

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2024.¹

Executive Summary: IIPA members are extremely concerned over proposed legislation to update the Brazilian copyright law. Under the last version of the text publicly available, the proposed bill would create new royalty remuneration obligations for advertisement and news material, as well as new collective royalties remuneration for any on demand distributions, potentially impacting the full ecosystem of intermediaries and platforms that would be responsible for such payments directly. Brazil considered a proposal that could have been understood to introduce a remuneration right for performers in addition to the exclusive right that performers already enjoy. The proposal was put forward without proper consultation with stakeholders or meaningful impact assessment as to its effect on the local recorded music market. Further, the proposal, while not entirely clear, resembles the additional remuneration right for performers that exists in Spain. However, as the Spanish experience and independent findings in countries that have considered similar proposals show, these “solutions” benefit mainly the collective management organizations (CMOs) that manage this remuneration, but not performers themselves.

Despite this concerning proposal, IIPA commends Brazil’s excellent progress with a number of enforcement actions against online piracy, including the fifth and sixth waves of Operation 404, which combined took down more than 868 websites and applications with audiovisual content, games, music, and sports events online piracy in eight different Brazilian states through criminal remedies, including site-blocking injunctions, in addition to leading search and seizure raids against major pirate targets and arrests of related criminals.² However, several long-standing normative and legislative concerns warrant keeping Brazil on the Watch List. Recent positions vocalized by the Ministry of Culture and ANCINE’s officials concerning the protection of copyrights, became a cause for concern. For the creative industries, Brazil is a top priority market in Latin America. As such, the country’s long overdue adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) is a major concern for IIPA members.

On another positive note, the National Intellectual Property Strategy (ENPI) was approved by the *Grupo Interministerial de Propriedade Intelectual* (Interministerial group on Intellectual Property, GIPI) in 2023 and serves as general guidance for all public initiatives concerning intellectual property (IP). Additionally, the National Plan Against Piracy (PNCP) has been in force since the beginning of 2022 and serves as general guidance for all the public initiatives concerning IP infringement up to 2025. IIPA urges Brazil to provide more resources to the National Council Against Piracy to implement the PNCP, primarily focusing on Copyright Act Reform and fast-tracking discussions at both ANATEL and the Brazilian Film Agency (ANCINE) to implement an effective system to tackle online piracy within Internet applications and sites based on Bill of Law #3696/2023, which was signed by the President on January 15, 2024, and sets forth an administrative site-blocking provision. Also, a new Copyright Act, if one is to be developed, should provide strong copyright protection in line with international best practices, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the Berne three-step copyright test.

¹ For 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://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

² See Daniella Almeida, *Agencia Brasil*, “Operation against piracy blocks around 270 websites and applications,” March 14, 2023, available at <https://agenciabrasil.ebc.com.br/geral/noticia/2023-03/operacao-contrapirataria-bloqueia-cerca-de-270-sites-e-aplicativos>; see also, Filipe Pontes, *Agencia Brasil*, “Operation 404 takes down 100 illegal access websites to the English Championship,” November 28, 2023, available at <https://agenciabrasil.ebc.com.br/geral/noticia/2023-11/operacao-404-derruba-100-sites-de-acesso-ilegal-ao-campeonato-ingles>.

Regarding market access barriers, unfortunately, taxes on video game consoles and accessories have been significant, and IIPA encourages Brazil to reduce the burden on this sector of the economy as it completes overall tax reform. IIPA continues to be concerned about potential new taxes and regulation for video-on-demand (VOD) services as well as digital services taxes (DSTs). Moreover, it is important that Brazil does not implement network fees. IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies, and practices that enable a sustainable and thriving creative sector.

PRIORITY ACTIONS REQUESTED IN 2024

Enforcement

- Continue to establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves.
- Ensure that ANATEL continues working to implement administrative site blocking for pirate sites, as well as continue enforcing laws preventing the importation and distribution of illicit streaming devices (ISDs) in every channel.
- Ensure that ANCINE can confirm copyright infringement of local and foreign protected works and consequently implement an administrative site-blocking procedure against pirate Internet applications and sites for such works pursuant to the approval of the Bill of Law # 3696/2023.
- Encourage state courts nationwide to assign specialized courts or judges to uniformly handle IP cases and implement a long-term national program to train judges, prosecutors, and police officers on IP law, the WIPO Internet Treaties, and enforcement measures.
- Ensure that the *Conselho Nacional de Combate à Pirataria* (National Council to Combat Piracy, CNCP) and GIPI continue to have the political support and increased resources to engage in cross-industry efforts against infringement of copyrights and online piracy; ensure that CNCP's National Plan to Combat Piracy speeds up discussions on Copyright Act reform; and support and reinforce the importance of the overall National IP Strategy as part of the copyright protection system in Brazil.
- Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles, and circumvention devices, including illicit streaming devices (ISDs).

Legal Reforms

- Reject proposals to introduce new measures that would disrupt the growth of the Brazilian digital music market, such as the unnecessary and ineffective additional remuneration right for performers.
- With regard to interactive uses of works, reject the addendum to Bill 2370/19 that appears to *de facto* downgrade the exclusive right of communication to the public to a mere remuneration right.
- Ratify and implement the WIPO Internet Treaties, and in particular, clarify that the making available right cannot be subject to default, mandatory collective rights management.
- Ensure the Copyright Law, currently under review, or any legislation on copyright, fully implements the WIPO Internet Treaties, the anticircumvention of TPMs, and penalties for trafficking in circumvention devices and software; removes the default rule whereby communication to the public rights (broadcasting and public performance) are collectively managed by ECAD; criminalizes signal theft in the Pay-TV and VOD sectors; penalizes repeat infringers; ensures that any exceptions and limitations comply with the three-step test; and provides deterrent-level penalties for infringement and choice of method to calculate said damages; among other things.
- Follow through with revision of the Customs Law to clarify that the retention of counterfeit or any other illegal product by customs authorities does not require a court's order to be confirmed.
- Ensure proper implementation of cooperation between ANCINE and ANATEL on a mechanism that ensures ISPs can impose effective relief to remove infringement of works, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

Market Access

- Enable industry growth by reducing high tariffs and taxes placed on video game products.
- Mitigate imposition of the VOD tax on movies and TV programming delivered on demand and refrain from developing excessively burdensome VOD or digital platforms regulations.
- Reaffirm that CMOs can assert rights to collect royalties for acts of communication to the public only where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works.
- To not renew theatrical quotas, because their renewal artificially constrains access to the Brazilian market for U.S. content exports, limiting consumer choice, and prevents exhibitors and distributors from making market-driven agreements.
- In alignment with recommendations from the Organization for Economic Cooperation and Development (OECD), refrain from establishing a digital services tax, which would significantly increase operational costs and act as a market access barrier.
- Refrain from implementing network fees, which are harmful to competition, to network neutrality, and ultimately, to consumers' rights.

ENFORCEMENT

- **Continue to establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves.**

According to IFPI's 2023 Music Consumer Study, the music piracy rate in Brazil stood at 47% of all internet users in 2023 – one of the highest in the world. Forty-two percent of users engaged in stream ripping using websites or mobile apps (50% of 16-34-year-olds) while 29% used cyberlockers or BitTorrent to download pirated music. Stream ripping is particularly popular in Brazil, allowing users to illegally, but easily, download copyrighted music content from YouTube using web sites or unlicensed mobile apps. The most popular sites record millions of visits from Brazil. For instance, *ssyoutube.com* received 151 million visits from Brazil during 2022 and is regularly used by more than 8% of the population to illegally download recorded music. The *Snaptube* unlicensed mobile app is used by more than one-in-five (20.5%) 16-64 year olds. Online piracy (VOD and Pay-TV) available through devices, Internet applications, and sites are a major cause of concern. Reports show that Brazil is the fifth country in the world for visits to audiovisual piracy websites.³ The use of cyberlockers and BitTorrents is decreasing over time in Brazil – 6% and 30% respectively year over year.

Digital piracy of video game files remains high in Brazil, most prevalently through linking sites, which received approximately 40 million visits in the first nine months of 2023, followed by websites for unauthorized digital goods (UDGs), receiving over eight million visits in the same period. While filesharing via cyberlockers and BitTorrent is on the decline (a decrease in audience of 6% and 30% respectively from 2022 to 2023), the overall picture relative to global piracy levels remains bleak. In 2023, Brazil ranked fourth in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member video game titles on public peer-to-peer (P2P) networks (ranking even higher, and first in Latin America, for certain video game titles). By the same metric, Brazil ranked first in the world for unauthorized file-sharing of mobile games, third in the world for console-based games, and fifth in the world for PC-based games.

Particularly damaging to the market for legitimate video game play in Brazil is the proliferation of unauthorized account resales, by which pirates offer access to digital copies of a single game title account to multiple different users, via websites dedicated to this illegal commercial activity. E-commerce platforms provide infrastructure for payment and product management.

³ Akamai, *State of the Internet, Security: Pirates in the Outfield*, Vol. 8, Issue 1, available at <https://www.akamai.com/resources/state-of-the-internet/soti-security-pirates-in-the-outfield>.

While the overall levels of piracy in Brazil remain high by global standards, enforcement efforts are having a notably positive impact, including Operation 404, executed by the Brazilian Ministry of Justice and Public Safety (with the support of the cybercrime team (CIBERLAB), enforcement authorities from ANCINE, stakeholders from the private sector (ABTA, Alianza, and MPA), and international anti-piracy groups and law enforcement (U.S. Department of Justice, the UK Intellectual Property Office (IPO), and the City of London Police Department's Police Intellectual Property Crime Unit (PIPCU)). Two successful rounds of Operation 404 were launched in 2023, ultimately taking down more than 868 websites and applications with pirated audiovisual content, games, music, and sports events. The Peruvian Copyright Office, INDECOPI, engaged with Operation 404 for the first time since 2019, working with Brazilian authorities to block 157 domains dedicated to music piracy, including MP3 download and stream-ripping sites. In parallel, the Brazilian authorities took action against 12 major stream-ripping and MP3 download mobile apps by ordering their removal from major app stores and sites where the apps could be downloaded. This wave resulted in the disruption of the prominent *VidMate* stream-ripping app which had more than 870 million downloads worldwide and over 1.1 million active users in Brazil. PIPCU and Homeland Security Investigations (HIS) remain important strategic partners to Brazilian authorities for Operation 404.

More than 40 criminal cases were conducted against illegal video game sites by law enforcement authorities during the year. The majority of these targets were commercial digital piracy sites (around 75%) and the others were download sites dedicated to video game piracy. These actions include two phases of the well-known Operation 404. IIPA urges the Government of Brazil to continue to establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves. Furthermore, the Government of Brazil should educate authorities for increased engagement against Brazilian targets that offer hacking tools, circumvention devices, and mod installation services, and that develop game emulators and other tools that specifically support video game piracy and circumvention of TPMs.

- **Ensure that ANATEL continues working to implement administrative site blocking for pirate sites, as well as continue enforcing laws preventing the importation and distribution of illicit streaming devices (ISDs) in every channel.**

On August 10, 2021, the Tribunal of Justice of the State of São Paulo issued a permanent blocking order against 14 stream-ripping sites in the criminal case initiated by the industry's anti-piracy body, *APDIF DO BRASIL* (*APDIF*). The decision was the first of its kind in Brazil against music piracy services and confirms the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. The decision is part of the campaign developed by *APDIF* and the Unit against Cyber Crimes of the State of São Paulo's Prosecutors Office (*CyberGaeco*). Following this decision, a series of further successful blocking applications have been filed by *APDIF* and *CyberGaeco* in 2022 and 2023 and consequently over 250 stream-ripping sites have now been blocked in Brazil.

Audiovisual content piracy continues to impact local and foreign rights holders in Brazil and represents a complex threat to be addressed by enforcement authorities and legislators within the country. The strong approach adopted by the telecommunications regulator ANATEL in 2023 regarding the seizure and site blocking against devices delivering pirate pay-tv channels, might pressure criminals and consumers to focus even more on other unauthorized sources of content, such as those available as VOD through pirate Internet applications and sites.

ANATEL's Tactical Management Plan for the 2023-2024 biennium has a specific goal for combating audiovisual piracy. In the new version, in accordance with tactical goal number 19, ANATEL must expand orders to block IP addresses or URLs used by unapproved TV box devices or in the irregular offering of audiovisual content until 2024.

- **Ensure that ANCINE can confirm copyright infringement of local and foreign protected audiovisual works and consequently implement an administrative site-blocking procedure against pirate Internet applications and sites for such works pursuant to the approval of the Bill of Law # 3696/2023.**

The lack of enforcement initiative by the audiovisual content regulator ANCINE, to address infringement outside of the Pay-TV framework, together with anti-copyright views vocalized by officials from the Ministry of Culture, pose a relevant risk to the creative industry and to the Brazilian economy and consumers, while online piracy options for VOD continue to evolve and deepen.

In December 2022, ANCINE's board of directors decided to completely redraft the agency's Anti-Piracy Program, which will now be called the Copyright Protection Program. In this context, the cooperation agreements that the agency had with the Motion Picture Association (MPA) and with other players, such as the Brazilian Pay-TV Association (ABTA) and e-commerce platforms, were terminated. Additionally, the Anti-Piracy Technical Chamber was dissolved, with the promise of setting up a Technical Chamber on Copyright Protection in the future. IIPA fears that these changes, under the pretext of reformulating anti-piracy programs, will undermine the various advancements that have been achieved in this area in recent years. Brazil should ensure proper implementation of cooperation between ANCINE and ANATEL of a mechanism that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities pursuant to the approval of the Bill of Law # 3696/2023, which was signed by the President on January 15, 2024.

- **Encourage state courts nationwide to assign specialized courts or judges to uniformly handle IP cases and implement a long-term national program to train judges, prosecutors, and police officers on IP law, the WIPO Internet Treaties, and enforcement measures.**

On August 10, 2021, the Tribunal of Justice of the State of São Paulo issued a permanent blocking order against 14 stream-ripping sites in a criminal case initiated by the industry's anti-piracy body, *APDIF*. The decision was the first of its kind in Brazil against music piracy services and affirms the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. The decision is part of the campaign developed by *APDIF* and *CyberGaeco*. Additionally, a successful inter-agency and public-private cooperation led by the Ministry of Justice, cyber-crime laboratory *CiberLab*, in collaboration with *APDIF* and prosecutors from *CyberGaeco*, developed an investigative protocol and blocking framework against illegal mobile apps dedicated to distributing music content without authorization to Brazilian users.

However, too much of Brazil's judicial system continues to lack adequate understanding of IP matters, though some exceptions exist, such as the specialized commercial and criminal courts in São Paulo and Rio de Janeiro. IIPA urges Brazil to commit sufficient resources and political will to assign well-trained tribunals throughout the country, (beyond just a few specialized courts or units in certain regions) and to train its police, judges, and prosecutors in best practices to effectively address the country's rampant piracy problem, as well as technical training in complex online piracy, TPMs, and anti-circumvention technologies, and to encourage state courts to assign specialized courts or judges to handle IP cases.

To have copyright infringement perceived as a relevant matter to courts, more work needs to be done with state and federal prosecutors and judges. Authorities should amplify the already implemented framework in use with *CyberGaeco* (state of Sao Paulo) and other prosecutors that are part of other cybercrime units in different states. The video game industry reports that seeking and obtaining support from Brazilian authorities varies greatly state by state, especially relating to complex claims regarding TPM circumvention. While there is some support in the region against local circumvention-related targets, the process is slow. At the same time, there is a need for a more consistent approach to judges, through the *Conselho Nacional de Justiça* (National Council of Justice, CNJ) and other state magistrate academies with support of multiple stakeholders and government. Economic related crimes such as IP violations are too fragmented and when individual cases are brought to courts, it is difficult to obtain the full attention

of the justice system. More detailed analysis by judges and prosecutors on precedents and leading cases, as well as a better understanding of the online infringement ecosystem, will support better decisions. Better public policy will also help authorities to recognize IP and copyright as a matter of interest to the society and national economy. The National Strategy on Intellectual Property (see below), overseen by the Ministry of Development, Industry, Commerce and Services and the CNCP, overseen by the Ministry of Justice and Public Security, are two important platforms to develop better public policy focusing on IP that may lead and support other national authorities.

- **Ensure that the *Conselho Nacional de Combate à Pirataria* (National Council to Combat Piracy, CNCP) and GIPI continue to have the political support and increased resources to engage in cross-industry efforts against infringement of copyrights and online piracy; ensure that CNCP's National Plan to Combat Piracy speeds up discussions on Copyright Act reform; and support and reinforce the importance of the overall National Strategy on Intellectual Property (ENPI) as part of the copyright protection system in Brazil.**

Even though there have been positive advancements in the last few years, especially with Operation 404, Brazil still suffers from a lack of specific norms and regulations regarding the enforcement of copyrighted works over the Internet and a lack of resources and staff to support enforcement actions considering the reach and amount of content piracy in the region. In June 2020, the Brazilian government launched a consultation amongst private sector institutions and rights holder organizations to design a National Strategy on Intellectual Property (ENPI). The stated goal of such a strategy is “to reach an intellectual property system balanced and effective, widely used and that incentivizes creativity, investment and innovation and access to knowledge, with a purpose to increase competitiveness and the social and economic development of Brazil.” Apart from having calls and meetings with representatives from all creative sectors in the country, the government distributed a questionnaire seeking to receive the opinions and positions on the most important topics related to the protection of IP rights in Brazil.

IIPA encourages CNCP to build on its 2022 work, develop a strategic plan to give top priority to combating widespread online enterprises dedicated to copyright infringement, and engage all rights holders and other players in the Internet ecosystem (including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, etc.) to develop better standards and effective voluntary agreements to fight online piracy. To effectively undertake these actions, the Brazilian government should adequately fund the CNCP and increase the CNCP capability to operate with more human resources and infrastructure.

Audiovisual industry stakeholders play an active role in the Ministry of Justice's National Council Against Piracy, with regular participation by the MPA and the Brazilian Pay-TV Association (ABTA). MPA was also recently chosen to participate in the Ministry of Economy's Intellectual Property Group (GIPI), which is responsible for discussing and updating Brazil's national strategy for IP.

Additionally, there were multiple events to address online infringements, including three hybrid events dedicated to discussing with state prosecutors the application of disruptive actions against online piracy and cyber criminals. These events took place in the cities of Belo Horizonte, Porto Alegre, and Santa Catarina, and they also included an online training on open-source investigations with classes on different subjects and counting more than 33 hours of information.

- **Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles, and circumvention devices, including illicit streaming devices (ISDs).**

Brazil needs to implement better border controls to stop the influx of counterfeit video game hardware, PDs, modified consoles, and circumvention devices, as well as ISDs. In one positive development, Brazilian Customs authorities recently seized 15,000 preloaded pirate video game consoles in a single enforcement action. However, despite evidence that modification (mod) chips, circumvention devices, and mod installation services exist in Brazil, and multiple industry training sessions in 2023 for customs authorities, the video game industry reports a lack of raids or customs seizures related to modified consoles or involving mod chips or circumvention devices. Authorities currently

focus efforts on simpler targets, such as preloaded game consoles or counterfeit merchandise. One video game console maker reported eight customs seizures and 18 criminal raids in 2023, with the majority of seizures involving consoles preloaded with unauthorized video game software (68k seized in 2023). Moreover, the Government of Brazil should encourage regional Federal Revenue enforcement units (DIREPs) to maintain anti-counterfeiting raid actions in the so-called secondary zones (in the local market).

LEGAL REFORMS

- **Reject proposals to introduce new measures that would disrupt the growth of the Brazilian digital music market, such as the unnecessary and ineffective additional remuneration right for performers.**

The Brazilian Congress is currently discussing Bill PL 2370/2019 that intends to create a new additional remuneration layer for the original rights holders (actors, directors, producers, screenwriters, musicians, etc.) of audiovisual works for the streaming of their performances fixed in audiovisual works or sound recordings. Moreover, pursuant to the draft's language, it is uncertain whether previous agreements would be sustained and the nature of the collective management of these rights (voluntary or mandatory). Additionally, ISPs possibly would be required to disclose information about their revenues and about the frequency of reproduction of works.

The wording of these provisions, notably when read in conjunction with the explanatory notes, is confusing. However, it could be understood to introduce a remuneration right for performers in addition to the greater exclusive right that performers already enjoy. The proposal is likely inspired by the additional remuneration right for performers that exists in Spain. However, as the Spanish experience shows, these “solutions” benefit mainly the performers’ CMOs that manage this remuneration, but not performers themselves. Even in Spain, where the local CMO is subject to the strict EU collective rights management framework, approximately 50% of collections are not distributed to performers due to deductions to account for management costs and the funding of social, cultural, or educational programs, and, more importantly, to the inability of the CMO to correctly identify or locate the rights holders for whom the amounts are collected.

This initiative, as well as similar ones in the region, need to be strongly opposed as they have a greatly disruptive effect on the digital market, investment in the region, and do not serve the purpose of improving performers’ remuneration (in fact, studies and data suggest the contrary). It is concerning that the Group of Latin American and Caribbean Countries (GRULAC) at WIPO has been quite supportive of these initiatives. IIPA suggests that a more effective way for the countries in this region to improve performers’ remuneration would be to provide for an adequate copyright framework, including adequate scoping of exceptions and limitations, a strict collective rights management framework, and, more importantly, effective enforcement mechanisms to combat piracy.

- **With regard to interactive uses of works, reject the addendum to Bill 2370/19 that appears to *de facto* downgrade the exclusive right of communication to the public to a mere remuneration right.**

Bill PL 2370/19 also includes unclear provisions on the scope of communication to the public and public performance that could be understood to mean that interactive exploitations are considered an act of public performance and, as a consequence, subject to default collective management by ECAD, and thus *de facto* downgrading the exclusive right to a mere remuneration one. IIPA urges Brazil to reject this addendum. In fact, if anything the Brazilian Copyright Act needs to be amended to clarify that any and all interactive uses of sound recordings are an exclusive distribution right not covered by the public performance right and thus not subject to the default collective management by ECAD.

- **Ratify and implement the WIPO Internet Treaties, and in particular, clarify that the making available right cannot be subject to default, mandatory collective rights management.**

In 2019, the Government of Brazil announced its decision to accede to the WIPO Internet Treaties. Acceding to the WPPT would naturally have a positive impact on producers' rights – in particular, in relation to the making available right in the wake of the decision in *ECAD v. Oi FM*, regarding certain online uses of recordings. In 2017, the *Superior Tribunal de Justiça* (Superior Tribunal Court, STJ) issued a decision in *ECAD v Oi FM* and held that interactive and non-interactive streaming (including simulcasts) are separate acts, each requiring the separate consent of the right holder. In this regard, the decision is correct; it confirms that online simulcasting is a separate act of exploitation from the terrestrial broadcast, and as such requires a separate license. Oi FM appealed the decision and the application was unanimously denied by the 1st Group of Judges (1^a Turma) of the Supreme Court (STF).

Despite being correct that interactive and non-interactive streaming are separate acts, the decision was problematic in that the Court held that both interactive and non-interactive streaming involve the public performance right, and therefore fall under ECAD's rights management mandate. The decision undermines the music industry's practice (which is in accordance with the international treaties on the subject matter), and the accepted interpretation of existing law: that the exclusive rights implicated in interactive streaming are licensed directly by record companies.

As indicated above, if interactive uses of sound recordings are deemed to fall under the public performance right (as opposed to the right of distribution, enshrined in Articles 93(II) and (V) of the Law, which has been the practice for many years), the licensing of such uses would fall under the default statutory mandate granted to ECAD (in accordance with Article 98 of the Copyright Law). In today's industry, streaming services are at the core of the business of recording companies. Although rights holders can opt-out of the default mandate granted to ECAD, collective management interference in a core area of the music business is unjustified and a substantial limitation to the ability of record companies to conduct their operations in a free market environment. It is also incompatible with WPPT. Other cases on the same issue are pending.

On July 20, 2022, the Executive submitted to Congress a bill to ratify the WPPT (but not WCT). IIPA urges the Government of Brazil to pass this bill and then ratify the WCT.

- **Ensure the Copyright Law, currently under review, or any legislation on copyright, fully implements the WIPO Internet Treaties, the anticircumvention of TPMs, and penalties for trafficking in circumvention devices and software; removes the default rule whereby communication to the public rights (broadcasting and public performance) are collectively managed by ECAD; criminalizes signal theft in the Pay-TV and VOD sectors; penalizes repeat infringers; ensures that any exceptions and limitations comply with the three-step test; and provides deterrent-level penalties for infringement; among other things.**

The most recent substantive copyright reform Bill 2370/2019, proposed to modify several articles from the Copyright Act (9610/98). The final text of the bill has not been made public and should involve adequate public discussions with rights holders. Under the last version of the text publicly available, the Bill would create new royalty remuneration obligations for advertisement and news material, as well as collective royalty remuneration for any on demand distributions, potentially impacting the entire ecosystem of intermediaries and platforms, which would be responsible for such payments directly.

It is also essential for Brazil to ratify and implement the WCT and implement the WPPT to foster a vibrant legitimate market for Brazilian and foreign content. IIPA urges the Government of Brazil to consult with rights holders on the proposed copyright reform and ensure that it does not over-regulate or create broad exceptions and limitations to copyright. IIPA makes the following recommendations for the potential new law:

- Amend Article 105 to confirm that: (1) injunctions, including catalogue-wide injunctions where applicable, are available against all types of copyright infringement, circumvention of TPMs, and dealing in circumvention devices, circumvention software and/or components including installation and modification; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.

- Amend Article 107, which covers TPMs, to encompass all forms of access and copy control technologies as well as dealing in circumvention devices and to include deterrent sanctions and penalties for the violations of TPMs.
- Clarify the provisions on damages to ensure that deterrent-level damages and a choice of method to calculate damages are available in respect of copyright infringement and circumvention of TPMs. Article 103 of the Copyright Law should be amended to expressly allow rights holders to choose the method of calculation of damages and include damage/losses suffered, an account of the infringer's profits, and a reasonable royalty as methods of the calculation of damages.
- Amend Articles 98 and 99, which govern Brazil's collective management of broadcast and public performance rights for authors, performers, and sound recording producers, to reflect international best practices. The law should, at a minimum, enable rights holders to: (1) determine whether to license their rights individually or collectively, which should be a voluntary decision; and (2) if they so choose, become direct members of the ECAD, a private umbrella CMO, and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to urge ECAD to amend its fixed split of the revenue collected from the single tariff, to the considerable disadvantage of producers. For example, music producers receive only 13.8% of total distributions despite their significant investments. Article 99(1) of the Copyright Law (introduced in law in 2013), which provides for a "one right holder one vote" rule within ECAD, should also be amended. This is not in line with international good practices and does not ensure that all rights holders whose rights are managed by ECAD are guaranteed fair and balanced representation in ECAD's governing bodies.
- Clarify that the exclusive rights in interactive streaming are excluded from ECAD's default mandate. As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi FM* where the STJ erroneously ruled that both interactive and non-interactive streaming involved the public performance right and therefore, fell under ECAD's collective management mandate. The new law should include sound recording producers' separate, exclusive right of making available to the public as established in Article 14 of the WPPT. In the alternative, the new law should expressly indicate that interactive uses of sound recordings fall under Article 93(II) of the existing law rather than under the public performance right. Finally, the exclusive right of making available should be enshrined in Brazil's copyright law, for both sound recordings and audiovisual works, consistent with obligations under both WCT and WPPT.
- Cover intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites.
- Criminalize signal theft in the Pay-TV and VOD sectors.
- Implement special cybercrime courts and prosecution units.
- Penalize repeat infringers, including those identified on online platforms and Internet applications, and have ISPs define clear and effective policies to deal with such matters. Brazil's e-commerce platforms rank among the world's most prolific, topping the markets in Latin America, for total URLs requiring enforcement for piracy-related products, such as circumvention devices and preloaded consoles with built-in games.
- Ensure that any exceptions and limitations comply with the three-step test.
- With respect to copyright infringement, ensure the availability of meaningful rights holder compensation that is commensurate with the harm suffered by the rights holder and at a level that will deter future infringements.

IIPA urges the Government of Brazil to focus on needed amendments to strengthen protection and enforcement for rights holders.

- **Follow through with revision of the Customs Law to clarify that the retention of counterfeit or any other illegal product by customs authorities does not require a court order to be confirmed.**

The Government of Brazil should revise the Customs Law to clarify that customs authorities do not need a court order to be confirmed to retain counterfeit or other illegal products that they have seized.

MARKET ACCESS

- **Enable industry growth by reducing high tariffs and taxes placed on video game products.**

Brazil's high tariffs and taxes on video game products and entertainment software are a long-standing concern and remain so moving into 2024. In August 2022, then-President Bolsonaro reversed reductions of IPI that had been applied earlier in the year for over 100 products, including video game consoles, whose rate now have returned to the burdensome level of 20%. As of July 2022, under the authority of the Foreign Trade Chamber (CAMEX) of the Economy Ministry, import (II) taxes for consoles that do not have embedded screens as well as peripherals and accessories remain at 12%.

The combination of IPI and II taxes targeting the video game console ecosystem continues to act as an incentive for the proliferation of infringing games in Brazil, which remains third in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member console-based video game titles on public P2P networks. These barriers also inhibit the growth of a legitimate video game industry in Brazil.

Under a 2013 interpretation of the law that considered customized software a service, 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, which continued to be applied to off-the-shelf, physical software. However, the taxation of off-the-shelf software, such as video games, is widespread, including the federal IPI, import tariff (II), federal social contributions (PIS and COFINS), and the municipal services tax (ISS). The overall heavy tax burden on such software therefore marginalizes the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these fees). IIPA urges the reconsideration of this problematic interpretation from 2013.

With broad tax reform underway, the video game industry hopes legislative efforts will soon result in an overall simplification of the tax regime, ending its cumulative character, and provide for an overall rate reduction for video game products that face an unjustifiably high tax burden given the unnecessarily adverse effect on consumers.

- **Mitigate imposition of the VOD tax on movies and TV programming delivered on demand and refrain from developing excessively burdensome VOD or digital platforms regulations.**

The Brazilian Congress is currently discussing several bills of law on VOD regulation (Bill 2331/2022, Bill 1994/2023, among others). If the most detrimental bills on VOD regulation are approved, VOD platforms would have to comply with several new obligations, such as mandatory investment, catalogue quotas, CONDECINE tax of up to 6% of the annual gross revenues, prominence obligations, general duties to provide the regulatory body with information about their activities, etc. Considering that the discussions on this subject have been advancing rapidly, it is likely that a proposal on VOD regulation will be approved in the coming months.

Since the end of 2022, ANCINE's board has been publicly positioning itself in favor of greater regulation for the VOD segment and included in its Strategic Agenda the publishing of new regulatory instruments that would require players on this market to provide the Agency with more information about their businesses. The Agency intends to require a lot of information on the segment, including, for example, on the number of platforms' subscribers, users, and transactions, on the platforms' direct investments in works, and on exclusive licensing agreements. So far, no new regulations were issued, but it is likely that they will be in the short or medium term. IIPA urges the Government of Brazil to refrain from developing excessively burdensome VOD or digital platforms regulations, which would harm the entry of new competitors in the Brazilian market. If such regulations are to be implemented, it is essential that they respect contractual and economic freedom and trade secrets.

- **Reaffirm that CMOs can assert rights to collect royalties for acts of communication to the public only where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works.**

The Government of Brazil should reaffirm that CMOs can assert rights to collect royalties for acts of communication to the public only in cases where authors and performers in audiovisual works have specifically mandated the CMOs do so, and only where the relevant rights have not already been assigned to producers of audiovisual works.

- **To not renew theatrical quotas, because their renewal artificially constrains access to the Brazilian market for U.S. content exports, limits consumer choice, and prevents exhibitors and distributors from making market-driven agreements.**

While theatrical quotas expired in September 2021, there are draft bills seeking to extinguish any deadline applied to the theatrical quotas or to expand them for up to 20 more years. Local content quotas limit consumer choice, can push consumers toward illegitimate content sources, and prevent exhibitors and distributors from making market-driven agreements. However, if they are to be implemented, it is important that the regulation does not include additional rules that would increase this burden, such as rules on the permanence of works in theaters, on session times, etc.

- **In alignment with recommendations from the Organization for Economic Cooperation and Development (OECD), refrain from establishing a digital services tax, which would significantly increase operational costs and act as a market access barrier.**

Bill 2.358/2020, Bill 131/2020, and Bill 218/2020 aim to create new taxes specifically for digital platforms and services. These bills are of great concern because, if approved, they could substantially increase the tax burden on digital platforms operating in the country. The likelihood of their passing is not very high given that Brazil seeks membership in the OECD and, in October 2021, signed the OECD Declaration-BEPS Project pledging not to impose taxes on digital services.

- **Refrain from implementing network fees, which are harmful to competition, to network neutrality, and ultimately, to consumers' rights.**

In 2023, ANATEL released a call for contributions that discussed, among other issues, the possibility of creating network fees, to be paid by application providers to connection providers, to fund telecommunications infrastructure. If network fees are implemented, they would have a detrimental effect on digital platforms activities, not only from a financial standpoint, but also because such fees are harmful to competition and to network neutrality, and ultimately, to consumers' rights.

TECHNICAL ASSISTANCE AND COOPERATION

The creative industries have provided technical assistance and cooperation in Brazil. Two online events dedicated to discussing with state prosecutors and police forces the application of disruptive actions against online piracy and cybercrime in general included a three-day training and meetings with a Brazilian Delegation of four authorities in Washington, D.C., to understand current video game industry IP protection matters and to meet with their U.S. counterparts. Events planned for the coming year include a hard-goods piracy training for customs authorities in collaboration with the IACC and an International Event hosted by state prosecutor of São Paulo with Italian and British authorities to discuss disruptive operations on IP protection. In addition, ESA participated in the U.S. Department of Justice's offices of Computer Crime and Intellectual Property Section (CCIPS) and Overseas Prosecutorial Development, Assistance and Training (OPDAT) in Pittsburgh, Pennsylvania, for Brazilian and Latin American authorities on advanced online investigations.

The Motion Picture Association Latin America and the Alliance for Creativity and Entertainment (ACE) hosted a training and education event in Los Angeles for Latin American enforcement authorities in May 2023. Associations

and officials gathered to share their expertise and to support further contribution aimed at addressing online content piracy in the region.