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Brazil's first software law has been in effect since December 1987.[1] Prior to that time software was not formally protected under Brazilian law. Although some legal scholars and lawyers argued that software was protected by the 1973 Brazilian Copyright Law,[2] no clear protection for software ever developed in the courts. Other legal arguments for the protection of software, founded on varying principles such as patent law, trade secrets, and unfair competition, never provided adequate protection. The new law places computer software squarely within the ambit of copyright protection, in accordance with the legal protections now offered in most of the developed countries of the world. A few unique provisions in the new law, however, set it apart from the copyright protection available in other countries. In general, the new law provides a new legal framework for the protection of computer programs and for the definition of opportunities for marketing programs in the Brazilian market. Regulations pursuant to the law were published on May 16, 1988.[3] The following is a general description of the law and the regulations pertaining thereto.

I. Protection of Programs

Protection of an owner's rights against infringement is granted for a twenty-five year period, beginning on the date of introduction of a program

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1. Software Law, Law No. 7.646 of Dec. 18, 1987, DIARIO OFICIAL [D.O.] 22, 221–22, 224 (Dec. 22, 1987) [hereinafter Software Law].

2. Copyright Law, Law No. 5.988 of Dec. 14, 1973, XXXVII LEX. 1917–34 (Dec. 1973) [hereinafter Copyright Law].

3. Software Regulations, Decree No. 96.036 of May 12, 1988, D.O. 8457–60 (May 16, 1988) [hereinafter Software Regulations].

into the market of any country of the world.[4] The law defines a "computer program" as an organized set of instructions in natural or codified language, contained in any type of physical media, necessary for the functioning of automatic data processing machines, devices, instruments, or related equipment based on digital techniques.[5]

The sole condition for receiving protection is the existence of an equivalent level of protection in the country of origin of the program.[6] Therefore, for example, a U.S. software author, to avail itself of protection under the new law, would have to show that the United States offers similar protection to authors of computer programs. No prior registration is required to receive protection; however, owners of programs may, at their discretion, register their products at an agency to be named by the National Copyright Council.[7] Such voluntary registration is confidential and likely to facilitate the effectiveness of future judicial or administrative measures taken to prevent infringement. Consequently, owners of programs that are likely to be copied in Brazil should seriously consider obtaining such registration. The Software Law clearly dispenses with the need for registration to obtain protection, although registration is required for marketing programs in Brazil.

The Software Law indicates four cases in which no infringement will be deemed to exist.[8] The most important one is where there is a similarity between a particular program and a prior copyrighted program, whether foreign or Brazilian. No violation exists when the similarity of the subsequent product is due to (i) functional characteristics in application, (ii) compliance with legal or regulatory rules or technical standards, or (iii) technical limitations on the possibilities for alternative forms of design.[9] The scope of these broadly defined protection withholding provisions will depend on administrative interpretation since the regulations are silent in this respect.

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4. The Software Regulations, *id.* art. 6, state that "introduction" of a program occurs when the author "uses or places a program at the disposition of another," whereas the Copyright Law, *supra* note 2, art. 4 refers to the "publication" of a copyrighted work. The differences between these two concepts are not entirely clear, although the Copyright Law concept is more precise and easier to apply.

5. Software Law, *supra* note 1, art. 1; Software Regulations *supra* note 3, art. 2.

6. Software Law, *supra* note 1, art. 3, § 2.

7. *Id.* art. 4; Software Regulations, *supra* note 3, arts. 7–11. The National Copyright Council is usually referred to as the "CNDA," an acronym for *Conselho Nacional de Direito Autoral.*

8. Software Law, *supra* note 1, art. 7.

9. *Id.* § III. The other three cases are: (1) reproduction of a computer program rightfully acquired, to the extent that such reproduction is necessary for use of the program; (2) partial duplication for teaching purposes, provided the author and program are specifically cited; and (3) integration of a program into a more comprehensive program or system, provided such integration is necessary for the user's end use and the integrated system or program is used exclusively by the party that undertook the integration.

II. Sales in the Brazilian Market

From a business perspective, one of the most important provisions of the Software Law is the one that defines Brazil's market reserve policy. All programs intended to be marketed in Brazil, whether foreign or domestic, must be registered with the Special Informatics Secretariat[10] (commonly called SEI).[11] Registration is necessary for business transactions to be legally valid and, in the case of foreign program owners, to allow legal remittances of payments through the banking system;[12] it is the administrative act that creates the right to sell a particular type of program in the Brazilian market. SEI will classify programs according to their development in Brazil or abroad, and will consider whether their development was the result of collaboration between Brazilian and foreign enterprises.[13] The definitions of the basic computer law of 1984 (the so-called Informatics Law)[14] will be used to determine the "nationality" of an enterprise.[15]

Two significant impediments are imposed solely on non-Brazilian firms. First, the right to marketing can only be granted to a foreign firm when the programs concerned are intended to be used in equipment that has previously been marketed by foreign firms in Brazil.[16] Second, and perhaps more significantly, registration of programs produced by firms dom-

10. *Id.* art. 8.

11. SEI is an acronym for *Secretaria Especial de Informatica.*

12. Software Law, *supra* note 1, art. 8, § 3(II).

13. *Id.* art. 8. The Software Regulations outline the procedures for such registration. Software Regulations, *supra* note 3, art. 13 divides programs into the following six categories: (1) programs developed in Brazil, by individuals who are residents and domiciled there, or by Brazilian companies; (2) programs developed as a result of "cooperation" between Brazilian and non-Brazilian companies pursuant to a SEI-approved project; (3) programs developed by a non-Brazilian company, which technology and marketing rights in Brazil relating thereto have been transferred to a Brazilian company, in accordance with an administrative ruling or an appropriate contract, approved by INPI; (4) programs developed in Brazil by non-Brazilian companies; (5) programs developed by a non-Brazilian company, which rights as to marketing in Brazil have been granted to a Brazilian company; and (6) programs which cannot be included under the categories set forth above. Further, SEI may not require that trade secrets or other confidential information be divulged. *Id.* art. 24. Within fifteen days of filing at SEI, SEI must publish a record of applications received so that interested third parties may submit to SEI administrative motions or requests concerning such applications. *Id.* art. 22. Thus, software authors (both foreign and Brazilian) may wish to monitor SEI's publications to verify that no other person submits a program in violation of their property rights.

14. Informatics Law, Law No. 7.232 of Oct. 29, 1984, XLVIII LEX. 534–43 Oct. 1984 [hereinafter Informatics Law].

15. Software Law, *supra* note 1, art. 8. The Informatics Law, *supra* note 14, art. 12, defines a Brazilian "enterprise" as: a company organized under Brazilian law, headquartered in Brazil, under the control of Brazilian residents, with no less that 70 percent of all voting stock held by Brazilian residents.

16. Software Law, *supra* note 1, art. 12; Software Regulations, *supra*, note 3, art. 10.

iciled abroad depends on SEI's ascertaining the absence of a similar program manufactured by a Brazilian enterprise.[17] This provision is particularly relevant with regard to programs produced by Brazilian firms that can be used in equipment produced by foreign companies.

The criteria to be used in SEI's decisions on the similarity question consist of vague norms. Initially, to give rise to a "similarity" decision SEI must find the existence of "functional equivalency." The three main considerations in determining "functional equivalency" are: whether the local product is original and independently developed; whether the Brazilian program exhibits substantially the same performance characteristics, considering the type of use for which it is intended; and whether a domestic program will be used in equipment and processing configurations similar to equipment manufactured by foreign enterprises.[18] Furthermore, facts showing that a program follows "established national practices" may, if deemed pertinent, add to an inference of similarity.[19] Finally, the local product must perform the same functions; in this respect, consideration may be given to the particular "characteristics of the domestic market."[20]

Foreign computer programs can be marketed in Brazil only by Brazilian companies,[21] with one narrow exception.[22] Brazilian firms wishing to sell programs produced by foreign enterprises must execute written contracts concerning the sale or license of programs and such contracts must be approved by the Brazilian Institute of Industrial Property (commonly called the INPI),[23] which should obtain the opinion of SEI in processing such registration.[24] Without such approval, payment of royalties abroad

17. *Id.* art. 8, § 2; Software Regulations, *supra* note 3, art. 3.

18. Software Law, *supra* note 1, art. 10(a). The Software Regulations, *supra* note 3, art. 3, shed some additional light on the similarity test, however, they continue to use subjective language. For example, the presence of "substantially the same performance characteristics" between two programs is clarified as producing "essentially the same effect." The Software Regulations provide that the similarity test should consider the type of application of the software, the current conditions of the Brazilian market for such software, and the similarity of the equipment in which different programs might be used. The market conditions criterion is especially vague and would seem to allow SEI to base decisions on political and economic factors (as opposed to strictly technical and objective considerations).

19. Software Law, *supra* note 1, art. 10(b).

20. *Id.* art. 10(d).

21. *Id.* art. 28. Foreign software can be directly imported into Brazil by the actual user, however, only one copy may be imported. *Id.* art. 30. Such programs are not subject to registration with SEI and should require, as regards governmental approvals, only the issuance of exchange control approval by the Central Bank of Brazil. Software Regulations, at *supra* note 3, arts. 14, 25, § 2.

22. Software Law, *supra* note 1, art. 12. The exception applies to programs designed for use in hardware marketed in Brazil by non-Brazilian companies.

23. INPI is an acronym for *Instituto Nacional da Propriedade Industrial.*

24. Software Regulations, *supra* note 3, art. 7.

through the banking system[25] will not be permitted and the contractual relationship between the foreign company and its Brazilian distributor will not be legally recognized.[26] To receive approval, the royalties may not exceed the world market prices and must be based on an amount per copy. Payments may not be calculated on the basis of production, sales, or profits made by the Brazilian purchaser or licensee.[27] The agreements must take the form of license agreements or assignments and should allocate liability for collection and payment of applicable Brazilian taxes. In addition, such agreements cannot limit the Brazilian company's ability to produce, distribute, or market the programs covered by the agreement. The Software Law also prohibits "exclusivity," which was probably intended to restrict the foreign licensor's ability to restrict Brazilian companies from carrying competing programs.[28]

III. Procedural Rules and Other Provisions

SEI must render a decision concerning registration of a program (which, in the case of a denial, must include the reasons for such denial), within 120 days after a request is filed.[29] Its failure to take any action results in a deemed registration of the program in question.[30] Registration is granted for a minimum three-year period, and will be automatically renewed unless a locally produced similar program has appeared in the domestic market.[31] The National Council on Informatics and Automation[32] decides on appeals taken from SEI decisions.[33]

In criminal or civil proceedings a judge may, as a preliminary measure, order the seizure of disputed products.[34] The Software Law also specifies

25. The Central Bank of Brazil is responsible for issuance of all exchange control authorizations for payment of amounts due in connection with the importation by Brazilian companies of software programs.

26. Software Law, *supra* note 1, art. 28.

27. *Id.* art. 29.

28. *Id.* art. 27(a). The drafting of this provision is not clear on its face and may be interpreted in one of at least three ways. First, as mentioned in the text, it may bar the foreign company from prohibiting the Brazilian licensee/distributor from carrying other products. Second, it could be read to mean that the Brazilian licensee/distributor cannot be granted exclusivity for production or distribution of a program. Third, it could be interpreted to mean that both sides are prohibited from demanding exclusivity from each other.

29. *Id.* art. 11.

30. Software Regulations, *supra* note 3, art. 33. All decisions or registrations to be rendered by the INPI, SEI, or the CNDA are considered approved if the agency concerned does not take any action within 120 days of the date of filing with such agencies. *Id.* art. 34. The Central Bank is not included in this provision.

31. Software Law, *supra* note 1, art. 9.

32. This council is commonly referred to as CONIN, an acronym for *Conselho Nacional de Informatica e Automacao.*

33. Software Regulations, *supra* note 3, art. 7.

34. Software Law, *supra* note 1, art. 38.

the sanctions that may be imposed on persons violating its provisions[35] and specifically authorizes injunctive relief (a relatively uncommon remedy in Brazilian law) as well as recovery of losses and damages.[36]

An unusual aspect of the Law is its imposition of certain obligations on the author of software being marketed in Brazil.[37] For example, authors must supply information relating to corrections in programs and must guarantee the suitability of a program to the purpose for which it was developed. In addition, throughout a program's technical validity period a copyright holder cannot withdraw the program from the market unless he indemnifies interested third parties for damages suffered as a consequence of withdrawal.[38]

IV. Conclusion

The Software Law and its regulations are important steps toward protection of software in Brazil. Nevertheless, they leave many important questions regarding such protection unanswered. Their effectiveness will be determined in the coming months as their provisions are put to practical use by software developers. Additional clarification will come through judicial contests that will arise under the new laws concerning its equivocal provisions, and from additional rules and interpretations that may be published by the various governmental agencies involved in the regulation of software in Brazil.

35. Infringement of a software copyright is punishable with a six month detention, plus a fine. *Id.* arts. 35 & 37.

36. Unlawful importing or exporting of programs for sale, including those imported or exported for demonstration purposes is punishable with a one to four year detention, plus a fine. The statute of limitations for violations of the law is five years. *Id.* art. 40.

37. *Id.* art. 24. Both the holder of the copyright and the distributor can be held liable for failure of a program to perform adequately. *Id.* art. 26.

38. *Id.* art. 25.