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Intellectual Property Rights and the Digital Era: Argentina and Brazil

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INTELLECTUAL PROPERTY RIGHTS AND THE DIGITAL ERA: ARGENTINA AND BRAZIL

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I. INTRODUCTION

The digital economy and the Internet, as one of its fastest-growing forms of expression, have posed innumerable new legal challenges to the protection of intellectual property rights (“IPRs”). “Digital assets”¹ require IPR protection in ways unforeseen by most national legal systems just 20 years ago.² Accordingly, many countries in Latin America³ have been adapting their intellectual property (“IP”) laws to provide adequate protection to IPRs and to foster the development of the digital economy and the Internet.⁴

Two countries that have followed this trend, Argentina and Brazil,⁵ have steadily strengthened the protection of IPRs by

1. Digital assets are those goods and services capable of being created, transformed, copied, disseminated or stored in a digital form and transmitted through the Internet.

2. “The governments of Latin America have already passed, or are moving fast towards passing, E-Commerce-related legislation. This need arises from the recognition that older regulations cannot address the complexities and nuances of the Internet and web technologies.” See Mikio Kuwayama, *E-Commerce and Export Promotion Policies for Small- and Medium-Sized Enterprises: East Asian and Latin American Experiences*, CEPAL – SERIE COMERCIO INTERNACIONAL (Santiago, Chile), October 2001, at 44, available at <http://www.eclac.cl/publicacione.PDF>.

3. “Concerning the juridical framework and e-commerce legislation, Latin America governments could speed up and should focus more on setting regional standards, but are not seriously being [sic] behind worldwide average.” Martin R. Hilbert, *Latin America On Its Path Into The Digital Age: Where Are We?*, CEPAL – SERIE DESARROLLO PRODUCTIVO (Santiago, Chile), June 2001, at 87, available at <http://www.eclac.cl/publicaciones/DesarrolloProductivo/5/LCL1555P/Lcl1555.pdf>.

4. In connection with the development of the Internet in Latin America, see Internet Software Consortium, *Nua Internet Surveys* (2001), at <http://www.isc.org>. The survey indicates that the growth in Internet hosting in 1999 was 136% in Latin America versus 74% in North America, 61% in Asia, 30% in Europe and 18% in Africa.

5. “In some countries of the region, mainly Brazil, Mexico and Argentina, the protection of intellectual property rights is becoming increasingly important. The

enacting new laws and subscribing to international agreements.⁶ As we will discuss herein, despite the progress they have made, Argentina and Brazil still need to comply fully with the obligations they have assumed in international IP agreements.⁷ The lack of compliance by Argentina and Brazil with international obligations derives from (i) delays in enacting domestic laws that put into full force the international IP agreements, and, to an even greater degree, (ii) the lack of enforcement of laws already enacted.⁸ Enforcement is of utmost importance for the proper protection of IPRs and the future competitiveness of Argentina and Brazil.⁹ Unless these two factors are properly and promptly addressed by Argentina and Brazil, the development of IPRs in the context of the digital economy and the Internet may be jeopardized.

mounting costs of research and development for new products or processes and the shortening of the product life cycle are driving this trend. Alberto Chong & Alejandro Micco, *The Internet and the Ability to Innovate in Latin America*, INTER-AMERICAN DEVELOPMENT BANK, January 2002, available at http://www.iadb.org/res/index.cfm?fuseaction=publications.View&pub_id=wp-464.

6. For a brief summary on the development of Internet legislation in Argentina, Brazil and other Latin American countries, see Kuwayama, *supra* note 2, at 44.

7. For a discussion of the adequacy of the Argentine and Brazilian IP laws in the context of international standards, see International Intellectual Property Alliance, *2003 Special 301 Report* (February 14, 2003), available at <http://www.iipa.com/special301.html> [hereinafter Report].

8. For an in-depth analysis of the issues related to the application and enforcement of IPRs in civil law and common law systems, see Masato Dogauchi, *Private International Law on Intellectual Property: A Civil Law Overview*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Geneva), January 24, 2001; Graeme Austin, *Private International Law and Intellectual Property Rights: A Common Law Overview*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Geneva), January 15, 2001; see also Andre Lucas, *Private International Law Aspects of the Protection of Works and of the Subject Matter of Related Rights Transmitted Over Digital Networks*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Geneva), December 17, 2000.

9. "IPRs are valuable only if they are well enforced, which implies that the legal system is integrally related to the intellectual property system. . . To underline the importance of enforcement-related institutional capabilities, Sherwood (1997), in a rating system on intellectual property regimes and their attractiveness to investors in 18 developing countries, assigns 25 points out of a possible 100 (the largest single point category) to factors such as judicial independence, prompt availability of injunctions, competence of judges in intellectual property subjects, length of delays experienced in legal proceedings and the capacity of police and customs agencies to act in IPR cases." Mart Leesti & Tom Pengelly, *Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration & Enforcement*, COMMISSION ON INTELLECTUAL PROPERTY RIGHTS (U.K.), at 35, available at http://iprcommission.org/graphic/documents/study_papers.htm.

II. ARGENTINA

A. Introduction

The digital era has placed Argentina in a portal of new opportunities to address economic disadvantages. The deregulation process that took place in Argentina during the 90's produced fundamental changes in the infrastructure of the country and the traditional economy based on power, oil and gas, utilities, telecommunications and transportation. These infrastructure changes were made possible by the enactment and enforcement of a regulatory framework that induced private investment, recognized private property rights to formerly state-owned assets and delineated the scope and extent of these property rights. However, these changes in the Argentine regulatory framework did not extend to the area of IPRs. Argentina did not address the legal concerns expressed by the international intellectual property industry¹⁰ and, therefore, was unable to propel the development of a true domestic intellectual property industry.¹¹ The deficiencies of the regulatory framework in Argentina, and especially the lack of enforcement of the regulations already enacted, still constitute the main barriers to the development of the intellectual property industry in Argentina, including the Internet. Argentina needs to overcome these barriers to ensure: (i) the economic integration of the country into regional and international markets;¹² (ii) the competitiveness of the traditional industries¹³ benefited by the deregulation process of the 90's; and (iii) the development of local technology and innovative industries.¹⁴

10. See Report, *supra* note 7.

11. "[A] good rule of law [has] a strong impact on economic performance. Simply put, institutions are crucial for achieving increased competitiveness, productivity, and economic growth. . . . A mediocre rule of law or an unnecessarily complex regulatory system that slows down the process will result in a strong disincentive to innovate. . . . The incentive to develop knowledge is weakened if that knowledge is not protected." Chong & Micco, *supra* note 5, at 16.

12. For a discussion of the economic consequences related to the protection of IPRS, see Carsten Fink & Carols A. Primo Braga, *How Stronger Protection of Intellectual Property Rights Affects International Trade Flows*, World Bank Workpaper 9, available at <http://worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2051/wps2051-abstract.html>.

13. Examples of this include the following: B2B oil & gas portals, digital and satellite data transmission, 3G telecommunications equipment, airline travel portals, and power trading.

14. Examples of this include the following: software and hardware industry, product design, telemedicine, e-learning, "e-jobs," digital databases and digitalized libraries, images, texts, music and other forms of entertainment, and e-commerce.

B. IPRs Regulatory Framework

In Argentina, IPRs are protected by the constitution.¹⁵ In pursuing this protection, the country has adhered to many of the most important international treaties and agreements, and enacted various laws and regulations related to the protection of IPRs.¹⁶ However, the scope and extent to which the various forms of IPRs are protected in Argentina depends mainly on the degree of actual enforcement of these treaties, laws and regulations. It is in this particular area that Argentina faces the biggest challenge to the protection of IPRs.¹⁷

C. Domain Names

1. Scope of Protection

In Argentina, domain names are under the supervision of "NIC-Argentina," a federal governmental agency ("NIC").¹⁸ NIC grants domain names in the *Country Code Top Level Domain System* (ccTLDs) ".ar" under six sub-domains: (i) ".com.ar"¹⁹; (ii)

15. ARG. CONST. art. 17 am. 1994. "All authors or inventors are the exclusive owners of their works, inventions or discoveries for the period of time established by law." *Id.*

16. Among those treaties and agreements adopted by Argentina in connection with the protection of IPRs are the following: the Universal Copyright Convention; the Paris Convention for the Protection of Intellectual Property Rights; the Brussels and Paris texts of the Berne Convention; the Treaty of Rome; the World Intellectual Property Organization (WIPO) Copyright Treaty; the WIPO Performances and Phonograms Treaty; the Trade Related Aspects of Intellectual Property Rights (TRIPs) of the General Agreement on Trade and Tariffs (GATT); and the Washington Treaty.

17. See Report, *supra* note 7, at 42.

18. NIC is the acronym that identifies the "Dirección de Informática, Comunicaciones y Seguridad" that belongs to the "Ministerio de Relaciones Exteriores, Comercio Internacional y Culto" ("MRE"). Note that pursuant to Resolution 2226/2000, the administration of domain names was formally transferred to the "Secretaría para la Ciencia, la Tecnología y la Innovación Tecnológica"; however, the transfer has not yet taken place. See *Registración de Nombres de Dominio en Internet* [Registration of Domain Names on the Internet], Ministerio de Relaciones Exteriores, Comercio Internacional y Culto [Ministry of Foreign Relations, International Commerce and Culture] Resolución 2226/2000 (Arg. 2000), available at <http://infoleg.mecon.gov.ar/txtnorma/64151.htm> [hereinafter Resolution 2226]; see also *Telecomunicaciones Decreto* [Telecommunications Decree] 252/2000 (Arg. 2000), available at <http://infoleg.mecon.gov.ar/txtnorma/62548.htm>, which created the "Programa Nacional para la Sociedad de Información" under the supervision of the "Secretaría para la Ciencia, la Tecnología y la Innovación Tecnológica."

19. Registration is available to any person or legal entity whether of national or foreign origin. See Resolution 2226, *supra* note 18, amendment no. 3, available at <http://www.nic.ar/acta3.html>.

“.org.ar”²⁰; (iii) “.gov.ar”²¹; (iv) “.mil.ar”²²; (v) “.net.ar”²³; and (vi) “.int.ar”.²⁴

Resolution 2226/2000 as amended (the “Regulations”)²⁵ regulates the actual registration of domain names.²⁶ The registration is free of charge²⁷ and can be conducted on-line. The registration of domain names pursues two main purposes: (i) to allow NIC to exercise supervisory functions, and (ii) to provide the holders of domain names with reliable registration information on a potential domain name violator.²⁸ However, it is unclear whether, and to what extent, this information may be used as evidence in a legal proceeding conducted in Argentina because there are no clear evidentiary rules or court decisions on this matter.²⁹ In contrast to other Latin American countries, domain names in Argentina may be registered by foreign registrars without residency or incorporation requirements. The foreign registrar needs only to provide a legal domicile in Argentina and his or her identification or tax number from his or her country of origin. The registration is valid for one year from the registration date³⁰ and can be

20. Registration is available only to non-profit organizations whether of national or foreign origin. It is not available to individual persons carrying out non-profit activities. *Id.*

21. Registration is available only to Argentine federal, state and municipal entities that belong to the Executive, Legislative and Judicial branches. *Id.*

22. Registration is available only to Argentine military entities. *Id.*

23. Registration is available only to Internet Service Providers (ISP) of national or foreign origin that are duly licensed to provide value-added services in Argentina by the National Commission of Communications. *Id.*

24. Registration is available only to diplomatic entities or international organizations with physical presence in Argentina. *Id.*

25. See Resolution 2226, *supra* note 18, amendments nos. 1, 2, 3, available at <http://www.nic.ar>.

26. *Id.*

27. However, Resolution 2226, following the guidelines of the WIPO, contemplates the possibility of charging a fee to discourage cybersquatter activity. *Id.*

28. The importance of this information is highlighted by the WIPO. See World Intellectual Property Organization, *Primer on Electronic Commerce and Intellectual Property Issues*, at <http://ecommerce.wipo.int/primer/section3.html>. The WIPO provides as follows: “187. *Best Practices for Registration Authorities*. [. . .] The collection and availability of accurate and reliable contact details of domain name holders is an essential tool for facilitating the protection of intellectual property rights on a borderless and otherwise anonymous medium. Such contact details provide the principal means by which intellectual property owners can go about the process of enforcing their rights.” *Id.*

29. See Horacio Fernandez Delpech, *Argentina: Registro de Nombre de Dominios de Internet en la Republica Argentina. Su Problematica. Propuestas de Solucion*, REVISTA ELECTRONICA DE DERECHO JURIDICO, April 11, 2003, at <http://www.alfaredi.org/revista/data/34-6.asp>.

30. However, pursuant to Amendment No. 1, the application of the mentioned one-

renewed upon the registrar's request.

Domain names are granted on a "first come, first serve" basis.³¹ NIC may deny registration of domain names when they are identical to another domain name already registered, when they give rise to confusion with governmental agencies or international organizations, when they are against "moral and good uses" (legal standard) as understood in Argentina, or when they refer to a publicly known person or entity. Domain names can be freely transferred between parties;³² however, the transfer must be registered with NIC in order to be enforceable *vis-à-vis* both NIC and other third parties.

The Regulations have granted immunity to NIC in connection with any liability arising from the registration, rejection, revocation or termination of domain names, including the infringement of trademark rights.³³ Consequently, to date, NIC has been of no help to domain name registrars in finding a solution to the various problems arising from the registration and use of domain names in Argentina.

2. Responding to Infringement

NIC does not have jurisdiction over the resolution of domain name conflicts, and the Regulations have not established an alternative procedure to resolve the conflicts. Consequently, any dispute arising over domain names must be submitted to the judicial courts for final judgment.

In cases involving disputes between registered trademarks and domain names,³⁴ the applicable jurisdiction corresponds to the courts in the location where (i) the infringement took place, or (ii) the defendant is domiciled.³⁵ However, given the nature of Internet activity, it may be difficult for the plaintiff to show that the infringement was committed within a certain territorial jurisdiction.³⁶ Thus, it may be easier for the plaintiff to obtain jurisdic-

year term has been temporarily suspended. Consequently, domain names need not be renewed at the end of the mentioned one-year term. See Resolution 2226, *supra* note 18, amendment no. 1, available at <http://www.nic.ar/actal.html>.

31. See NIC Reglas del Registro No. 1 (Arg. 2000).

32. The assignment must be done in writing before a notary public.

33. See NIC Reglas del Registro No. 16 (Arg. 2000).

34. See "Heladerias Freddo," Juzg. Fed. Civ. y Com. [1997] J.A. 7; "Camuzzi de Argentina," 1a Inst. Civ. y Com. [1999] J.A. 4; "Pugliese Francisco Nicolas," CNEspecial Civ. y Com. [1999] J.A.; "Pines," Juzg. Fed. 1a Inst. Civ. y Com. [1999] J.A. 5.

35. See Cód. PROC. CIV. Y COM. art. 5 para. 4.

36. See "EDEA," Juzg. Fed. 1a Inst. Civ. y Com. [1999] J.A. 10.

tion over the defendant in the courts corresponding to the location where the defendant is domiciled.

To date, most of the conflicts between registered trademarks and domain names have been resolved by the courts by applying traditional trademark principles as contemplated in the Argentine trademark law. In these cases, the courts have granted priority to the holder of a registered trademark, and not to the holder of a domain name. In granting this priority, the courts have decided, without looking into whether the trademarks were well-known or notorious, that the mere registration of domain names similar to third parties' registered trademarks constitutes the unauthorized use of the registered trademark.³⁷ Consequently, the courts have ordered the suspension, cancellation or transfer of the disputed domain names in favor of the trademark holders. In deciding these conflicts, the courts did not discuss the specialization principle³⁸ as it is typically applicable to trademark conflicts. Accordingly, the current position of the Argentine courts provides a good deal of protection to the holder of a registered trademark, but, at the same time, imposes an unnecessary burden on the normal registration process of domain names by preventing the registration of domain names that do not pose a real risk to previously registered trademarks.

3. Domain Names Overview and Conclusion

The Regulations encourage the abusive registration of domain names because the process is free of any charge and the domain name does not need to be renewed at the end of the one-year term.³⁹ There are no specific regulations in Argentina that resolve conflicts arising from the registration or use of domain names. Under the Regulations, NIC has no power to solve domain name conflicts and it is not liable to third parties for the performance of

37. In so deciding, the courts have taken into account the special characteristics of cyberspace, where otherwise the holder of the registered trademark would be prevented from using the trademark on the Internet.

38. The specialization principle would allow the registration of domain names identical to registered trademarks when they distinguish different goods or services and (i) there is no risk of confusion between the services or goods protected by the trademark and those connected with the domain name, (ii) the trademarks are not publicly known or notorious, and (iii) there is good faith by the domain name registrar.

39. In June 2000, no more than 20% of the domain names registered in Argentina were active. See *Potencie las Ventas de su Empresa*, at <http://www.terra.com.ar/canales/tecnologia/0/587.html>.

its powers. Accordingly, under the current Regulations, NIC has no incentive to solve the many problems in this area.

To date, trademark laws have provided the basis for the resolution of conflicts between registered trademarks and domain names. However, future actions may also derive from the application of (i) consumer protection laws,⁴⁰ (ii) civil code statutory damages,⁴¹ and (iii) criminal laws.⁴² We believe that the reasoning followed by the courts to date will influence the enactment of future domain name legislation in Argentina. Thus, the courts should make efforts to balance the protection of the trademark rights holders with those of bona fide domain names registrars.

D. Marks

1. Scope of Protection

Marks (trademarks and trade names) are governed by law 22.362,⁴³ its regulatory decree⁴⁴ and several other laws that incorporate international conventions to which Argentina is a party ("Trademark Law"). Trademarks can be defined as any signs with distinctive capacity,⁴⁵ and trade names can be defined as names or signs used to designate an activity, whether for profit or otherwise.⁴⁶ A trademark is distinct from a copyright, which protects an original artistic or literary work, and a patent, which protects an invention.⁴⁷

1.2 Trademarks

The ownership of, and exclusive right to, a trademark may be obtained only through registration with the Argentine Registry of Trademarks (the "Trademark Registry").⁴⁸ No previous use is

40. Ley 25.156, [LIX-D] A.D.L.A. 3942 (Arg. 1999).

41. Cód. Civ. art.109 (tort liability or "*responsabilidad extracontractual*").

42. Cód. PEN. art. 172 (fraud); Cód. PEN. art. 159 (undue influence with clients).

43. Ley 22.632, [XLI-A] A.D.L.A. 58 (Arg. 1980).

44. The regulatory decree is dated March 24, 1981.

45. Ley 22.632, *supra* note 43, at art. 1 ("The following may be registered as trademarks to distinguish products and services: one or more words with or without conceptual meaning; drawings; emblems; monograms; engravings; stampings; seals; images; bands; combination of colors applied at a specific location on the product or on packages; wrappings; packages; the combination of letters and of numbers; letters and numbers on account of their special design; advertising slogans; contours having the capacity to distinguish and any other sign with such capacity.")

46. *Id.* at art. 27 ("The name or sign with which an activity is designated, for profit or not, constitutes a property for the purposes of this law.")

47. See RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS (1996).

48. Ley 22.362, *supra* note 43, at art. 4.

required to file a trademark application, and the mere use does not confer ownership over the trademark. However, the owner of an unregistered trademark may oppose, or request the rejection of, a trademark application if the person seeking the registration knew or should have known that the trademark belonged to a third party.

Trademarks are granted on a "first to file" basis.⁴⁹ Protection may be requested in any or all of the 42 trademark classes recognized internationally. Any trademark (i) with distinctive capacity that (ii) does not conflict with an earlier registration or with a pending application and (iii) which is not otherwise prohibited by the Trademark Law, shall be considered for registration. However, trademarks that are identical or confusingly similar to previously registered trademarks (or previously filed trademarks) cannot be registered if they cover the same products or services. International priority on the trademark may be claimed under the Paris Convention.

The term of a trademark registration is 10 years from the registration date, and can be renewed for unlimited consecutive 10-year terms. Renewal is a condition for the continuation of the rights granted under the original trademark registration. The assignment of and liens on trademarks must be filed with the Trademark Registry in order to be enforceable vis-à-vis third parties. Although not mandatory, trademark license agreements should also be registered in order for the licensor and licensee to be able to obtain certain tax benefits and facilitate the enforcement of their rights.

1.3 Trade Names

The protection of a trade name arises from its public use for a period of more than one year. The protection extends only to the field of activities for which that name is being used, and the trade name may not create confusion with other trade names in the same field. The owner of a trademark may challenge the registration of a trade name that is identical to or confusingly similar to the trademark. Trade names may also be protected under the Paris Convention, in which case the trade name must be publicly known in Argentina in order to be subject to protection.

49. *Id.* at art. 8.

2. Responding to Infringement

The Trademark Law expressly identifies several forms of infringement.⁵⁰ Both civil and criminal actions may be filed against the violator of mark rights. Legal actions related to marks violations, cancellation and infringement must be brought before federal courts. The owner of the mark may request pre-trial injunctions to restraint the infringement, subject to placement of a bond. Once the owner requests the pre-trial injunction, the court may request the placement of a bond before the injunction is granted. Infringement actions are punishable by fine and/or imprisonment of up to 2 years.

In Argentina, there are no express regulations regarding trademark dilution. However, the courts have recognized that the owners of publicly known or “notorious” trademarks have the right to oppose the registration of trademark applications in those classes not covered by the publicly known or “notorious” trademark. The opposition to a trademark application may be requested on grounds of prior registration, application or use of a trademark. The nullification of a trademark already granted can be requested on grounds of prior registration, application or use of a trademark or when the registration was obtained in violation of the law or in bad faith.

3. Marks Overview and Conclusion

Argentina complies with most of the legal obligations set forth in international IPRs treaties and agreements, and thus, owners of marks, whether national or foreign, are fairly well protected by the Trademark Law. However, chronic delays in the Trademark Registry⁵¹ and in the overall Argentine judicial system place a very serious burden on actual enforcement of the rights, and, accordingly, constitute an actual barrier to the protection of marks.

50. The following acts constitute infringement under the Trademark Law: (i) counterfeiting or fraudulently imitating registered marks; (ii) using counterfeited registered marks, (iii) using fraudulently imitated marks; (iv) using a third party's marks without authorization; and (v) selling or offering for sale third party marks without authorization. See Law No. 22.632, *supra* note 43.

51. The registration process of a mark may take no less than 5 months.

E. Copyrights

1. Scope of Protection

Besides the general protection granted under the federal constitution,⁵² copyrights are protected by Law No. 11.723⁵³ as amended ("Copyright Law"). The Copyright Law grants protection to the author of works that (i) contain a minimum degree of originality and novelty and (ii) are fixed to a physical or tangible medium. The Copyright Law protects the expression of ideas, procedures, operational methods and mathematical concepts (in tangible and material form), but it does not protect the ideas, procedures, methods and concepts themselves.⁵⁴ Copyright protection is granted to all forms of writings, musical works and plays, cinematographic, choreographic and pantomime works, drawings, paintings and sculptural works, architectural, artistic and scientific works (independently or as applied for business or industrial purposes), maps, plans and blueprints, plastic works, photographs, engravings and phonographs, computer programs (both in source and object codes), databases or compilations of other materials and derivative works (regardless of the process of reproduction), radio programs, websites and multimedia works.⁵⁵ Copyrights are granted to the author of the work, his or her heirs and assignees.⁵⁶ The duration of the protection depends on the type of work. As a general rule, protection is granted to the author for life and to his or her heirs and assignees for seventy years after the author's death. Photographic works are protected for twenty years from the date of first publication, and cinematographic works for fifty years from the date of death of the last co-producer of the cinematographic work.

In Argentina, the author possesses certain inalienable rights to the copyrighted work itself that cannot be revoked, assigned or transferred to third parties (such as the right to preserve the integrity or the ownership of the work). However, the author has the power to fully assign to third parties the *economic benefits* deriving from the copyrighted work. An important exception to these inalienable rights was introduced by the Copyright Law in 1998 by recognizing "work made for hire" in connection with the development of computer software works. Consequently, unless

52. ARG. CONST. art. 17.

53. Ley 11.723, [1] A.L.J.A. 268 (Arg. 1933).

54. Ley 25.036, [LVIII-E] A.D.L.A. 5040, art. 1 (Arg. 1998).

55. *Id.*

56. Ley 11.723, *supra* note 53, at art. 4.

agreed otherwise, the author of a work made during the course of employment does not retain any rights, and all rights, economic or otherwise, correspond to the employer.

In order to obtain the protection of the Copyright Law, the copyrightable work and any related agreement must be registered with the National Direction of Copyrights (the "Copyright Registry"). The registration provides: (i) conclusive proof as to the existence, title, author and content of the work; (ii) a legal presumption as to who is the author of the work; (iii) the necessary comparative elements for the courts to determine the existence of illegal copies; (iv) a good faith presumption in favor of the registration holder in the event of a claim by a third party; and (v) information to the public regarding the availability of the copyrighted work for licensing and other contractual arrangements.

In order to obtain the protection of the Copyright Law, the author must deposit a physical copy of the work with the Copyright Registry.⁵⁷ Upon deposit, the Copyright Registry will publish in the Official Gazette for 30 days the relevant information concerning the work, and it will grant a certificate of ownership if no third party claim is filed. The deposit of the copyrighted work is valid for 3 years and may be renewed. The deposit of the copyrighted work is kept under complete secrecy and destroyed upon non-renewal.⁵⁸

The Copyright Law grants national treatment to those works made by foreign authors without regard to the country of origin; provided, however, that the foreign country also recognizes intellectual property rights. To obtain protection in Argentina, the author needs to show that it has complied with the copyright laws of the country where the work was first published. In this case, the term of protection granted in Argentina will be similar to the term granted by the foreign country or will be the term under the Copyright Law, whichever is shorter. Although not mandatory, the registration with the Copyright Registry is highly recommended because it will provide strong evidentiary value in the case of infringement in Argentina.

1.2 *Computer Software and Databases*

Argentina protects software and databases within the scope of

57. The actual requirements of the deposit will depend on the nature of the work. *Id.* at art. 58.

58. Decree 7616/63, A.L.J.A. 138 (Arg. 1963).

the Copyright Law.⁵⁹ The Copyright Law defines software works as those works consisting of one or more of the following: (i) designs of logical flows of data in a computer system; (ii) computer software, in both source and object code; and (iii) technical documentation for explanatory, support, training, development, use or maintenance purposes.⁶⁰ The Copyright Law defines databases as those works consisting of an organized group of interrelated data that has been gathered for storage, process and recovery purposes by means of computer-related techniques and systems.⁶¹

The specific registration requirements for computer software and databases will depend on whether they have been made available to the general public.⁶² "Publicly available" computer software works are registered by depositing with the Copyright Registry samples of the works together with any packaging material. "Non-publicly available" computer software and databases are registered by depositing all of the information that the author considers advisable in order to facilitate the identification of the work and the preservation of the confidential information.⁶³ The system allows the registration of both complete works and projects still under development, as well as the addition of new materials during the development period. Given the confidentiality of the registration, it also allows the protection of source codes, and by doing so, the author ensures a greater degree of protection in the event a court must decide on a piracy case related to the registered work. Publicly available databases are registered by depositing extended extracts of information, together with a written description of the database's structure, organization and main characteristics. The information provided by the author should be sufficient to provide an understanding of the database.⁶⁴

The registration is also available for software licenses, commercialization and distribution agreements and other similar arrangements in connection with computer software. This regis-

59. Ley 25.036, *supra* note 54, at art. 1 ("For purposes of this law, scientific, literary and artistic works include written materials of all nature and length, among which are included, computer programs both in source and object code, databases or compilations of other materials . . . without regard to the process of reproduction.")

60. Decree 165, [LIV-A], A.D.L.A. 203, art. 1 (Arg. 1994).

61. *Id.*

62. Software and databases are considered available to the public when they have been made available to the public for reproduction or commercial distribution or when their transmission has been offered for exploitation purposes.

63. This information is kept by the Registry in a sealed envelope that may only be opened upon judicial order of a competent court.

64. Decree 165, *supra* note 60, at art. 3.

tration constitutes legal evidence of the existence of the agreement and the rights of the parties vis-à-vis third parties. In addition, the registration may trigger the application of certain tax benefits for the parties to the agreements. As mentioned before, the Copyright Law expressly addresses the ownership of computer software developed by employees during the course of employment. In those cases, the Copyright Law grants the ownership of the work to the employer, and therefore, the employer may register the software with the Copyright Registry and have full enjoyment of all the rights granted by the Copyright Law. Any licensee or other authorized person can make only one back-up copy, which may only be used in case of destruction or damage of the original licensed work.

1.3 Websites

Websites have three elements that may be protected: (i) content, (ii) graphic design (“look and feel”), and (iii) source code. All of these elements are protected by the Copyright Law.⁶⁵ The content of a website may consist of: (i) an independent work capable of being protected as copyrightable work on its own, or (ii) information or data that, although not qualified for copyright protection, may be protected as a database if the information or data has been organized in a singular and particular form. The graphic design (“look and feel”) of the website, if original, may also be protected under the Copyright Law as an artistic work. The source code corresponding to the website may also be protected if it complies with the requirements set forth under the Copyright Law.⁶⁶

For practical purposes, the website may be registered with the Copyright Registry in three different ways: (i) as a non-previously published website, (ii) as a publicly available website, or (iii) as a periodic publication. If the website consists of a magazine posted on the Internet, the website may be registered as a periodic publication. If the website is subject to frequent or important changes, the changes should also be registered. The changes may be comprised in one or more filings and registered with the Registry periodically.⁶⁷

65. Protección Legal de un Website, *available at* <http://www.legalweb.com.ar/publicaciones/legal.html>.

66. *Id.*

67. *Id.*

2. Responding to Infringement

The holder of a copyright may oppose any and all forms of unauthorized copies of a registered work, regardless of the purpose for which the copy was made. Therefore, an unauthorized copy of a copyrighted work would constitute infringement of the author's rights even if the copy was made for private, not commercial, use.⁶⁸

The infringement of copyrights may give rise to both criminal and civil actions. Criminal actions can be based on fraud and may result in imprisonment of the infringing party and seizure of the unauthorized copies.⁶⁹ In addition, the copyright holder may seek recovery of damages by means of a civil court award.

3. Copyrights Overview and Conclusions

The Copyright Law provides adequate protection, and the Argentine government has been active in ensuring that Argentina complies with the international treaties to which the country is a party.⁷⁰

The enforcement of the Copyright Law has been improved. However, it still remains one of the greatest concerns of the copyright industry.⁷¹ Some of the major deficiencies that Argentina must address are inadequate application of criminal sanctions in piracy cases, delays in prosecuting criminal and infringement cases, use of illegal software copies by governmental agencies, lack of a coordinated campaign to prevent piracy and weak border controls to stop the import of illegal copies.

F. Patents

1. Scope of Protection

The Argentine patent law ("Patent Law")⁷² grants protection to any inventions⁷³ of products or processes that (i) contain nov-

68. See Delpach, *supra* note 29, at 200.

69. Ley 11.723, arts. 71, 72, [1] A.L.J.A. 268 (Arg. 1933).

70. See Office of the United States Trade Representative, *2002 National Trade Estimate Report on Foreign Trade Barriers: Argentina*, available at <http://www.ustr.gov/reports/ntr/2002/argentina.PDF>.

71. *Id.*

72. Ley 24.481, [LV-C] A.D.L.A. 2948 (Arg. 1995) (modified by Ley 24.572, [LV-E] A.D.L.A. 5892 (Arg. 1995)).

73. The Patent Law defines invention as any human creation that allows the transformation of substance or energy to the advantage of mankind. *Id.*

elty,⁷⁴ (ii) involve an inventive activity⁷⁵ and (iii) are capable of industrial application.⁷⁶ The novelty of the invention must be complete and worldwide. In addition, the invention must be capable of being protected under the Patent Law.⁷⁷ The term of the patent is 20 years from the filing date of the application with the National Institute of Industrial Property ("Patent Registry"); provided, however, that the patent holder pays the applicable patent annual fee to the Patent Registry. In Argentina, patents may be granted to individual persons or legal entities without regard to their nationality. Patents are granted on a "first to file" basis and are only valid in Argentina. Therefore, multi-country protection may only be achieved by filing multiple applications in each corresponding country. However, the date of filing of the patent application in Argentina may be used by the applicant to request priority in the other member countries of the Paris Convention.⁷⁸ The patent grants to its holder the exclusive right to prevent third parties from manufacturing, using, offering for sale, selling or importing the patented work in Argentina. However, third parties may request a compulsory license of the patented work when the holder of the patent does not exploit the invention within Argentina.⁷⁹ Patents may be transferred or licensed to third par-

74. However, the novelty will not be affected by the disclosure of the invention by the inventor at a national or international exhibition within one year prior to the patent application or priority date. *Id.*

75. In order for inventive activity to exist, it should exceed the mere application of available knowledge. There is inventive activity when the creative process or its results are not deduced from the state of the art in an evident form by a person normally skilled in the corresponding technical matter. *Id.*

76. There will be industrial application when the purpose of the invention is to obtain an industrial service or product capable of being manufactured or applied in a repetitive, serial or scale form. *Id.*

77. The Patent Law does not grant protection to scientific theories, mathematical methods, literary or artistic works, aesthetic creations, plans, rules and methods for carrying out intellectual activities, games, economic and commercial activities, computer programs, methods of diagnosis, surgical or therapeutic treatment applicable to humans or animals, living matters or substances pre-existing in the nature. *Id.*

78. The Paris Convention sets forth that the filing date of a patent application in one of the member countries will also grant priority in the other member countries. In order to obtain this benefit, the additional filing must be made within one year from the original filing date. Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.S.T. 1583, 24 U.S.T. 2140 (Argentina ratified the Paris Convention on February 10, 1967, and on October 8, 1980).

79. Third parties may request from the Patent Registry a compulsory licensing of the invention if (i) the invention has not been exploited within 4 years from the application date of the patent, or 3 years from the date that the patent was granted, or (ii) the exploitation of the invention has been interrupted for more than one year. In order to determine whether the invention has been exploited in Argentina, it is not

ties; however, these agreements must be registered with the Patent Registry in order to be enforceable vis-à-vis third parties. The basic rule set forth in the Patent Law is that patents are only granted to the inventors of the work. However, when the invention is developed by an employee during the course of work, the employer may claim patent rights over the invention if the inventive capacity of the employee was totally or partially within the scope of work for which the employee was hired.

2. Responding to Infringement.

Patent infringement may give rise to both civil and criminal actions, which must be filed with the competent federal court. Sanctions may consist of fines, imprisonment and the payment of damages. Additionally, the holder of the patent may request other remedies, such as the seizure and attachment of the infringing goods and/or of the equipment used to manufacture these goods. Sanctions apply to those who (i) knowingly produce or request the production of goods in violation of a patent; (ii) import, sell, display or introduce in Argentina goods in violation of a patent; (iii) illegally appropriate or disclose an invention; and (iv) illegally obtain the disclosure of the invention from third parties. In addition, the Patent Law mandates that those in possession of infringing goods must disclose the name of the person who provided the goods and the estimated value of the goods, as well as the time the goods began to be sold, under penalty of being considered an accomplice of the patent infringer.

3. Patent Overview and Conclusion

The Patent Law is one of the most controversial aspects concerning the protection of IPRs in Argentina, especially in connection with the protection of pharmaceutical products. Argentina has been inconsistent in fulfilling its obligations under the TRIPs and has consistently used its status as a developing country to delay the changes required by the international community.⁸⁰ Although Argentina has been prolific in enacting regulations concerning the protection of patents, the following problems still con-

required that the invention be manufactured in Argentina. Therefore, the requirement may be satisfied by the inventor by importing the invention into Argentina and selling and distributing the invention in a form sufficient to satisfy the demand of the local market. See Ley 24.481, [LV-C] A.D.L.A. 2948 (Arg. 1995) (as modified by Ley 24.572, [LV-E] A.D.L.A. 5892 (Arg. 1995)).

80. Argentina is on the USTR Special 301 Priority Watch List. See Office of the United States Trade Representative, *supra* note 70.

stitute major obstacles: failure to grant preliminary injunctions to deter patent infringements, failure to protect confidential information provided to the Patent Registry by patent applicants, failure to grant certain exclusivity for patents and failure to conduct legal proceedings without lengthy delays.

G. *Argentina Conclusion*

The protection of IPRs is the result of (i) clear definition of IP rights and obligations, events of infringement and remedies, and (ii) effective and timely enforceability of the IP rights and obligations and remedies. Argentina generally provides an adequate regulatory framework as to the definition of IPRs issues, rights and obligations, infringements and remedies. In addition, despite some important exceptions, Argentina incorporates new legal developments and bilateral and multilateral obligations in its national legal system within a reasonable time after their introduction.

The IP barrier in Argentina is on the enforceability side of the equation. Argentina has been unable, and in some instances unwilling, to strengthen the judicial system in order to reduce the term of conflict resolution, provide timely injunctive relief and increase the number of searches and criminal prosecutions of IPRs infringements. The governmental agencies in charge of supervising, applying and enforcing IPRs laws lack sufficient personnel and economic resources, and in those cases where resources exist, the performance of their duties is jeopardized by an overwhelmingly bureaucratic system. The customs and other enforcement authorities lack sufficient resources and training to identify IPRs infringement and to prevent the introduction and distribution of pirated and other illegal products.⁸¹

III. BRAZIL

A. *Introduction*

The explosive growth in Internet use promotes and allows its users many benefits such as easy access to all types of informa-

81. See Office of the United States Trade Representative, *1997 National Trade Estimate*, available at http://www.ustr.gov/pdf/1997_argentin.pdf. According to the *1997 National Trade Estimate*, Argentina presents the following levels of infringement: Records & Music 60%; Entertaining Software 95% (2001); Business Software Applications 62%; Motion Pictures 45%. *Id.* US industry estimates that Argentina's lack of appropriate protection of pharmaceutical products result in losses of over \$540 million a year. *Id.*

tion, the speedy exchange of information on a low cost basis, etc. This phenomenon might also lead to an increase in disputes or even lead people to disregard intellectual property laws. Information that can be easily accessed and copied can also be easily violated. The assertion, however, that Intellectual Property rights can be easily violated through the Internet does not render Intellectual Property laws obsolete.

Publications, products and services available through the Internet are usually directed towards the international market. Accordingly, intellectual property protection must have international application. Quite often, intellectual property registration protection is territorial. However, by virtue of numerous international treaties and conventions, the protection and enforceability of intellectual property rights is also available beyond a country's border.⁸²

In the last decade, Brazilian legislators introduced new concepts for the protection of intellectual property. Those statutes were the first step towards the construction of an international legal system for the digital era.

Brazil has been regarded as one of the most promising countries for the development of the Internet. Brazil has more Internet users than any other country in South America. Also, a study prepared by Network Wizard reveals that Brazil is one of the countries most actively seeking to participate in the global economy through technological development, with emphasis on IP protection legislative support.⁸³

This article addresses intellectual property protection for digital products and services including Web sites. It also discusses the new software law, registration of domain names and other recent enacted statutes and regulations.

B. Legislative Framework

For the purposes of the present work, while addressing Brazilian Intellectual Property ("IP") history, our main goal is to examine the conditions in which intellectual property law development took place, as well as to analyze what lies ahead in the near future.

In 1878, during the World Fair in Paris, many countries dis-

82. Karin Grau-Kuntz & Newton Silveira, *A Exaustão do Direito de Marcas na União Européia e o Mercosul*, 106 REV. DIR. MERC. 107, 121 (Braz. 1997).

83. Ivan Moura Campos, *Futuro da Internet: entre o elitismo e o computador popular*, Entrevistas, at <http://www.comciencia.br/entrevistas/internet/campos.htm>.

cussed the protection and enforceability of intellectual property rights. As a result, five years later, in March 1883, eleven countries, Brazil among them, joined the Paris Convention.⁸⁴

Inspired by the Paris Convention, Brazil's Intellectual Property Law was enacted in 1887. On December 11, 1970, Law No. 5648 created the National Industrial Property Institute ("INPI"), known as the Brazilian Patent and Trademark Office. INPI is a governmental agency responsible for the registration of intellectual property in Brazil and for the protection of those rights.⁸⁵ INPI analyzes requests for patent and trademark registration and examines transfer of technology contracts.

The Brazilian Industrial Property Code of 1971 addressed issues related to trademarks, industrial designs, inventions, utility models, etc.⁸⁶ For more than thirty years, this statute regulated matters involving intellectual property rights.

Brazil is a signatory of the Final Minutes of the Uruguay Round Trade Related Aspects of Intellectual Property ("TRIPS") Agreement.⁸⁷ The Brazilian National Congress approved, the

84. Newton Silveira, *Aplicação do Acordo Trips no Brasil*, 115 REV. DIR. MERC. 66, 66 (Braz. 1999).

85. "The National Institute of Industrial Property (INPI) is a Federal Autonomous Entity, created in 1970, linked to the Development, Industry, and Foreign Commerce Ministry (www.mdic.gov.br). Its main purpose, according to Law 9.279/96 (Industrial Property Law), is to execute, within national sphere, the norms that regulate the industrial property, considering its social, economic, legal, and technical functions. Another one of its functions [is] to pronounce itself regarding the convenience of executions, ratification and denouncement of conventions, treaties, pacts, and agreements related to the industrial property. Created in order to substitute the former National Department of Industrial Property, the Institute added to the traditional tasks of concession of marks and patents, the responsibility for the legalization of technology transference contracts and subsequently, for the registration of computer programs, corporate franchise contracts, registration of industrial designs and geographic indications." Instituto Nacional Da Propriedade Industrial [hereinafter INPI], at <http://www.inpi.gov.br/idiomas/ingles/inpi/inpi.htm>.

86. Lei 5.772, CÓD. PROP. INDUST. (Braz. 1971), available at <http://www.inpi.gov.br/legislacao/conteudo/codigo.htm>.

87. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. "The TRIPS Agreement aims an [sic] harmonization of domestic laws on industrial property of the member countries, taking, however, into account the differences existing among the domestic systems so as "to reduce misinterpretations and difficulties to the international trade." AIPPI Reports, *The Need and possible means of implementing the Convention on Biodiversity into Patent Laws, Question 159*, at <http://www.aippi.org/reports/q159/gr-q159-Brazil-e.htm> (last visited May 3, 2003). See also Newton Silveira, *Aplicação do Acordo Trips no Brasil*, 115 REV. DIR. MERC. 66 (Braz. 1999).

TRIPS Agreement in December 1995.⁸⁸

A year later, in May 1996, the new Industrial Property Law 9.279 was enacted. The Industrial Property Law brings Brazil's patent and trademark regime up to the international standards specified in the TRIPS Agreement.⁸⁹

The Brazilian intellectual property legal system is basically composed of the Copyright Law (Law 9.610 of February 19, 1998), the Software Law (Law 9.609 of February 19, 1998), and the Industrial Property Law (Law 9.279 of May 14, 1996)^{90, 91} In addition to these laws, other statutes that regulate intellectual property rights include Article 5 of the Brazilian Constitution, the Consumer Code (Law 8.078 of September 11, 1990), and the law regulating corporate names (Law 8.934 of November 18, 1994).⁹²

Intellectual property law has been quasi-internationalized by international treaties. Brazil is a signatory of several international treaties such as the Paris Convention on Protection of Intellectual Property, the Patent Cooperation Treaty and the Madrid Agreement. Brazil is a member of the World Intellectual Property Organization ("WIPO") and a signatory of the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention is an international treaty by which member nations recognize copyright protection for works originating within another member country.⁹³

88. On December 21, 1994, Brazil executed the TRIP Agreement in Geneva and on January 1, 1995 the Brazilian National Congress ratified the agreement. Silveira, *supra* note 81, at 70. International treaties and Conventions that Brazil has adhered are enforceable once they are approved by a two-thirds vote of each house of Congress, in two separate votes. LUIS ROBERTO BARROSO, *CONSTITUIÇÃO DA REPUBLICA FEDERATIVA DO BRASIL ANOTADA* 156, n.2 (Saraiva ed.) (1998).

89. Gustavo Starling Leonardos, *Dos Prazos de Validade das Patentes em Vista do Acordo Trips e da Nova Lei de Propriedade Industrial*, 758 REV. TRIB. 89, 100 (Braz. 1998).

90. Lei 9.279 (Braz. 1996) (On May 14, 1996, the Industrial Property Law (9.279/96) revoked the Industrial Property Code of 1971), available at http://www.direitonaweb.adv.br/legislacao/lei9279_96.htm.

91. Silveira, *supra* note 84, at 69.

92. See BRAZ. CONST. art. 5 §§ XXVII, XXVIII (1998). Article 5 of the Brazilian Constitution section XXVII –provides that “authors own the exclusive right to use, publish or reproduce their own works, and such rights may be transmitted to their heirs for a period fixed by law” and section XXVIII - “the following are assured, as provided by law: a) . . . b) the right of creators, performers and their respective syndicates and associations to monitor the economic utilization of works that they create or in which they participate.” Keith S. Rosenn, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, FEDERATIVE REPUBLIC OF BRAZIL BOOKLET 1, 4-6* (Gisbert H. Flanz ed. 2002).

93. A complete list of the countries which are members of the Berne Convention is set forth in the WIPO web page. World Intellectual Property Organization

C. Domain Names

The explosive growth in Internet use and the concurrent increase in the number of domain name registrations has called into question how trademark law applies to the Internet and has given rise to numerous domain name disputes. As the Internet usage increases, the influx of companies registering its domain names also increases.⁹⁴ Thus, if the listing of a domain name in a database were not regulated, it would create “a no man’s land.” As time passes by and “online land” becomes more valuable, the number of conflicts involving new online “territories” is likely to increase. In Brazil, corporations driven by competition and regulatory incentives, will try to get their respective domain name license and thus guarantee their right to exploit it.

“Domain names” are alpha-numeric addresses that identify and provide access to specific Internet sites. Domain names often are abbreviated versions of a company name or one of its trademarks.

1. Scope of Protection in Brazil

Brazilian domain names are registered with the Research Incentive Foundation of the State of São Paulo (“FAPESP”), a non-profit organization located in the city of São Paulo. The Science and Technology Minister, on May 31, 1995, enacted a “Portaria Interministerial” creating the Brazilian Internet Administration Committee.⁹⁵ The Committee is a public entity responsible for the registration and the management of Internet Domain Names within the Brazilian territory.⁹⁶ The FAPESP was appointed in 1996 by the CGI as the agency in charge of domain name registration and management in Brazil.⁹⁷

Resolutions 001 and 002 of the CGI establish the rules for registration of domain names in Brazil.⁹⁸ Domain name exten-

[hereinafter WIPO], Berne Convention for the Protection of Literary and Artistic Works, at <http://www.wipo.org/treaties/documents/english/word/e-berne.doc>.

94. Newton Silveira, *A Propriedade Intelectual na Internet e a Questão dos Nomes de Domínio*, 119 REV. DIR. MERC. 26, 31 (Braz. 2000).

95. Portaria Interministerial MC/MCT No. 147 (Braz. 1995), http://www.mct.gov.br/legis/portarias/147_95.htm.

96. *Id.* at art. 1.

97. Ana Amelia M. B. de Castro Ferreira, *Domínios Dominados - Simulação de Vão Para Registrar Um Ponto Br* (2003), at <http://www.conjur.uol.com.br/view.cfm?id=17811&ad=a>.

98. Comitê Gestor da Internet no Brasil, *Regulamentação*, at <http://www.cg.org.br/regulamentacao/resolucao001.htm> and <http://www.cg.org.br/regulamentacao/resolucao002.htm>.

sions can be of a generic nature (i.e. com.br or ind.br) or of a restricted nature (i.e. edu.br, gov.br, org.br). Domain name registrations under the extensions .BR, COM.BR, IND.BR, ORG.BR, G12.BR, NET.BR, MIL.BR, GOV.BR, ART.BR, ESP.BR, IND.BR, INF.BR, PSI.BR, REC.BR, TMP.BR, ETC.BR, AGR.COM, SRV.COM, FAR.COM, IMB.COM, FM.BR, AM.BR, TUR.BR, TV.BR are granted only to entities registered with the Brazilian Ministry of Finance's Corporate Taxpayer Registry ("CNPJ")^{99, 100}. The CGI, however, approved a new rule allowing foreign entities to register a .BR domain name without the CNPJ number, provided that a local representative is duly appointed. A foreign company has to provide a consularized power of attorney to a Brazilian entity to register a domain name on its behalf. The agent is not required to be affiliated with the foreign entity and can represent other institutions. Foreign entities are also required to file an affidavit of commitment to incorporate a subsidiary in Brazil within twelve months. The registration will be canceled in case the foreign entity does not establish a presence in Brazil within a grace period of one year from the registration.¹⁰¹

Additionally, the maximum number of registrations allowed per entity used to be ten domains. Since April 4, 2002, an entity is able to register as many domain names as it wishes. However, the restriction against registration of the same domain name under two or more generic DPNs was maintained.¹⁰² Nevertheless, there will be no restrictions on an entity applying for the registration of restricted DNS.

Individuals may register a domain name provided the Brazilian Ministry of Finance's Individual Taxpayer Registry (CPF/MF)

99. The Committee is responsible for the maintenance of Domain Names exclusive to Brazil as geographic location, in the following categories: gov.br, for government organizations; sp.gov.br or .rj.gov.br, for the federation states; org.br, non governmental organizations; com.br, commercial; mil.br, military; edu.br, educational; net.br, telecommunication companies; art.br, art institutes; esp.br, sports; ind.br, industries; inf.br, information; and .psi.br, for internet providers. There are also Domain Names related to professions such as, adv.br, for attorneys; arq.br, for architects; eng.br, for engineers; jor.br, for journalists; and med.br, for medical doctors. Comitê Gestor da Internet no Brasil, Regulamentação, Anexo II, at <http://www.cg.org.br/regulamentacao/anexo2.htm>.

100. Registro.br, Info, at <http://registro.br/info/dicas.html>.

101. Registro.br, Registro para empresas estrangeiras, at <http://registro.br/info/registra-estrangeiros.html>.

102. If a legal entity is the owner of ZZZ.com.br, it will not be able to register the same domain name under IN.BR. An entity cannot register one same domain name under two or more generic DPNs. Nevertheless, an entity will be able to have a registration of ZZZ.com.BR and ZZZ.NET.BR.

number is presented. The Top Level Domains available for individuals are ADV.BR, ARQ.BR, ENG.BR, ETI.BR, JOR.BR, LEL.BR, MED.BR, ODO.BR, PSC.BR, VET.BR, NOM.BR, QSL.BR, CIM.BR, MUS.BR, FND.BR, BMD.BR, TRD.BR, GGF.BR, ATO.BR, NOT.BR, MAT.BR, ADM.BR, BIO.BR, CNG.BR, CNT.BR, ECN.BR, FOT.BR, FST.BR, NTR.BR, PPG.BR, PRO.BR, SLG.BR and ZLG.BR.¹⁰³ In Brazil, domain names are granted on a first-come, first-serve basis.¹⁰⁴ FAPESP will refuse applications of domain names already registered or names containing certain reserved expressions, mainly comprised of well-known trademarks.¹⁰⁵

The FAPESP may cancel the registration of a Domain Name if it receives a written termination renouncing the registration or, by judicial order, if the Domain Name is not used for a non-interrupt period of 180 days. Additionally, FAPESP may cancel the registration of a Domain Name in cases of default in payment, either the initial payment or maintenance fees, if a notification to comply in thirty days is received and no action is taken. It may also cancel a registration if the rules established by Resolution 01/98 and future amendments are not followed. It should be noted that FAPESP can deny or cancel a registration based on lack of payment, but it will need a judicial order to cancel a registration of a domain name involved in an Internet crime.

FAPESP forbids the registration of some pre-defined names and concepts like "internet.com.br." It is not allowed to register domain names that may induce good faith third parties to err.¹⁰⁶ Other negative variations on organization names, for example, "yourcompanysucks.com" are also forbidden by FAPESP.

Since no statutory regulations regarding domain name disputes were enacted in Brazil, the policies and procedures to settle disputes involving domain names remain unclear. Some trademark owners, however, succeeded in obtaining preliminary

103. The resolution requires an individual to present a valid CPF number (equivalent to a Social Security number) to register a professional domain name. Comitê Gestor da Internet no Brasil, Regulamentação, Anexo II, at <http://www.cg.org.br/regulamentacao/anexo2.htm>. Some professional organizations have criticized this rule because it does not require showing of a valid professional license.

104. Res. 001/98 art. 1-I, available at http://www.mct.gov.br/legis/outros_atos/res1_98.htm.

105. Omar Kaminski, *UM "Screenshot" dos Nomes de Domínio no Brasil*, Instituto Paulista de Direito Comercial E Da Integração (2001), at <http://www.ipdci.org.br/revista/arquivo/011.htm>.

106. See Lei 9.279, arts. 124 (IV), 125 and 126, (Braz. 1996), available at http://www.direitonaweb.adv.br/legislacao/lei9279_96.htm.

injunctions against cybersquatters once they made a showing of bad faith and unfair competition.

On March 29, 2000, the Appellate Court of the Paraná State rendered a decision granting the trademark owner the title to a domain name registered by a third party in bad faith. The heirs and successors of the late Brazilian Formula 1 racer, Ayrton Senna, sought to prevent a private school, Laboratório de Aprendizagem Meu Cantinho Ltda., from using the domain name "ayrtonsenna.com.br".¹⁰⁷ The lower court held that the defendant registered "ayrtonsenna.com.br" in bad faith and entered a preliminary injunction suspending the registration. The Court of Appeals of the Paraná State held that the plaintiffs had the right to use the name because they registered the trademark "Ayrton Senna" with the Brazilian Patent and Trademark Office (INPI), prior to the defendant's registration of the domain name.

Additionally, one of the most famous domain name infringement cases in Brazil involves the Internet provider America Online Inc. ("AOL") versus America On Line Telecomunicações Ltda., a local internet provider that registered the domain name "aol.com.br" in 1997. In February 2001, AOL was able to freeze the domain name "aol.com.br."¹⁰⁸ The arguments presented by America Online Inc. in this lawsuit were based on their prior trademark rights over the expression "AOL", and the bad faith of the Brazilian provider who should have been familiar with the "aol.com" domain name.

2. Trademark and Domain Names

If a trademark is being infringed by a domain name, it is advisable to obtain evidence that the domain name was registered in bad faith. If the registrant is a cybersquatter, the trademark owner may have a reasonable chance to succeed in a domain name recovery lawsuit. In other words, if the distinctive formative element of the domain name is identical to or similar with a registered mark, the owner of the trademark registration with the INPI enjoys superior rights. Additionally, to establish the infringement, the owner of the trademark does not need to show that it uses the trademark. The exhibition of the trademark registration is sufficient to support his rights.

107. *Ayrton Senna Promoções e Empreendimentos Ltda. v. Laboratório de Aprendizagem Meu Cantinho Ltda*, Apelação Cível n. 86.382-5, <http://www.tj.pr.gov.br/consultas/judwin/ConsCodigoAco.asp>.

108. Kaminski, *supra* note 105.

The recent decisions involving domain name disputes have a direct impact on how and to what extent corporations protect their rights.¹⁰⁹ Therefore, many corporations are registering their trademark with the INPI to secure not only their trademark rights but also to secure their domain names.

FAPESP is not related to the INPI and grants registrations on a first come first serve basis without conducting a search with the INPI to see if a potential domain name registration infringes on an existing trademark. As a result, famous trademark owners were not able to register a domain name with their trademark because these famous names had been registered as domain names before the rightful owners could do so. On the other hand, domain name holders object to the policy that forces them to relinquish domain names when a trademark owner decides it wants a Web site with that particular name.

Having a trademark registered with INPI does not automatically entitle one to have the same domain name, but it puts the owner of the trademark a step ahead. Conversely, if you have a domain name and no record at the INPI, any INPI registered company is likely to prevail in litigation over the name.

It should be noted that when a trademark or a brand is registered with the INPI, it is classified according to the company's activities (wholesale, real estate, pharmaceutical, etc). Thus, one brand could be registered in multiple categories. Notwithstanding, with domain names, there are no categories for different activities, and names are registered on a first come, first serve basis. Therefore, there is the possibility of domain name disputes involving two owners of trademarks registered before the INPI. Some criticize domain name registration because it conflicts with traditional trademark law. Brazilian trademark law allows multiple parties to register the same trademark, but only one party may use the corresponding domain name.

3. Responding to Infringement

Disputes involving domain name registration in Brazil are solved through settlement between the parties or litigation. Before commencing litigation, it is advisable for the rightful owner of a trademark to serve a cease and desist letter seeking an immediate action from the domain name holder to stop the use of the

109. Waldemar Alvaro Pinheiro, *Do Registro de Marcas Alheias na Internet*, 753 REV. TRIB. 66 (Braz. 1998).

trademark as a domain name and its voluntary cancellation or assignment.

Many corporations are using alternative dispute resolution methods to solve disputes involving domain names. Brazilian corporations are presenting claims before national and international arbitration organizations such as the Internet Corporation for Assigned Names and Numbers panel ("ICANN"), a WIPO administrative organization.¹¹⁰

In addition, corporations should take precautionary measures and conduct audits to determine both the status of their trademarks and whether those marks have been registered as domain names with FAPESP.¹¹¹ Corporations with a number of related trademarks should consider registering each of their trademarks as a separate domain name. Also, future domain name holders should conduct a comprehensive trademark search before registering a domain name and investing money in the creation of a Web site.

Finally, corporations could consider partnering with search engines instead of relying mainly on domain names to locate their sites. The development of search systems allowing users to locate sites without relying primarily on domain names could lessen the importance of the domain name system and reduce the potential for conflicts with trademarks. These search systems may soon supersede the importance of domain names. Still, although these new systems could avoid potential conflicts, it could also generate other conflicts involving the "search tools" and wording criteria.

The proliferation of search engines and their growing importance in helping consumers navigate the Web has led to another battlefield between trademark owners and Web site owners - meta-tags. Meta-tags are HTML (hypertext markup language) tags used in the "hidden" header of a Web page.¹¹² To date, in Bra-

110. The first Brazilian company to present a claim before the WIPO panel was EMBRATEL, a telecommunication company. They claimed against the registration of the domain names "embratel.net" and "embratel.com" by a third party in the United States. The panel granted to Embratel the rights to its domain names. The decision was based on Embratel, as a well-known trademark worldwide. See *Empresa Brasileira de Telecomunicações S.A. - Embratel v. Kevin McCarthy*, 2000 World Intellectual Property Organization (WIPO) Case No. D2000-0155 (May 29), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0155.html>.

111. Trademark owners should also use search engines to determine who is using their trademarks in meta-tags.

112. These meta-tags are not displayed when the page is opened. However, they are easily determined by using your browser to look at the source code for a page. Some of the most popular search engines consider meta-tags to be part of the text of

zil, there exists no legal rule addressing this issue. Brazilian courts and scholars are divided on how to deal with “metatag”, “linking” and “framing.” Currently, the analysis is made case by case.

D. Trademark

Industrial Property law, which governs patents and trademarks in Brazil, was amended in 1997. The new law improved several aspects of Brazil’s intellectual property regime, providing patent protection for agrochemical products, pharmaceutical processes, etc. This new law also added provisions for the protection of “well-known” trademarks.¹¹³ In Brazil, registration of brand and commercial names are awarded based on the order of their receipt.

A trademark is a word, phrase, symbol or design, or a combination of the foregoing, used in commerce, which identifies and distinguishes one party’s goods and their source from another. A service mark is a trademark that identifies and distinguishes services rather than goods. The terms trademark and mark are used herein to signify both trademarks and service marks. In Brazil, all rights stem from the registration of the trademark with the INPI and no protection is awarded to an unregistered owner even though he may have been using a trademark for years.

Section 125 of the Brazilian Industrial Property Law establishes that reputed marks are protected in all classes of products and services. Hence, the protection encompasses even dissimilar goods not produced by the owner of the reputed trademark. Section 130 of Brazilian Industrial Property Law enables the owner to protect the material integrity and reputation of his trademark, which can be applied whenever the trademark is used for a dissimilar but offensive goods or services. Moreover, Brazil protects well-known trademarks, even for dissimilar goods and services, whenever there is a risk of association as defined by the Paris Convention and TRIPS.¹¹⁴ Additionally, articles 189 and 190 of the Brazilian Industrial Property Law provide that infringement of trademark is a criminal offense.¹¹⁵

the Web site, even though they do not appear on the page, and therefore rank these sites based upon the “hidden” meta-tags.

113. Eduardo Grebler, *A Nova Lei Brasileira Sobre Propriedade Industrial*, 111 REV. DIR. MERC. 100, 111 (Braz. 1998).

114. TRIPS Agreement, *supra* note 87, at § 16. (whose rules can be directly invoked by nationals or foreigners in Brazil).

115. Cód. PROP. INDUST. arts. 189, 190 (Braz. 1971). The crimes enumerated in

Disputes involving trademarks are generally resolved within the court system.¹¹⁶ Since Brazil is mainly operating with traditional legislation, many of the laws when applied to protection of intellectual property rights in the digital era are subject to varying interpretations.¹¹⁷ The Brazilian judiciary and civil services are considered fair, but their decision-making is hampered by time-consuming procedures.

E. Patent

Patents may be granted for the protection of inventions, utility models, and industrial designs. The Industrial Property Law 9.279/97 provides protection for substances which were not pat-

these articles are: a) to reproduce a trademark registration in whole or in part, without the authorization of the trademark registration holder; b) to imitate the registered trademark in a manner that induces confusion; c) to change a third party's trademark which identifies the product and then place it on the market; and d) to import, export, sell, offer or exhibit for sale, conceal or keep in stock, a product branded with a trademark illegally reproduced or imitated, in whole or in part; or a product held in a container or package carrying a legitimate mark of a third party. The penalty for these crimes is imprisonment and it may vary from 1 (one) month to 1 (one) year. AIPPI Reports, *Criminal Law Sanctions with regard to the Infringement of Intellectual Property Rights, Question 169*, at http://www.aippi.org/reports/ql169/ql169_brazil_e.html.

116. In a case involving a trademark dispute between Maeda S/A Agroindustrial, a Brazilian corporation established in 1976 as Agropem Agro Pecuaria Maeda, and Vibrac, another Brazilian corporation, "[t]he Third Panel of Brazilian Superior Court of Justice held that a prior trade name has legal grounds to oppose a trademark application even in case it is not in direct competition with the first. The court ruled that although trademark rights may not grant protection to goods in different classes, trade name protection is broader and covers any market segment.

The appellate court granted the exclusive right to Maeda S/A Agroindustrial over the trademark AGROPEN and determined that Vibrac do Brasil Industria e Comercio should cancel its trademark application. Maeda's product and services are related to seed and plants. Vibrac's products and services are related to veterinary drugs.

The appellate court decision is based on the Section 8 of the Paris Convention. Trade names do not need to be registered to be protected in all countries of the Union. Also, the court held that the fact that Maeda has changed its trade name did not weaken its rights."

Maeda S/A Agroindustrial applied for registration of the trademark 'Maeda Agropem' in 1976. Vibrac applied for registration of the trademark Agropem 20 years later. "Maeda started with a long judicial battle and had its exclusivity right granted by the lower court. The Court of Justice reversed the decision of the first instance ruling that a trademark must be considered well known to enjoy protection in different market segments. Maeda appealed against the decision claiming likelihood of confusion due to the similarity of consumers and likelihood of association." Erika Aoki, Brazil: Trade Name Protection (Feb. 2002) (intranet posting on file with author).

117. Luiz Guilherme Marinoni, *Marca Comercial, Direito de Invento, Direito Autoral, etc. Impropriedade do Uso de Ações Possessória, Cominatória e Cautelar. Cabimento de Ação Inibitória*, 768 REV. TRIB. 21, 31 (Braz. 1999).

entable under Brazil's Industrial Property Code of 1971, such as chemical compounds and pharmaceuticals. In addition, the Industrial Property Law extended the term of a products patent from fifteen to twenty years and improved protection for patents generally.¹¹⁸

To register a patent, an application must be submitted to INPI containing the inventor's claims, a full description of the invention, designs of the invention when applicable, and proof of compliance with all legal requirements.¹¹⁹ The registration process is lengthy and time-consuming.¹²⁰

As a rule, rights to any patent which is developed during the effectiveness of any agreement or statutory relationship, research or development; or in which the activity carried out by the employee, civil servant or individual hired to render services is expressly provided for; or which results from the nature of the work for which he was hired, will belong to the employer or contractor of the services, unless the parties agree otherwise.

However, if the patent is developed independently of any agreement or statutory relationship, and without the use of any resources, technological information, materials, facilities or equipment belonging to the employer or contractor of the services, the rights to such patent will belong to the employee, civil servant or individual rendering services. Rights to technological modifications or derivations belong to the author, provided this has been contractually established.¹²¹

Article 18 of the Industrial Property Law establishes that eve-

118. Grebler, *supra* note 113, at 104.

119. "The deposit of patent request and industrial designs can be effected in the Reception (shop) of INPI's head office in Rio de Janeiro[.] . . . Requests should be solicited by means of the special form, Model 1.01, Deposit of Patent Application, or Addition Certificate, or Model 1.06 (see filling instruction on the back of the form). . . . The requests should contain: . . . [a] Descriptive Report: [a] fundamental part of the patent document which describes, in a sufficient, precise and clear manner, the object of the request, highlighting with precision the result to be obtained in accordance with the nature of the required protection[; b] Justification: [a] fundamental part of the document, which defines the material for which protection, is requested, establishing the rights of the inventor/creator[;] . . . [c] Designs: [p]art of the request document which serves to facilitate or allow the perfect understanding of the request object described in the descriptive report, which can, in the case of a working model, define the scope of the protection[;] . . . [and d] Summary: [a] summary of the technical description of the patent request, which allows a short evaluation of, the material covered in it." INPI, Patent - DIRPA, Deposit of Application, at http://www.inpi.gov.br/idiomas/ingles/patente/conteudo/p_inform.htm.

120. NEWTON SILVEIRA, A PROPRIEDADE INTELECTUAL E A NOVA LEI DE PROPRIEDADE INDUSTRIAL 41 (Saraiva 1996).

121. Grebler, *supra* note 110, at 108.

anything contrary to the morality, sound principles and public safety, health and public order will be non-patentable within the Brazilian territory. The national laws and courts of Brazil define what is contrary to morality and public order. Hence, international intellectual property transactions may give rise to complex international conflict of law issues. These conflicts are likely to occur in cases where the national law excludes from patentability or prohibits the commercialization of foreign inventions. The Industrial Property Law regulates the crimes against patents, industrial designs, trademarks, geographic indications and the crimes of unfair competition.¹²²

F. Copyright

Brazil's copyright law generally conforms to world-class standards but copyright enforcement in Brazil continues to be uneven. Problems have been particularly acute with respect to sound recordings and videocassettes. In the last couple of years, however, enforcement of copyright laws against video and software piracy has improved and several corporations have had some success in using the Brazilian legal system to protect their copyrights. Vigorous industry anti-piracy campaigns have had a positive impact and general awareness among the populace has increased significantly.

The Brazilian legal system does not have an equivalent to the U.S. concept of "work for hire." A corporation, even an employer, cannot be the owner of the copyright over an invention. An employer, however, may acquire a copyright from an employee pursuant to an assignment of rights. This deficiency is particularly bad for Brazil's economic development because it induces companies to transfer research and development to countries with more attractive copyright protection. In Brazil there are few cases

122. Pursuant to Article 183 to 186 of the Industrial Property Law, the crimes for patent infringement are: "a) to manufacture a product which is patented, without the authorization of the patent owner; b) to use a patented process without the authorization of the patent owner; c) to export, sell, exhibit or offer for sale, keep in stock, conceal or receive, with an economic purpose, a product which is a patent infringement; d) to import a patented product without the owner's consent, for the purpose mentioned in item "c" above, provided that the product was not placed on the local market by the patent owner or with his consent; and e) to supply a component of a patented invention, provided that the final application of this component necessarily leads to the exploitation of the subject-matter of the patent." AIPPI Reports, *supra* note 115. The criminal remedies and penalties available for such crimes are: seizure; criminal complaint; imprisonment and fines. *Id.*

involving employers and employees' disputes because the job market discourages these potentials claims.

Special intellectual property law issues arise in building an Internet Web site. In Brazil, a web site owner will typically hire a Web site developer to design and/or help build the site. Typically, the developer will be an independent contractor and not an employee of the site owner for copyright purposes. In such cases, the Web site owner will not own the copyright in the work created by the developer. To acquire copyright ownership, the Web site owner will need to secure an assignment of the copyright.

Most countries' copyright laws provide that non-authorized copies violate an author's rights. Traditionally, the reproduction act involves the creation of a similar or equal written document or product.¹²³ Of course, an individual does not violate an author's rights if he goes to a bookstore, picks up a book, reads a passage and memorizes it. Notwithstanding, the violation occurs if that same individual photocopies a passage of the book without authorization. Accordingly, the violation of an author's rights requires one to make physical copies of a work as opposed to "mental" copies.¹²⁴

Over the World Wide Web, for example, a user might connect to a virtual bookstore and locate a book's file. As it is often the case, a user would have to download the book file from the Web to virtually "open" the book and read a passage. So, if a user downloads the book's file, would the user be in violation of the author's right? The answer is not clear and it can be argued that there would be a violation if the user fails to erase the book's file from his computer. By analogy, erasing the file may correspond to the individual returning the book to its shelf. Notwithstanding, it may be alleged that the user had an actual copy of the book file on his computer. Thus, even if the file was later erased, it does not alter the fact that the information was once copied. Similarly, the destruction of a photocopied passage of a book would not cure prior violation of the authors' rights.

The national legislation, however, is insufficient to address the problems of the dissemination of copyrighted works in the digital form. It is important to address the scope of protection afforded under the Brazilian Intellectual Property Laws because international treaties such as the Berne Convention, provide that

123. Silveira, *supra* note 94, at 26, 31.

124. ANGELO VOLPI NETO, COMÉRCIO ELETRÔNICO - DIREITO E SEGURANÇA, (Juruá 2001).

intellectual property matters such as the protection of copyrighted works are governed by the national law of each country.¹²⁵

Article 90, V, Law 9.610/98 provides that copyright owners have the sole discretion to allow the use and publication of a licensed right. Section V regulates copyright use and reproduction and its broad language may be applied to Internet providers.¹²⁶ Internet providers need previous authorization from authors before making a protected right available to their users. Also, the Brazilian legislators failure to address in detail the use and reproduction of copyright's rights in cyberspace does not render Law 9.610/98 obsolete. Section V's broad language may be read to include cyberspace protection to copyright.¹²⁷

Crimes against copyrights are embodied in the Brazilian Penal Code.¹²⁸ Brazilian Penal Code¹²⁹ prevents users from making multiple copies of copyright material.¹³⁰ Violators and anyone who tampers with copyright protections could face fines or imprisonment that may vary from one to four years. The Federal Government of Brazil, however, has not given police adequate tools or training to effectively enforce the law. In addition, the Brazilian

125. This method is known as principle of the national treatment. Online publications and services are typically covered by a combination of patent, copyright, trade secret and trademark law. Also, online publications and services are increasingly intended for the international market. Patent and trademark registration protection is territorial. Copyrights have been quasi-internationalized by virtue of conventions and treaties, but the scope of protection for computer software, especially with regard to the protection against non-literal infringement, depends on the domestic laws of each country. See TRIPS Agreement, *supra* note 87, at Annex 1C, pt. I.

126. JUAREZ DE OLIVEIRA, CÓDIGO DE PROPRIEDADE INDUSTRIAL: LEI N. 9.279 DE 14-5-1996; LEI DE SOFTWARE: LEI N. 9.609 DE 19-2-1998; LEI DE DIREITOS AUTORAIS: LEI 9.610 DE 19-2-1998 79-81 (Oliveira Mendes 1998).

127. A case where the defendants Jurisinformatica Ltda, Wide Soft Sistemas and Mario César Bucci published at the web site <http://www.jurinforma.com.br> legal articles authored by the plaintiff, João Antonio César da Motta. *João Antonio César da Motta v. Jurisinformatica Ltda et al.*, 6ª Vara Cível Central de São Paulo, Processo n. 000.99.065490-7, 04/23/2001, available at <http://www.uol.com.br/direitoautoral/jurisprudencia0501.htm>.

128. CÓD. PEN. (Braz. 1940) (Law Decree No. 2.848 of December 7, 1940 created the Código Penal).

129. Pursuant to section 184 of the Brazilian Penal Code, the following acts are described as crimes: "a) to violate a copyright; b) to reproduce an intellectual work, phonogram or video, by any means, with profit intentions, without the author's or the producer's authorization; and c) to sell, exhibit for sale, import, rent, buy, hire, lend, exchange or stock, with profit intention, an original or a copy of an intellectual work, phonogram or video, without the author's or the producer's consent." AIPPI Reports, *supra* note 115.

130. P.R. TAVARES PAES, NOVA LEI DA PROPRIEDADE INDUSTRIAL 188 (Revista dos Tribunais 1996).

Penal Code should be amended to provide higher fines that create a true deterrent to infringement. Brazil should also increase the effectiveness of the criminal enforcement system and decrease delays in the judicial process.

G. Software

In Brazil, rules for the protection of software as well as penalties for noncompliance with such rules are established in Law 9.609 of February 19, 1998, the New Software Law. The new software copyright protection law contains amendments that introduce a rental right and an increase in the term of protection to fifty years. It also offers standard protections for software (life of the author plus fifty years).

Enforcement of copyright law related to software is improving, but piracy is a continuing problem. Sources differ regarding the volume of pirated software in Brazil, but estimates range from 40% to 70 % of the market. With national campaigns and effective lobbying, software manufactures have successfully raised the awareness of the Brazilian business community of the importance of complying with copyright protection legislation.¹³¹ Additionally, the Software Law, in Article 12, describes the penalty and the criminal proceedings for crimes against software, relating to infringement of computer programs' (software) rights.¹³²

H. Disputes

Effective and timely dispute resolution mechanisms are essential to the protection of intellectual property rights. To date, conflicts involving intellectual property rights have been solved on a case-by-case basis and the Brazilian courts have been sensitive to the existence of earlier rights of the plaintiffs in various areas (trademarks, civil names, trade names etc).¹³³ The generally inef-

131. *Brazil Fights Back Against Piracy*, LATIN LAWYER ONLINE (Oct. 2002), at http://www.latinlawyer.com/Country/main_fs.cfm?area=litigation.

132. Lei 9.609 (Braz. 1998), available at http://www.senado.gov.br/netacgi/nph-brs.exe?sect1=NJURLEGBRAS_SEMICONE&s1=@docn=000001966&1=20&u=/www/legbras/&p=1&r=1&f=G&d=NJUR. Pursuant to article 12 of the Software Law, the following acts are described as crimes: "a) to violate a software; b) to reproduce, by any means, a software, in whole or in part, with profit intention, without the author's or his representative's consent; and c) to sell, exhibit for sale, import, rent, buy, hire, keep in stock, with profit intention, an original or a copy of a software produced with a software violation." AIPPI Reports, *supra* note 115.

133. *Jurisprudência Seleccionada*, 760 REV. TRIB. 151, 154 (Braz. 1999).

ficient nature of Brazil's courts and judicial system has complicated the enforcement of intellectual property rights.

Additionally, alternative dispute resolution, such as mediation and arbitration, are now widely regarded as an efficient, quick and cost-effective way to resolve intellectual property disputes.

I. Brazil Conclusion

The development of Internet and other online products and services is directly related to and places special importance on the development of intellectual property statutes. Intellectual property protection helps reduce the risks of online piracy and stabilizes electronic commerce.

The Brazilian legal system grants intellectual property owners that have a registered patent, trademark, commercial name or other intellectual property right, the right to intervene and protect their interests in cases of misappropriation of their property rights. In theory or on paper, Brazil provides for a greater protection of industrial and intellectual property rights than many developed countries.

At the same time, when intellectual property rights are at issue, making paper rights a reality is not the only task for the Brazilian's courts and the federal, state and county governments. Ultimately, it requires an international effort with respect to all countries compliance with the Brazilian statutes and registration process with the INPI. The protection of intellectual property rights should not only be enforced when there is a breach. Usually, the companies that have failed to follow registration procedures with the INPI would later claim that Brazil's intellectual property law offers no protection. In response, it can be argued that although they may be a rightful owner they were given the opportunity but failed to comply with the local intellectual property filing requirements and they should not receive the same benefits and protections as another intellectual property owner that fulfilled all requirements. Therefore, this work's critics are not limited to individuals and corporations that disregarded intellectual property rights of third parties. It is also directed at the legitimate owners or holders of intellectual property rights which, by filling their rights with the competent agency, would be the first ones to "make paper rights a reality."

IV. FINAL CONCLUSION

IPRs have wide spread effects on most aspects of human creativity, both economic and cultural.¹³⁴ The advent of the digital era, with the introduction of innovative technologies and the Internet, has reemphasized the value of IPRs as a way to offer incents to “creators to produce and disseminate new creative materials.”¹³⁵ Consequently, multiple initiatives (private and governmental) have emerged to provide IPRs with adequate protection.

The protection of IPRs requires a regulatory framework that (i) provides legal rules that clearly define rights and obligations, events of infringement and remedies, and (ii) ensures the actual enforcement of these legal rules. In addition, the globalization process has mandated that protection of IPRs be guaranteed at both national and international levels. As a result, most of the Western countries have enacted domestic laws and subscribed to bilateral, regional and international agreements providing for the protection of IPRs.

Latin America has not been absent in this process. Argentina and Brazil have substantially strengthened the protection of IPRs during the last ten years. Accordingly, these two countries have managed to reform domestic regulations and subscribe to international agreements that, to varying degrees, follow the guidelines and fulfill the needs of the international IP community.

Despite these regulatory advances, Argentina and Brazil do not provide adequate enforcement of domestic and international regulations and, consequently, these countries are very deficient in their protection of IPRs holders. Deficient enforcement originates from institutional weaknesses in the judicial system, ineffective legal and administrative procedures, absence of coordinated national campaigns directed to prevent infringement, inadequate training, lack of resources, and multilevel governmental bureaucracies that dilute accountability and produce chronic delays in the prosecution of IP infringement.

The deficient enforcement of IPRs constitutes an actual barrier for the protection of IPRs in Argentina and Brazil. Lack of enforcement distorts the actual cost of creating, transferring and acquiring new technologies, knowledge and proprietary works. In addition, it increases the market risk and the cost of doing busi-

134. See Primer on Electronic Commerce and Intellectual Property Issues, The Impact of Electronic Commerce on Intellectual Property, WIPO, available at <http://ecommerce.wipo.int/primer/>.

135. *Id.*

ness in the local markets and, thus, diverts investments and technology flows to other countries with lower IP barriers.

Argentina and Brazil are on the right path and should continue to improve their respective regulatory frameworks. However, without actual commitment and enforcement of IPRs, any prospect of increasing their global competitiveness may turn out to be illusory.