutors on IPR law, the WIPO Internet Treaties, and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact. It is notable that some Brazilian copyright cases depart significantly from the global norms relating to the interpretation of certain rights enshrined in the WIPO Internet Treaties, such as, for example, the right of making available. More awareness raising and training, and obviously, ratification of the treaties, are needed to improve the level of copyright protection and legal certainty in the Brazilian market.
- Encourage law enforcement agencies to discuss and 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.
- Implement better border controls against the import of PDs, such as the HTV box, and video game counterfeit hardware.

Legislation and Regulation

- Accede to, ratify, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Enact legislation: (i) implementing the WIPO Internet Treaties, in particular, ensuring that the making available right is applied in Brazil in the WPPT-compatible way and that TPMs are available; (ii) authorizing court orders requiring Internet service providers (ISPs) to block access to offshore websites dedicated to copyright infringement; (iii) providing criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and criminalizing signal theft in the home entertainment sector; (iv) covering intermediary liability and advertisements placed on pirate sites; and (v) implementing the cybercrime special courts and special prosecution units.
- Ensure that implementation of the Marco Civil Internet law and related decrees and legislation do not interfere with voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Adopt and enforce new laws that explicitly protect against the circumvention of technical protection measures and trafficking in circumvention devices; hold Internet Service Providers (ISPs) responsible for facilitating infringement under certain circumstances, including a requirement that ISPs expeditiously take down infringing content when notified by a rights holder representative.

Market Access

- Reduce high tariffs and taxes placed on video game products, as well as on general on-demand content, 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 eliminate audiovisual quotas that discriminate against non-Brazilian content.

COPYRIGHT PIRACY IN BRAZIL

Internet Piracy: Internet access continues to grow in Brazil and demand for online content has intensified. While consumption largely involves access to legitimate, licensed sources of copyright materials, Internet piracy continues in parallel, which takes away from the growing legitimate market and hampers investment in production and legitimate distribution infrastructure. 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. 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. A dozen legal online music services compete to deliver recorded music to Brazilian listeners at compelling price points.³ Despite this abundance of legal offerings, 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. For example, the music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world’s sixth largest music market. Since that point, monetization of music in Brazil (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 music market. 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. This reinforces the necessity for having a long-term plan to tackle illegal sites and operators on a frequent basis. 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,⁴ and the shockingly high proportion of Brazilian Internet users who relied on illegal sources for their online music or audiovisual consumption.⁵

Internet piracy in Brazil is characterized by three main types of distribution channels: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites); (ii) file sharing via illicit peer-to-peer (P2P) networks and indexing sites for torrent files; and (iii) circumvention of technological protection measures, such as stream-ripping websites. While cyberlockers and linking websites are nearly all hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many appear to have local operators, and rely on local intermediaries (such as advertising providers and payment processors) for monetization channels. The top 105 most active local infringing sites dedicated to music accounted for over 118 million visits in 2018. 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.⁶ Access to local or foreign linking and download websites also remains popular among Brazilian video game consumers. There has also been an increase in the number of websites, and an increase in visitors to such websites, that are structured as private forums for infringing links, as they are considered more “stable and safe” for sharing links. Many Brazilian sites also employ

³<http://www.pro-music.org/legal-music-services-latin-america.php>.

⁴See 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.

⁵See Comunicado do Ipea - 2012 - Maio - nº 147, *Download de músicas e filmes no Brasil: Um perfil dos piratas online*, available at http://www.ipea.gov.br/portal/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”).

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

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 second main channel for Internet piracy in Brazil is file sharing via illicit P2P networks, especially BitTorrent, 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 2018, for the eighth straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file-sharing of video games on public P2P networks (99% of it using the BitTorrent protocol). The video game industry also reports that Brazil is among the top five countries for detected P2P swarms by volume. Notably, Brazil once again topped the world’s list for volume of unauthorized file sharing using consoles; it again ranked second for PCs and third for mobile devices (up from sixth in 2017).

A third major channel for online piracy, “stream-ripping” websites, is of particular concern to the music industry. Such 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 and premium tiers 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. 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: *Flvto.biz* and *2Conv*.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyright works in Brazil.

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). 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.

Piracy Devices (PDs): Use of PDs continues to rise 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 PDs 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 PDs are sold on the Internet, mainly in online marketplaces such as *Mercado Livre*.

Hard Goods Piracy: Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies (or for unlicensed downloads, such as stream-ripped files). 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 PDs have also entered the hard goods piracy market. In the case of video games, hard goods piracy takes several forms in both online and street markets: (i) Pre-loaded devices, discs, and memory cards that are locally burned and assembled with illegal copies of videogames; (ii) circumvention devices with preloaded games and game copiers and mod chips that circumvent access controls and enable the play of infringing copies of games; and (iii) modified consoles. 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.⁷

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 combined with high-quality video illegally 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 2018, a total of 32 camcords, six video camcords and 26 audio camcords, of MPAA-member films were traced to Brazilian theaters, up from 16 during the previous year. Brazil must strengthen its enforcement regime to combat this growing problem. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films, negatively impacting investment in production and legitimate local distribution infrastructure, 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

Even after the positive outcome of "Operation Blackbeard,"⁸ Brazil's enforcement effort against online copyright crime remains far short of what is needed to combat this serious problem. In 2017 and 2018, there were no criminal enforcement actions against pirate websites. One positive development that occurred in early 2019 is that the Brazilian federal authorities launched "Operation Copyright" and executed raids against the administrators for *Speedshare* and the private server service *speedboxBR*. The sites were notorious in Brazil for the illegal online distribution of content, including video games. Both services are now offline and the federal authorities are in the process of seizing the domains. Because of the successful raids, at least twelve other illegal file-sharing sites were taken offline by the administrators. IIPA acknowledges that such *ex officio* raids occur in Brazil, but the raids are insufficient to tackle the gravity of the problem. 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. The recently created Ministry of Citizenship (to which the former Ministry of Culture is attached as a Special Secretariat) and the relaunched CNCP should play a central role in developing training activities with participation of experts in the private sector. Fortunately, the relationship with federal and state law enforcement continues to improve due to more frequent trainings and meetings with law enforcement agencies, hopefully raising their awareness of online infringement and cooperation for future cases and public policy coordination, as both jurisdictions are relevant for the implementation of any successful nationwide strategy.⁹

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. However, coordinating anti-piracy efforts of state law enforcement institutions would be a force multiplier, especially if more state police and prosecutors received training against cybercrime. 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

⁷See IIPA's 2018 Brazil country report for more details on the hard goods piracy in Brazil, <https://iipa.org/files/uploads/2018/02/2018SPEC301BRAZIL.pdf>.

⁸In 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, IIPA is not aware of any new prosecutions of pirate sites in 2018. Moreover, IIPA is informed that the resulting prosecutions are proceeding slowly, and no trial dates have been set.

⁹The 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.

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 promising signs that U.S.-based hosting providers will honor injunctions issued by Brazilian courts. Unfortunately, backlogs and delays in the civil justice system diminish the value of this preliminary relief, and the timeframe for actions and replies from local hosting ISPs is not ideal. The logical forum for implementing a coordinated national effort against online piracy could be the long-standing CNCP, if relaunched with participation of both government and private sector players, especially the copyright industries. While in recent years, CNCP has been relatively inactive, and some copyright industries were even excluded from its membership, in 2017 CNCP obtained a new permanent staff and has gained some momentum. It is now essential that CNCP develop a new strategic plan, and that the new plan give top priority to combatting widespread online enterprises dedicated to copyright infringement.¹⁰ CNCP could largely benefit from more investment in resources, and this is something that the new administration should seriously consider. CNCP has the opportunity to be the voice of the country regarding IPR issues, and should be more active in engaging all right holders and other players in the Internet ecosystem, including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, and the like, to reach better standards to fight online piracy, as well as to engage in round tables for future MOUs on critical areas for this market.¹¹

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. 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 film industry was pleased to see National Cinema Council Resolution 3/2017, creating a working group on anti-piracy that will deliver recommendations for ANCINE. ANCINE recently created a special chamber called the Technical Chamber to Fight Piracy. This forum serves as a stable channel of communication between ANCINE and the private sector. It is composed of public and private stakeholders, with the goal to develop and implement anti-piracy initiatives within the local audiovisual industry.

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. The National Forum against Piracy and Illegality (FNCP) has assisted authorities in raids and improved enforcement training efforts and results. The Entertainment Software Association (ESA) has also provided training sessions to Customs agents to better identify and investigate the importation of illegal devices and pre-loaded game consoles and to state and federal prosecutors on online open source IP investigations.

According to the Brazilian Customs authority, there was a 10% increase in raids and an 18% increase in seizures of counterfeit goods and infringing products in 2017. Additionally, 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). However, video game companies reported there were no seizures by Customs of products infringing their video game products in 2018. In 2019, Customs should increase border enforcement against PDs, circumvention devices, and other technology that primarily facilitates infringement.

¹⁰For 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.

¹¹There 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.

While there has been some 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. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of “experts”; inadequately trained police, prosecutors and judges; lack of coordinated efforts amongst enforcement authorities; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.¹² Ultimately, too much of Brazil's judicial system lacks adequate understanding of intellectual property matters, though there are some exceptions (the specialized commercial courts in Rio de Janeiro). Brazil needs to modernize its police and courts to propagate best practices and to train judges and prosecutors.¹³

LEGISLATION AND REGULATION IN BRAZIL

A number of bills remain pending in Congress that would significantly affect the content industries, for better or worse. The new Administration should take advantage of the first part of 2019, 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. IIPA members are concerned about proposals granting total immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include in these proposals exceptions for IP enforcement, which must then be properly implemented. Additionally, there are concerns with overly broad copyright immunity, for example, provisions that immunize parties who induce or facilitate infringement. Such troubling proposals are also occurring in Argentina and broad immunities are in operation in Chile. Legal incentives that ensure cooperation of ISPs and other online intermediaries with rights holders, are important for online enforcement.

- **Marco Civil da Internet Law:** The implementation of this law 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.
- **Signal Theft:** Bill 239/2007, introduced in 2007 by Senator Aelton Freitas, criminalizes the act of signal and energy theft. This bill awaits a vote in the Lower House Main Floor. Bill 186/2013, introduced in 2013 by Senator Blairo Maggi, also criminalizes the act of signal theft. This bill is pending before the Committee on Constitutional Affairs of the Senate.
- **Intermediary Liability Bill:** Bill 9744/2018 was introduced in the Lower House and calls for civil liability for advertising networks engaging in business with rogue sites. It currently awaits a further report at the Committee on Constitutional Affairs.
- **Site Blocking Bills:** Bill 5204/16, created out of a CPI initiative, expressly authorizes 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, including criminal copyright infringement. The bill is still under consideration by the Committee on Science and Technology along with another site-blocking bill (169/17). Bill 200/16 in the Senate and Bill 5130/2016 in the Lower House take a diametrically opposed approach. Both amend the Marco Civil da Internet law to expressly prohibit site blocking under any circumstances.¹⁴ While IIPA urges that those bills be rejected, its introduction underscores how vulnerable and ideologically driven the enforcement ecosystem in Brazil remains.¹⁵

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

¹³For 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.

¹⁴As 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. See IIPA 2015 at p. 77. 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.

¹⁵In 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.

- **Copyright Reform Bill of 2009 (No. 6117/09):** This bill proposes several changes to the Copyright Law—including sensitive items relating to expansion to copyright limitations that go beyond what is acceptable under the three-step test; audiovisual co-authorship; broadcasting exclusive transmission; exhaustion of rights; private copy & TPMs; and compulsory license—that are inconsistent with Brazil’s international obligations and would likely deter investment in Brazil’s creative industries. It awaits a vote in the House Committee on Culture.
- **Enforcement Reform:** Bill 2729/03 (now Bill 63/2012) addresses some of the systemic enforcement impediments referenced above. It was approved by the House of Deputies in 2012 and sent to the Senate, 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.¹⁶
- **Camcording:** Bill 6512/16 punishes camcording without requiring proof of the perpetrator’s intent to profit. It awaits a report at the Lower House Committee on Constitution and Justice.¹⁷
- **Public Performances:** Bills 0206/2012 and 3968/1997 would amend existing law to provide for additional exemptions to payments for public performances, such as providing that the use of a television set in a hotel room is not public performance. 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 rights holders.¹⁸
- **Data Protection Law:** This bill will be fully implemented in the next 18 months and will be enforced in February 2020. It was heavily inspired by the European GDPR and places Brazil in accordance with many other similarly inspired data protection laws around the world, which is also an important aspect of the country’s application to the OECD. This new law imposes restrictions to open source investigations as it limits the use of Whois data, as well as other information that is useful for the local industry to verify infringements and refers cases to authorities. The bill should be implemented in a way that still allows for proper enforcement against online piracy.
- **Cybercrime Special Courts:** Bill 6832/17 was approved by the constitutional commission of the Chamber of Representatives and will be moving forward to the Senate. The bill extends the jurisdiction of the already implemented “small claim courts” system under the Law 9099/98 to cover minor offenses committed via the internet and other technological tools, which includes multiple IP violations. A small claims court may increase the ability to tackle more simple cases of online infringements.

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.

¹⁶Among 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.

¹⁷A 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. However, 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.

¹⁸In 2017, the Superior Tribunal Court (STJ) issued an important decision in the ECAD v. Oi.FM case, regarding certain online uses of recordings. ECAD v. Oi.FM (Special Appeal No 1.559.264 – RJ (2013/0265464-7)). The STJ held that interactive and non-interactive streaming (including simulcasts) are separate acts, each requiring the separate consent of the rights holder. This aspect of the decision is positive for rights 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 that fall within the producers’ exclusive distribution right. Thus, this decision may undermine rights holders’ freedom to license their exclusive rights. The decision was appealed and the application was unanimously denied by the 1st Group of Judges (1ª Turma) of the Supreme Court (STF). In principle, further appeals may be available, but the prospect of success is low.

Brazil is not a member of either of the WIPO Internet Treaties, though it certainly should be encouraged both to join these treaties and to bring its law into full compliance with them. The new government brings the opportunity to Brazil for joining the WIPO Internet Treaties and discussions on this should be encouraged as economic opportunities for the development of the Brazilian digital economy.

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. 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 pirate copies, whether smuggled across the border or burned within the country, are not subject to 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 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.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector: Effective September 2011, Law 12.485/2011 imposes local content quotas for pay-TV, requiring every qualified channel (those airing films, series and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime and requires that half of the content originate from independent local producers and that 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, called CONDECINE, as part of a broader tax regime on film and television content. The taxes, which apply to films, advertising, pay-TV and "other segments" (which ANCINE considers to include VOD content), represent a unique and serious threat to the growth of the VOD market. The taxes are currently under discussion with industry stakeholders after ANCINE's current President, Christian de Castro, took office in early 2018. CONDECINE is burdensome if levied over VOD services (especially when charged on a "per-title" basis, as prescribed in the currently existent ANCINE regulation) and will limit the choices available to Brazilian consumers in the nascent online content market. 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 has been discussed and was approved by the Superior Cinema Council in late 2018; we urge ANCINE and the recently created Ministry of Citizenship (to which the former Ministry of Culture is attached as a Special Secretariat) to give it favorable consideration, as well as to consider the current VOD CONDECINE charge on a "per-title" basis as illegal and detrimental to market growth.

Screen Quotas: The most recent Presidential Decree on Screen Quotas imposed quotas for 2018 similar to prior years: it required 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 (so-called “supplementary quota”). To make local films even more competitive, ANCINE used its jurisdiction to issue a normative ruling (IN 141) to change the Decree’s “day-base” screen quota criteria to a “showing” criteria. The difference is significant: under the old “day-base” methodology, theaters could theoretically comply by showing one Brazilian film per day. The change to a “showing” model—in measuring the actual number of Brazilian films shown in a theater—would encourage more showings of Brazilian films in addition to strengthening the reporting requirements with which theaters must comply. In late 2018, a Federal Court issued an injunction provisionally suspending the above-mentioned supplementary quota, spurring new discussions on the legality of such quotas. MPAA will closely review this new development, as screen quotas are adjusted annually and the 2019 Decree has yet to be issued, which potentially could exclude the supplementary quota.

Accessibility in Theaters: In 2016, ANCINE, Brazil’s audiovisual regulatory agency, 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 patrons with special needs, and appreciates ANCINE’s agreement to extend the sign language deadline and to form a technical committee of key stakeholders. In 2018, the technical committee agreed to a viable implementation timeline, made effective by means of ANCINE Normative Ruling n. 145. In accordance with such regulation, distributors shall be in full compliance with accessibility requirements by June 2019, while exhibitors have until January 2020 to fully implement the measure. On a related note, in late 2018, a Court of Justice issued an injunction demanding both distributors and exhibitors alike to fully implement the requirements by March 2019, but an appeal by ANCINE revoked the injunction. MPAA is working closely with regulatory bodies to ensure that the accessibility features are implemented with a technological solution that is secure, efficient and meets global best practices.

Collective Management Organizations (CMOs): Brazil’s Ministry of Culture had granted the accreditation of three CMOs prior to its abolition. These entities, representing directors, screenwriters and artists of audiovisual works, will collect remuneration for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, pay-TV and digital distribution, provided that the rights that originate such collection have not been assigned to the work’s producer. Such accreditation, which MPAA and other national and international industry stakeholders have appealed, was granted despite the fact that Brazilian law does not afford such rights to any of the mentioned rights holders. Although the concrete effects of these accreditations on U.S. industry are unclear, it is important that a final decision by the new Special Secretary of Culture (within the newly created Ministry of Citizenship) clearly recognizes the absence of underlying legal rights to any collection claim, therefore revoking the accreditation.