

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2000 SPECIAL 301 REPORT

BRAZIL

EXECUTIVE SUMMARY

Given the growing levels of optical media piracy in Brazil, the market for legitimate copyright products is being decimated. IIPA believes Brazil should be elevated to the Priority Watch List.

Brazil lacks an articulated strategy followed by specific action which would coordinate the efforts of the local and federal police, prosecutors, judiciary, and other administrative authorities such as customs and tax officials. Several piracy trends converge on Brazil. Pirated optical media product, primarily manufactured in southeast Asia and Paraguay, cross the porous Brazilian borders, devastating the local markets. Organized crime elements, both within Brazil and outside, exercise control over the production and distribution of infringing copyrighted products. The isolated efforts of some Brazilian police units, which have conducted a substantial number of raids, were to no avail. The number of criminal copyright cases which went to judgment in 1999 can be counted on one hand. Out of over 1,400 criminal complaints filed by three of our industries with Brazilian authorities in 1999, only four criminal sentences were issued, and all involved small fines totally insufficient to deter piracy. Courts also require extremely high expert fees and bond requirements in civil copyright infringement cases. This untenable situation with the Brazilian enforcement system harms U.S. copyright holders as well as Brazilians who are creating and distributing copyrighted materials.

Over the years, the Brazilian government has made numerous commitments to U.S. government officials to address the core problems of high piracy and inadequate enforcement. And yet, there has been little concrete action by Brazil to actually address these issues. In fact, recent efforts to revise the procedures in criminal cases have resulted in more defendants in copyright infringement cases being released instead of serving their sentences. Last year, Brazil proposed plans of action and proposals to both the U.S. government and the copyright private sector. Engagement with the private sector halted somewhat abruptly after the industries offered suggestions to improve the Brazilian government's proposal. Meanwhile, as our industries continue to expand their local presence, increase their anti-piracy investigations, and foster public awareness campaigns, the scope of the problem only worsens. Estimated trade losses due to copyright piracy of U.S. products in Brazil increased to \$917.1 million in 1999, a staggering amount.

These copyright problems are not just a bilateral issue between the U.S. and Brazil. As a member of the World Trade Organization, Brazil is currently obliged to provide the standards of copyright protection found in the TRIPS Agreement. Given the wide range of deficiencies in its enforcement system, Brazil fails to meet its current TRIPS enforcement obligations in several ways, including: its failure to impose deterrent criminal penalties (TRIPS Article 41, 61); to avoid unwarranted delays in criminal and civil cases (TRIPS Articles 41, 61); to avoid unnecessarily costly

procedures (TRIPS Articles 41, 50.3) and to provide effective border measures (TRIPS Articles 41, 51-60).

For the reasons described in this report, IIPA strongly recommends that Brazil be elevated to the Special 301 Priority Watch List this year.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 1999

| INDUSTRY | 1999 | | 1998 | | 1997 | | 1996 | | 1995 | |
|---|--------------|----------------|--------------|----------------|--------------|-------|--------------|-------|--------------|-------|
| | Loss | Level | Loss | Level | Loss | Level | Loss | Level | Loss | Level |
| Motion Pictures | 120.0 | 35% | 125.0 | 40% | 110.0 | 30% | 100.0 | 35% | 90.0 | 38% |
| Sound Recordings / Musical Compositions ¹ | 300.0 | MC95% CD35% | 290.0 | MC95% CD30% | 110.0 | 80% | 80.0 | 50% | 70.0 | 45% |
| Computer Programs: Business Applications ² | 362.9 | 61% | 298.8 | 61% | 315.7 | 62% | 366.7 | 70% | 307.6 | 74% |
| Computer Programs: Entertainment Software | 116.2 | 90% | 103.2 | 89% | 99.1 | 87% | 92.5 | 82% | 82.5 | 80% |
| Books | 18.10 | NA | 20.0 | NA | 26.0 | NA | 27.0 | NA | 30.0 | NA |
| TOTALS | 917.1 | | 837.0 | | 660.8 | | 666.2 | | 580.1 | |

OVERVIEW OF BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

The Brazilian Government has Achieved Few Concrete Results Toward Reducing Piracy and Improving Enforcement Efforts under the Level of Bilateral Engagement to Date

During the 1990s, Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool.³ On April 30, 1993, the U.S. Trade Representative designated Brazil as a Priority Foreign Country. As a result of the ensuing Section 301 investigation, the Brazilian government committed in a February 1994 diplomatic agreement to take certain concrete steps to improve its IPR regime, including the early implementation of TRIPS, improving protection for computer software, addressing certain tax issues affecting computer software, and improving copyright enforcement in general. Over the next few years, Brazil's

¹RIAA estimates that the piracy levels in Brazil in 1999 were 95% for audiocassettes and 35% for compact discs. The composite level of audio piracy in Brazil is 50% for 1999.

²BSA's statistics for 1999 are preliminary. In IIPA's February 1999 Special 301 filing, BSA's 1998 estimates of \$283.2 million at 59% were also preliminary. BSA finalized its 1998 numbers in mid-1999, and those are reflected above.

³For more details on Brazil's Special 301 history, see Appendices D and E of this filing.

placement on the Special 301 lists seesawed between the Special Mention list and the Watch List. On May 1, 1998, Ambassador Barshefsky removed Brazil from the Special 301 list, in recognition of its legislative accomplishments on copyright legal reform. She added, "However, Brazil must take further significant steps to combat piracy."⁴ Copyright piracy issues have been highlighted in several bilateral meetings as well as U.S. congressional trips to Brazil over the years. In February 1999, IIPA recommended that Brazil be elevated to the Priority Watch List because of the continuing failure of that government to address the rising piracy problems and deteriorating enforcement actions by the government authorities despite very active participation in anti-piracy efforts by the affected copyright industries.

USTR put Brazil back on the Watch List in April 1999, noting that "the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. Piracy rates have continued to climb over the past year, and the sound recording industry saw its losses double in 1998. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove policy authority to engage in ex officio searches and seizures on their own initiative. We look to the Government of Brazil to take decisive action to reduce piracy rates, focusing on the major markets currently being devastated by piracy. We also look to the Brazilian government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000."⁵ For further details on the Brazil's history on the Special 301 list, see appendices D and E of this submission.⁶

Industry Cooperation with Senior Brazilian officials to Devise National Anti-piracy Strategies has Met with No Tangible Results

Prior to the April 1999 Special 301 decision, Brazilian officials invited industry representatives in Brazil to meet with President Cardoso and several senior Brazilian cabinet ministers to discuss the copyright enforcement situation. The industries were unified in their recommendation that the government create an enforcement agency with a single coordinator to lead it. Trade Minister Lamprea considered the meeting constructive, and extended an invitation for another meeting.

Subsequent to that April meeting, the various industry associations (including the recording, business software, motion picture, and book publishing industries) met and created an informal alliance called ABRACOP (Aliança Brasileira de Combate à Pirataria). The member associations of ABRACOP are: ABC (MPA), APDB (music), ABES (software), APDIF, UBV, ABDR (reprography). This group created a document which emphasized the need for the creation of a federal anti-piracy

⁴Press Release, Office of the U.S. Trade Representative, May 1, 1998.

⁵Press Release, Office of the U.S. Trade Representative, April 30, 1999.

⁶Also of note: Brazil currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1998, \$2.19 billion of Brazilian imports to the United States benefited from the GSP program, accounting for 40.2% of its total imports to the U.S. For the first eleven months of 1999, \$1.7 billion of goods from Brazil entered the United States under the duty-free GSP code.

enforcement agency, and included details of its possible structure and operations. ABRACOP representatives then met with more Brazilian ministers in early June 1999 to discuss this proposal. In return, the Brazilian officials offered a vague proposal which basically outlined the creation of a committee to discuss and study the piracy problems in Brazil. At that point, ABRACOP sent a letter (dated July 19, 1999) to the Foreign Relations Minister, which provided specific comments about this proposal (Proposta do Executivo). There has been no reply to date. MPA met with government officials in Brasilia on September 10, 1999, to follow-up, but was given only a vague commitment on a reply. ABRACOP has agreed to resume meetings and its efforts in Brasilia, with possible support by the new MPA lobby structure (ULAC).

COPYRIGHT PIRACY IN BRAZIL

Optical Media Developments

CD piracy exploded in Brazil in 1998, leading to dramatic increases in losses for U.S. recording companies, music publishers, film companies, book publishers, and publishers of entertainment software and business software. During 1999, the CD piracy problems worsened as a result of Brazil's economic recession. The recording industry was able to confirm that a significant part of the problems involved the international distribution of optical media product, emanating primarily from production facilities in Southeast Asia. Such optical media distribution networks are under the control of organized criminal elements including Chinese, Taiwanese, Paraguayan, Bolivian, Panamanian and Brazilian nationals. Chinese and Korean groups control the pirate CD distribution in São Paulo. These groups are known to bribe the police in order to facilitate distribution. Another problem involves the organized crime element of Brazilian nationals who are involved in retail sales of pirated products within Brazil. Yet another problem is the large scale distribution networks in Brazil, whether these involve thousands of street vendors with established facilities (such as gas stations) which blanketed the major highways in Brazil.

Piracy Continues at Unacceptably High Levels

As exemplified by the chart above, the piracy levels for most of the copyright industries exceeds 50%, meaning at least half the each market is composed of pirate products.

Alarming increases in the levels of CD piracy in Brazil first hit in 1998, when the recording industry began to call attention to the fact that piracy was threatening to destroy the world's sixth largest market for sound recordings and music. In 1999, the widespread audio piracy problem in Brazil worsened, due to the growing pirate market and also, to a lesser degree, Brazil's economic troubles. For three consecutive years, Brazil's audiocassette market has been completely lost to pirates, and there was no reversal of this disastrous fact in 1999. Cassette piracy now accounts for 95% of the cassette market, with the legal industry selling 300,000 audiocassettes and the pirates selling approximately 60 million units in 1998. Estimated losses due to audiocassette piracy are about \$100 million. Audio CD piracy is also on the rise, blanketing about 35% of the Brazilian market, an increase over 1998, and causing about \$200 million in estimated trade losses. In all, the sound recording and music industries suffered \$300 million in estimated losses due to piracy in Brazil in 1999.

Again, the main reason for the rapid increase in CD piracy is the lack of strong and coordinated action by the Brazilian government against unrestricted imports, distribution centers and street vendors, who switched from selling pirate audiocassettes to pirate CDs (which have a higher profit margin than cassette piracy). In addition, the regional CD problem caused mainly by neighboring Paraguay, and its links to Southeast Asia, have not improved over the past year. This CD problem is so sophisticated, it makes investigations and actions very difficult to accomplish without the intervention of the federal government. Rising CD piracy has caused commercial sales of legitimate product in Brazil to fall 20% in 1998 (compared to 1997) and 15% in 1999 (compared to 1998). When the legal recording market sales dropped 30% in the first four months of 1998, the industry pleaded with the government for action, but to no avail.

For years, the pervasive audiocassette piracy has basically destroyed the legitimate Brazilian market. In the southern cities and in the interior, the pirate cassette market is still strong. It is important to note that almost 75% of this pirate product in Brazil affects Brazilian repertoire. The pirate market switched very rapidly from audiocassettes to CDs, as street vendors, flea markets and "sacoleiros" crossing from Paraguay into Brazil increasingly sold CD product. This phenomenon is obvious in major cities like São Paulo, Salvador, Curitiba, Recife, Fortaleza, Rio de Janeiro, and even in Brasilia, where more and more street vendors now sell pirate CDs. In fact, industry and police antipiracy efforts in São Paulo have caused the street vendors to react and create new strategies to avoid raids. These vendors now are more mobile and carry small bags of CDs instead of setting up fixed stalls. In northeast Brazil, the pirate sales take place in established shops. Gas stations throughout the country freely distribute pirate CDs.

Pirate and bootleg cassettes and CDs mainly enter Brazil from Paraguay via Foz de Iguazu, Corumba, Maringa and Punta Pora, and also through the ports of Santos, Paranagua, Recife and Salvador, as well as at the airports at Manaus, Rio de Janeiro, Sao Paulo and Foz de Iguazu. Paraguay acts as a bridge to deliver pirate CD product from Taiwan, Korea, Thailand, Singapore, and China, as well as from the U.S. and several European countries (Italy, Germany and France). Brazilians take advantage of the lack of border controls and install manufacturing facilities across the border in Ciudad del Este, Paraguay, bringing their products back and forth without any kind of control. During 1999, the recording industry found and dismantled two huge CD plants in Ciudad del Este which were targetting the Brazilian market. Amazingly, the CD plants entered Paraguay from Brazil.

In response to piracy, the recording industry has introduced a hologram seal of authenticity for placement on all legitimate CDs. In December 1998, the Brazilian government issued a decree to establish an official, numbered stamp to be affixed to IPR goods, including sound recordings, videos and books. The recording industry remains concerned that if this stamp is not properly implemented, it could in fact be used against the recording industry by spawning an entirely new counterfeit stamp industry. This program is to be implemented in early 2000, and the industry will be closing watching its implementation.

The Business Software Alliance (BSA) reports that preliminary estimates for 1999 trade losses due to business software piracy in Brazil rose to \$362.9 million. The estimated 61% level of business software piracy in Brazil has remained constant for the last two years. BSA was very active with its enforcement campaign in 1999, supported by good regional press coverage. The enforcement campaign was aided by the passage in February 1998 of amendments to the 1973 copyright law, which increased civil penalties to 3,000 times the retail value of the pirated software, and the passage (also in February 1998) of a new software law, which provided greater

protection for software copyright, including stiffer criminal penalties for certain types of software piracy.

BSA continued to focus its anti-piracy activities in the following states: Minas Gerais, Paraná, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, São Paulo and the Federal District of Brasília, and to a lesser extent in the northern states of Bahia, Ceará, and Pernambuco. Software piracy continues to exist in its traditional forms in Brazil, including illegal reproduction/duplication of software programs both for commercial (i.e., sale) and noncommercial (i.e., use) ends, illegal use by end users, hard-disk loading of illegal software by computer resellers, and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience and, especially, for the unauthorized electronic distribution of illegal software. Although Brazilian Internet pirates have been responsive to cease and desist letters sent by BSA and its member companies, many of these pirates simply close down one Website and open up an identical Website undetected (with a different Universal Resource Locator or Web address). The Internet may well eclipse other media for advertisement and distribution of illegal software in the near future. In respect of end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against large and medium-sized companies, which has had some impact on the level of piracy. However, there still exists a considerable small business segment in Brazil that has far from legalized.

Estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs and multimedia products) in Brazil in 1999 are \$116.2 million, an increase from the prior year, with an estimated piracy level of 90%. The biggest problem for this industry in Brazil remains the lack of border controls and the high level of piracy. The vast majority of illegal software for all platforms is made in Asia (Hong Kong, Macau, the People's Republic of China, Taiwan, Thailand, Malaysia or Singapore) and is shipped to Paraguay. From there, the product crosses the border into Brazil. Piracy has adversely affected sales of interactive entertainment software on all platforms. Gold burning of PC product has become very popular in Brazil. Reports also indicate that there is an organized crime element involved in videogame piracy, and this makes it very difficult to engage local authorities in that fight.

Retail videogame piracy continues to be a major problem, with stores having large quantities of counterfeit videogame cartridges for sale. Pirated videogames in cartridge format, produced in Southeast Asia, enter the Brazilian market, often via Paraguay, where they were assembled. Pirate CD-ROMs containing interactive entertainment software products are often mixed in with other shipments of optical media from southeast Asia. As mentioned above in the recording industry section, the large shipments seized in Panama (bound for Paraguay and in turn Brazil) also contained videogame programs. Parallel imports from Asia also enter Brazil, thus harming the ability of copyright owners and their licensees to distribute locally.

Video piracy in Brazil is the major piracy problem facing the motion picture industry there. The established video market in Brazil is by far the most extensive in Latin America, with an estimated 12,000 video stores throughout the country. And that number may be underestimated; there is an unknown number of small "underground" video stores that never buy legitimate product and are not registered by any commercial or government survey. Yet this enormous market potential is extremely difficult to develop, because video piracy in Brazil has reached a high degree of integration into the video market. Approximately half of the pirated material in video clubs is copied back-to-back from legitimate product, while the other half is distributed from numerous

small clandestine duplication laboratories. Excellent quality counterfeit videos, sold by clandestine duplication and distribution organizations, are common throughout Brazil. These organizations use legitimate tapes as masters for illegal duplication. Typically, these titles can be found on the pirate market shortly after the video release, and pirate tapes often contain counterfeited security stamps. To counter the use of counterfeit security stamps by these organizations, the Brazilian Video Union (UBV) adopted a completely new and uniform system for labeling videocassettes, including security marks, and has agreed to use a single color (gray) cassette for original tapes. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Brazil are estimated to be \$120 million in 1999. This slight reduction in estimated losses is due to devaluation, not a reduction in piracy.

The book publishing industry reports that photocopying of English language study materials and individual lessons and chapters from textbooks, as well as entire books, continue to be the major forms of book piracy in Brazil. AAP indicates that photocopying on university campuses remains rampant, despite the combined efforts over the years of local publishers and the Camara Brasileira do Livro (the local publishers association) to address this problem. More unauthorized photocopying occurs in the northeastern states of Brazil, compared to São Paulo, Rio de Janeiro, Minas Gerais and Porto Alegre. Imported educational materials are commonly photocopied, due in part to their high price. Some of the largest universities are now discussing legitimizing the photocopying that goes on in their libraries. Imported books and journals for the computer market are also widely photocopied. The potential problem in the near future may be unauthorized translations, as U.S. publishers begin to enter that specific market in Brazil. Estimated trade losses due to piracy were, \$18 million for 1999.

ENFORCEMENT IN BRAZIL

There continues to be a general lack of interest and unacceptable delays in effective enforcement of the copyright law throughout the enforcement system, including judges, prosecutors and customs officials. While police efforts have been moderately successful at the raiding level, police are becoming discouraged because the actions they take rarely reach conclusion in the courts. There is still a lack of clear and direct instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Itamaraty, Policia Federal, Policia Civil, Alfandega) to act on their own initiative.

Brazil fails to meet its current TRIPS enforcement obligations in several ways, including failure to: impose deterrent criminal penalties (TRIPS Article 41, 61); avoid unwarranted delays in criminal and civil cases (TRIPS Articles 41, 61); avoid unnecessarily costly procedures (TRIPS Articles 41, 50.3); provide effective border measures (TRIPS Articles 41, 51-60).

Brazil Fails to Impose Deterrent Criminal Penalties

Police raiding activities are inconsistent

The level of police attention to piracy varies throughout the country. Certain industries are able to achieve adequate cooperation with police officials, often depending on the region and on personal contacts. Most of the enforcement efforts are commenced by investigations conducted by the copyright industries themselves, and are not the result of any major Brazilian government

initiatives. The police, prosecutors and judges have demonstrated a lack of understanding of IPR issues in many instances. Rightholders may initiate criminal actions with either federal or state police officials to obtain search orders based on proof of copyright infringement. The federal police and judiciary are not considered to be effective in copyright enforcement. Federal police officials have jurisdiction over the types of crimes that are generally viewed as producing large-scale corruption (such as border controls and drug trafficking).

Perhaps as an indication that the criminal authorities have begun to recognize the socioeconomic significance of the crime (or perhaps to prepare itself for future assertions of nonaction), police statistics in São Paulo now include piracy as an official statistical classification. This will now allow for comparative measurements, but most importantly it allows for the creation of a database of offenders.

The local recording antipiracy association, APDIF do Brasil, has been very active for more than four years, working primarily in the states of São Paulo, Paraná, Minas Gerais, Mato Grosso do Sul, Goiás, Bahia and Rio de Janeiro. During 1999, APDIF brought 777 actions, which resulted in the seizures of 1.46 million pirate audiocassettes, and 1.4 million pirate CDs. While these numbers appear impressive, they reflect a very small portion of the entire pirate market. These 3 million pirate units are few, compared to a pirate market of some 95 million units.

Although the Brazilian police started to cooperate in more actions to actions against street vendors during 1998, such cooperation declined in 1999. This effect is because there is a lack of clear guidelines and direction from senior Brazilian officials. In addition, in those rare cases where the police were helpful and took action, the cases often get bogged down with the prosecutors, who with few exceptions are unwilling to bring cases against street vendors.

The motion picture industry also was very active during 1999 as in prior years. During 1999, the Motion Picture Association (MPA) initiated 1,518 investigations, conducted 1,671 raids and seized 212,063 pirate videos (69,857 in São Paulo and 54,605 in Rio de Janeiro). MPA investigations uncovered three large duplication centers in the São Paulo area. Thirty-four laboratories were dismantled, and 441 VCRs were seized, the most effective effort in several years.

MPA revamped its enforcement program mid-1999. In two operations run in the fall of 1999 in São Paulo, MPA and police officers discovered a well equipped laboratory with two dozen VCRs, counterfeit labels and other equipment. The suspected operator of this lab is an active police officer. The individuals apprehended, including the police officer, have been indicted and are awaiting trial, for piracy as well as for the theft of the VCRs found in the lab. In addition, MPA investigated and dismantled an organized ring of pirates which illegally reproduced tapes and then forcefully sold them to businesses in the Korean community by threats and extortion. The defendants in this case, too, are awaiting further legal process.

BSA brought 118 criminal police actions against resellers in Brazil in 1999, a significant increase from the 34 criminal police actions brought in 1998. These actions include actions brought in collaboration with ABES (the local software association). In a rare example of the police acting mostly on their own initiative (BSA provided some technical assistance), in Rio de Janeiro the consumer affairs police (DECOM) brought actions against street vendors selling pirate software, which has resulted in one conviction to date (two year's probation and a fine), with several other cases still pending. In São Paulo, BSA continues to work closely with DECOM in bringing cases against computer resellers that load hard disk pirate software on computers. In all the DECOM São

Paulo cases, the suspects were arrested, but promptly released on bail, which almost always requires the payment of a small sum (\$600 or less). The signs are that DECOM in São Paulo will prosecute these suspects, although there have been no convictions as yet due to long delays in the criminal process. In Recife, BSA worked with DECOM, which resulted in the arrest of five individuals suspected of selling illegal software; again, these individuals were immediately released from custody upon the payment of small bail amounts. There have been no cases to date in which BSA has been involved where an individual has served a jail term for software piracy.

After years of effort, the Brazilian software industry, with the support of the U.S. software industry, succeeded in obtaining a "fiscal crime" provision in the Software Law enacted in February 1998. Under Article 12 §3 paragraph II of the Software Law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as an independent public action. With certain limited exceptions at the state level, two years into the new Software Law, it is clear that the Brazilian IRS (Receita Federal) and the respective state tax authorities are dedicating no resources to pursue this kind of tax evasion. The exceptions referred to are ten tax evasion cases brought about by lobbying efforts of the software industry, and which were brought by the state police (tax evasion departments) in coordination with state Tax Departments in the Federal District of Brasilia and the state of Bahia. The basis of these actions is that the state is suffering great losses due to the sale of illegal software as pirate resellers are not collecting the ICMS tax (equivalent to a value added tax) from purchasers upon such sale. BSA was extremely hopeful that this type of tax evasion case would have a big impact on the level of piracy in Brazil, especially by medium- and large-sized companies. Indeed, the few cases brought in the Federal District of Brasilia and the state of Bahia attracted a lot of press coverage, which disseminates to the public the risks associated with software piracy. While the software industry continues to work with certain state tax authorities under the fiscal crime provision of the new software law, action is needed by the Receita Federal, which to date has shown absolutely no interest in pursuing tax crimes of this nature.

Unnecessary requirement for technical analysis causes excessive delays and exposes viable cases to unwarranted dismissal

MPA reports that it has had several cases dismissed because of improper technical analysis by police experts and also reports that the majority of its over 3,600 cases are stalled because of the improper application of a technical analysis of the evidence. Police experts currently insist on physically examining the suspected pirate tape, looking for physical evidence of piracy (lack of UV label, home-made labels, etc.) and are requesting equipment for internal examination (e.g., a cross-pulse monitor to determine second-generation copying, etc.). This type of exam is based on a trademark paradigm where the essential element is falsification, but in copyright the essential element is lack of authorization.

Note that Article 184 Section 2 of the Criminal Code defines a criminal copyright violation for video as: (1) the sale, rental, introduction into the country, etc., (2) of an original or copy, (3) for a lucrative purpose, and (4) in violation of copyright. Article 184 Section 1 of the Criminal Code then defines such a violation of copyright as: "the lack of the express authorization of the author or representative." A criminal expert's opinion regarding the physical state of the tape signifies absolutely nothing as to whether or not a copyright violation of the work contained in the tape took place. The criminal expert's opinion may create a presumption, but it cannot determine if it the tape was authorized or not. Only documents can prove that because Article 184 defines violation of copyright as the lack of express authorization.

One current motion picture case proves the point: In Minas Gerais, based on a technical exam stating that the seized tapes were genuine, the judge ordered the return of the tapes and dismissal of the case. However, the law clearly states that the nonauthorized commercial use of original tapes is a criminal violation of copyright. The MPA has had numerous other cases dismissed on similar grounds, when the police expert, based on a physical exam, has reported to the judge a "lack of evidence" sufficient to proceed. In no case, however, has the expert requested documentation regarding authorized use, which is the true basis of a copyright violation.

MPA does not argue that a technical analysis is improper (apparently Article 158 does require such a report be given to the judge), but asserts that it is being improperly applied in copyright cases. The expert exam of the evidence must be oriented towards the existence of express authorization (usually some form of documentation), leaving a physical examination to trademark and patent falsification. Resolution of this issue is important and not difficult. It does, however, require that Brazilian criminal authorities re-examine their procedures and understand the difference between copyright and trademark violations.

Prosecutions are ineffective; few cases reach the courts, and those few that do fail to impose deterrent penalties

During 1999, throughout the entire country of Brazil, the courts issued only a handful of judgments (four) in criminal copyright infringement cases. This is even worse than the six cases reported in 1998.

Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Case backlogs constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities in the law and a general lack of resources. Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence. A major problem has been the low penalties imposed in the few criminal copyright infringement cases which have been decided by the courts. This problem may be alleviated if the penal code is reformed to index penalties for inflation and if the courts actually impose deterrent levels of penalties in copyright cases. Regulations aimed at reducing the backlog of court cases further undermine and weaken deterrence. Courts usually suspend jail terms for first offenses, thus returning defendants to the streets to return to their illicit activities.

In 1999, the recording industry filed over 400 complaints with the police, and this resulted in approximately 777 raids. As a result of these actions, 1.4 million pirate audio CDs and 1.4 million pirate audiocassettes were seized. Indictments resulted in 280 cases. However, despite all this activity, only three judgments were rendered in criminal cases, all of which were converted to low fines.

With respect to audiovisual cases, the MPA reports that out of 1,671 raids in 1999, 832 criminal investigations were initiated (although in the majority of cases, that simply means that the MPA has legally presented itself as representing the rightsholders and a file has been opened; it does not mean active investigation). As for legal resolutions in 1999, 144 cases were suspended, 91 were dismissed, and there were no convictions. Most of the dismissals occurred either because the accused was found not to have the criminal intent to engage in copyright infringement or because the experts' reports were not conclusive enough to identify the seized tapes as piracy (see

the comments on unnecessary technical analysis). The 114 cases were suspended under Law No. 9099, which provides for the suspension of sentences for first-time offenders. Judges have been suspending cases under Law No. 9099 and ordering compensation which varies from providing a few pounds of food for public distribution to a penalty of \$20 per tape (or less) to be paid to the MPA member companies. This low level of penalties does not come close to meeting the TRIPS Article 61 standard of providing for deterrent "criminal procedures and penalties to be applied" in cases of commercial piracy. As a result, for the third year in a row, not one infringer of audiovisual works has received a sentence of imprisonment.

As for business software actions, BSA's criminal campaign against resellers is focused on seizures and publicity, and includes conducting actions with DECOM (consumer protection), the state police, the fiscal authorities (under the new Software Law), and the filing of private criminal suits (usually against the directors of an end user, subsequent to the filing of a civil damages suit). In 1999, there were 118 criminal business software complaints filed in Brazil. Some of these actions were brought in collaboration with ABES, the local Brazilian software association. One criminal verdict was issued, for two years' probation and a fine of less than US\$600.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN BRAZIL 1999 AND 1998

| ACTIONS | Recording Industry 1999 (1998) | Motion Picture Industry 1999 (1998) | Business Software Industry 1999 (1998) |
|---|---|---|--|
| Number of complaints filed with police | 409 (530) | 832 1,320 | 118 (34) |
| Number of raids Conducted | 777 (680) | 1,671 (2,381) | 118 (34) |
| Number of pirate copies seized | 2.86 million (2.85 million) | 212,063 (243,581) | NA NA |
| Number of cases Suspended or dismissed | 18 (not available) | 235 (148) | (0) (0) |
| Number of defendants convicted (including guilty pleas) | 3 (5) | 0 (1) | 1 (0) |
| Criminal sentence Issued | 1-year jail term, commuted to small minimal fines (Minimal fines) | None (Community service) | 2 years' probation plus fine < \$600 (None) |
| Ratio of convictions to the number of raids conducted | 0.8% (0.7%) | 0% (0.04%) | 0.8% (0%) |

Notes:

- The information in this chart is provided by IFPI Latin America, MPA and BSA.
- The suspensions or dismissals cited above are the result of judicial decisions. See discussion below regarding Law 9099-95, which permits judges to sentence first-time offenders with up to two years' probation and monetary damages.
- NA = Not Available.

Unwarranted Delays in Criminal Cases

Court delays in criminal copyright infringement cases can take as long as two to three years in the courts of first instance. Not surprisingly, there is a tremendous backlog of cases in the Brazilian courts. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case.

As one example of the unnecessary delay in prosecution, the MPA reports an October 1998, raid on a video duplication center in the City of Santo Andre, where it seized 152 VCRs and fake security stickers. Initially faced with the prosecutor's unreasonable assertion that the case lacked sufficient evidence, this important case continues to sit without progress. In addition to that one example, however, MPA faces a large backlog of 3,686 cases pending (1,127 in São Paulo and 719 in Rio de Janeiro), including over 600 dating from 1997.

Unwarranted Delays in Civil Cases

BSA continues to bring civil search and seizure actions, followed up in most part (unless the defendant settles within thirty days of the search and seizure) with the filing of civil damages suits. BSA brought 67 civil actions against software pirates in 1999, an increase in the number of actions from 1998. If the level of software piracy in Brazil is in any way connected to the number of denunciations received by the BSA anti-piracy hotline telephone service, it should be noted that the hotline received 18,292 calls in 1999 (an increase from 5,600 calls in 1998), which produced 1,450 leads of suspected piracy (an increase from 730 leads in 1998). Due in part to the devaluation of the real at the end of 1998, many defendants in BSA cases were reluctant to reach a settlement with BSA even in the face of very strong evidence of software piracy. Accordingly, whereas in 1998 a lot of defendants offered settlement terms after the search and seizure action but before the filing of the main civil damages suit by BSA, BSA filed a larger number of civil damages suits in 1999.

The civil court system in Brazil is notoriously overloaded, inefficient, and slow. In São Paulo, judges may be responsible for 3,000 or more cases in a year. Cases usually take from eighteen months to two years to come to trial. However, defendants have access to many grounds of appeal, and this process regularly takes three years before a judgment is issued by the relevant superior court. Incredibly, BSA has cases in São Paulo dating back to 1991 and 1992 that have still not received a judgment from the relevant superior court. These unwarranted and excessive delays violate TRIPS (Articles 41, 61).

High Expert Fees and Bonds in Civil Infringement Cases

In addition to unacceptable delays in the court process described above, BSA encounters two more problems on a regular basis: the approval by judges of absurdly high expert fees and the imposition of very high bond requirements. Because of these costs, the software industry frequently elects to drop cases rather than incur the large attendant fees. Court experts are necessary to conduct search and seizure actions against those suspected of infringing software copyrights, but the fees imposed bear no relation to the amount of work involved; often judges approve fees in the range of \$15,000 to \$25,000 (especially in São Paulo), for what amounts to perhaps 30 to 40 hours' work.

Bonds are imposed before a court orders a search and seizure against a suspected pirate, and they have been as high as \$450,000 (this case resulted in the BSA member companies involved desisting from the case). These fees and bonds are an obstacle to enforcement, in violation of TRIPS Article 41(1) and (2) (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays), Article 53 (high bond requirements are unreasonable deterrence) and Article 3 (high bond requirements on foreign plaintiffs violate national treatment). In two recent case, BSA guaranteed a bond of R\$300,000 (US\$170,400) and R\$100,000 (US\$56,800).

Brazilian Border Measures are Ineffective

In 1999, the copyright industries requested that the Brazilian government focus on improving border enforcement. There seemed to be little progress made on improving this problem. Because of the lack of coordination of the actions of Brazilian customs and federal police, border controls are lax and must be tightened to stop the massive amounts of pirated and counterfeit product (including piratical CDs, audiocassettes, videocassettes and videogames) entering Brazil from Paraguay, particularly at the cities of Foz do Iguazu, Corumba, Campos Grande and Maringa. Bolivia and Uruguay are also growing sources of counterfeit production for the Brazilian market. Brazil promised the U.S. years ago that it would work with the Paraguayan government on border issues, but only recently have enforcement efforts been observed at the Brazilian border. The Brazilian airports are also a significant source for pirate shipments around the country. Other ports of entry for infringing product include the main airports and the seaports such as Santos, Paranagua and Manaus. While coordination efforts may be underway, they have not resulted in any tangible improvement on the ground. According to the Brazilian Government, they implement a "red traffic light" system in the major sea ports with Paraguay. A few months later, the industry found that two large CD plants made their way to Paraguay via Brazil (via the ports of Santos and Paranagua).

CRIMINAL CODE AND REGULATIONS

Criminal Code Amendments

The Brazilian penal code was amended in 1993. Unfortunately, those amendments failed to include procedural provisions which would have permitted the police to seize all infringing copies (instead of just the amount of product necessary for evidentiary purposes) and implements used for reproduction which are found during an anti-piracy raid. The legislation should be amended to provide this seizure authority, as required by TRIPS Article 61. In addition, the levels of fines in the 1993 amendments have been overwhelmed by inflation, and should be tied to the indexing system in the general provisions of the Brazilian penal code. The Brazilian government promised to make best efforts by June 1994 to pass legislation to ensure that the range of higher penalties available under the indexing system in the general provisions of the penal code applied to copyright infringement. This has not been achieved.

Presently there are two amendments pending to the current Brazilian penal code. The first is Bill No. 2.681/96, which has strong copyright industry support. This bill would amend Article 184 of the penal code to include unauthorized rental of a work or sound recording for profit and add provisions permitting the destruction of seized materials by Brazilian authorities.

The second proposal, Portaria 232/98 proposed by the Ministry of Justice, reflects a substantial revision of the entire penal code. The concern here is that this proposal would lower the level of criminal penalties and remove the authority of the police to initiate searches and seizures on their own initiative (ex officio), and instead would make them available only upon judicial warrants. The copyright industries oppose this proposal.

Criminal Procedure Regulation 9099-95

A criminal procedure regulation was issued in 1995 to alleviate serious court overcrowding. This regulation, Law No. 9099-95, provides for the suspension of proceedings with a two-year probation for first-time offenders, requiring the defendant to redress monetary damages as a condition to granting the suspension. When the regulation first went into effect, the copyright industries were hopeful that it could have a positive impact on piracy, because it requires the defendant to pay damages as a condition to granting the suspension, and the accused remains on probation for a period of two years. As the courts have begun issuing these suspensions, there is growing concern that these regulations are not supporting the creation of a system which has expeditious and deterrent penalties. As detailed above, most copyright cases are cycled through this system. Many offenders receive suspended sentences or very low fines, community service, or no sentences at all. This lenience clearly is not providing a deterrence to piracy.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law and Software Law

Under its 1994 agreement with the U.S., Brazil promised to enact legislation on computer software and to pass amendments to its copyright law by making "best efforts" to accomplish this by January 1, 1995. These bills were finally enacted by February 1998. The software bill (PL 200/96) passed both Houses, and was signed in its entirety, without amendment, by President Cardoso, and entered into effect on February 20, 1998. On February 19, 1998, President Cardoso signed into law amendments to the 1973 Copyright Law (Law No. 9.610) which entered into effect on June 20, 1998.

Proposed Creation of Specialized IPR Courts

The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which should significantly improve intellectual property rights enforcement. Our reports indicate that these courts are restricted to industrial property matters. IIPA and our members continue to recommend that courts also be established to handle copyright infringement cases. Although no specific action has been taken to create these courts, the Brazilian Judicial Commission has assigned the issue as a specific agenda item (number 15) in its list of pending actions.

Government Asset Management of Software

The Brazilian government should consider stronger efforts to support government software management in its public ministries and agencies. The Brazilian Government has done less to reduce government software theft (piracy) than perhaps any other major Latin American government. The President has never enacted a decree ordering federal agencies to buy legitimate software. Moreover, public entities are required by law to appeal any decisions against them to the end of the appeals process, with the result that software piracy actions against government agencies involve costly legal battles that last for many years. In addition, BSA has a pending case against government where there have been indications that the agency has used its power and name to try to influence the judicial process.

NONTARIFF BARRIERS

Local Printing Obligations for Films and TV Programming

Article 21 of Brazilian Law 8.401/92 establishes a 100% local printing obligation for films and television programming. Importation of color prints for the theatrical and television markets is prohibited. All such prints must be produced locally, regardless of price or quality of work. There are only two printing laboratories in Brazil, which cannot supply the growing demand for prints in Brazil due to the increasing construction of multiplex theaters. In order to supply the Brazilian market with the number of prints required and to increase competition and promote modernization of printing labs in Brazil, Brazil should allow the importation of prints manufactured abroad.

This provision violates Article XI of the General Agreement on Tariffs and Trade, which prohibits quantitative restrictions on imports. It also is inconsistent with Brazil's obligations under the treaty of Asunción, which created Mercosur and establishes the free circulation of goods and services within the member countries of Mercosur. Brazil should take immediate steps to bring its practices into conformity with its international trade obligations.

Remittances and Computer Software

Brazil has eliminated most of the non-tariff barriers that afflicted the computer software industry. At last report, the Central Bank is still requiring (per Circular No. 2685 of May 1996) that an agreement duly registered with the Ministry of Science and Technology (including the registration certificate) be presented to the financial institution conducting the currency exchange operation as a prerequisite to remitting overseas payments. In addition, the Brazilian entity seeking to make the remittance must also present an import license, an invoice from the (foreign) supplier, and an invoice that the Brazilian entity has issued to the purchaser of the program.