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Copyright Protection and the Marketing of Software in Brazil: The New Legal Framework

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In late 1987, Brazil enacted a new software law. This law does not clarify the "market reserve" policy that Brazil enacted in 1981 to reserve the market for small computer systems and their accessories to Brazilian-owned companies. Instead, it establishes the legal framework that governs the marketing and protection of software in Brazil. This framework is relevant both to foreign producers of computer systems who can export to Brazil despite the "market reserve" policy and to foreign producers of software. Under this framework, foreign producers of computer systems and software must comply with various requirements to ensure that the agreements they enter into with Brazilian parties will be enforceable.

This article is divided into two parts. Part I discusses the rules that govern copyright protection of software in Brazil. Part II discusses the rules that govern the marketing of software in Brazil, explaining the so-called "enrollment" and "approval" requirements and outlining Brazil's import regulations foreign exchange policy, tax regulations, and dealer legislation.

I. Copyright

Law No. 7,646 of December 18, 1987 (the Software Law), specifically extends copyright protection to software. Non-Brazilian software is entitled to copyright protection to the extent that Brazilian software receives similar protection in the country of origin of the non-Brazilian software. Because

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Brazilian software should be entitled to copyright protection in many developed countries,[1] software from these countries should automatically be entitled to copyright protection in Brazil. In Brazil, software may also be entitled to copyright protection under the Berne and Universal Copyright Conventions, provided the country of origin for the software is also a signatory to these Conventions.[2]

A. Term

Software will enjoy a twenty-five-year term of copyright protection. This term will begin when the owner first "publishes" (i.e., releases) the program in any country.[3] The Software Law does not specify whether software first published prior to the Law's effective date[4] qualifies for copyright protection. Most practicing attorneys believe that such software should qualify.

B. Coverage

Copyright protection covers only the program. By definition, this protection should also extend to firmware (i.e., microcode). Although this protection does not cover technical documentation, written instructions, and user manuals, such materials should be entitled to copyright protection as "literary works" under the Brazilian Copyright Law.[5]

C. Registration

The Software Law does not require software owners to register their software to benefit from copyright protection. The software may, however, be registered with the National Institute of Industrial Property (INPI)[6] to establish prima facie evidence of the copyright.

To register software with INPI, the owner must disclose: the author of the program; where and when the program was first released; and other information

1. *E.g.*, England, France, West Germany, Japan, and the United States offer copyright protection to software.

2. Berne Convention (Paris Text, July 24, 1971), art. 3, promulgated in Brazil by Decree No. 75.699 of May 6, 1975, Diario Oficial [D.O.] (May 9, 1975); and Universal Copyright Convention (Paris Text, July 24, 1971), arts II and III, promulgated in Brazil by Legislative Decree No. 55 of June 28, 1975, D.O. (June 30, 1975).

3. Software Law, Law No. 7.646 of Dec. 18, 1987, art. 3, Diario Oficial Da Uniao [D.O.U.] (Dec. 22, 1987) [hereinafter Software Law].

4. Dec. 22, 1987.

5. Copyright Law, Law No. 5.988 of Dec. 14, 1973, XXXVII Lex. 1917-34 (Dec. 1973) [hereinafter Copyright Law].

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

that establishes the authorship and identity of the software.[7] The owner also must provide INPI with portions of the program in "human-readable" language (i.e., source code) "to establish the independent creation and identity of the program."[8] Although not specifically indicated in the Software Law, the software owner should be able to decide what portions are necessary to establish such independent creation and identity.

The Software Law and its implementing regulations require INPI to treat the information that the owner discloses as confidential for a minimum of five years.[9] INPI will renew this confidentiality period if the owner makes a specific request and pays applicable fees. During the initial confidentiality period and any renewal periods, INPI is authorized to disclose this information only in response to a court order or at the owner's request.

D. Noninfringements

The Software Law does not consider the following acts to be copyright infringements: the duplication of legally acquired software, if necessary to use the software (e.g., back-up copies); the use of software for educational and training purposes, if the software and its author are properly identified; or, the integration of the software into other application or operating software, if technically required to allow the end-user to use the software for its intended purpose.[10]

In addition, a preexisting program will not be deemed to infringe another copyrighted program when similarities arise from: functional characteristics of the programs; compliance with legal, administrative, or technical rules; or the inability to express the program in an alternative form (i.e., the merger of the "expression" into the "idea").[11] Under a literal interpretation of this rule, if a developer is alleged to have infringed the copyright of a preexisting program and had access to that program, the developer cannot conversely use any of the three justifications of this rule to demonstrate that there was no infringement.

This rule should not apply to contractual trade secret protection. Therefore, in a license or distribution agreement, a foreign company should be entitled to restrict a Brazilian licensee from copying, using, or integrating the licensed software even in ways that would not constitute copyright infringement. Because distribution agreements must be submitted for approval to the Brazilian Special

7. Software Regulations, Decree No. 96.036 of May 12, 1988, art. 8, D.O.U. (May 16, 1988) [hereinafter Software Regulations].
8. Software Regulations, *supra* note 7, art. 9.
9. Software Law, *supra* note 3, art. 4, para. 3; INPI Normative Act No. 95 of Dec. 5, 1988.
10. Software Law, *supra* note 3, art. 7.
11. Software Law, *supra* note 3, art. 7(3).

Secretariat of Informatics (SEI),[12] however, SEI may deem such contractual restrictions to be unacceptable "limitations on production or distribution."[13] It remains unclear whether SEI would accept a provision that establishes that the foreign company will own all rights in any such copy, modification, or development.

E. Modifications and Developments

Under the Software Law, a licensee who modifies software with the consent of the licensor is presumed to own the copyright in the modified software.[14] This legal presumption assumedly may be modified or supplemented by contract. For this reason, when a foreign company executes agreements with Brazilian end-users or distributors, it should require the end-users or distributors to acknowledge that the foreign company will own all rights in any modification or development of its software. As an additional precaution, the agreements should also require the end-users or distributors to execute any instrument that may be appropriate to assign such ownership to the foreign company or to perfect such ownership in the company's name. Again, it remains unclear whether SEI would accept such provisions when imposed on a distributor.

The Software Law does not specify who is entitled to the copyright in software that has been modified *without* the consent of the copyright owner. Such unauthorized modifications or development should constitute copyright infringement because the limitations seem to presume that a software developer has lawfully obtained the right to use the original software.

F. Work for Hire

Under the Software Law, an employer or contractor is presumed to own the copyright in software that its employee or subcontractor develops during the employment or contractual term, but only if the software was developed by using the employer's or contractor's equipment and was within the scope of employment or subcontract.[15] The employee or subcontractor is presumed to own the copyright in software that it develops without using the employer's or contractor's equipment and outside the scope of employment or subcontract.[16]

The Software Law does not indicate who owns the copyright in software that an employee or subcontractor develops within the scope of the employment or subcontract, but without using the employer's or contractor's equipment, or vice versa. To resolve this question, the Brazilian courts may rely on provisions of the

12. SEI is an acronym for *Secretaria Especial de Informatica.*
13. Software Law, *supra* note 3, art. 27.
14. Software Law, *supra* note 3, art. 6.
15. Software Law, *supra* note 3, art. 5.
16. *Id.*

Brazilian Industrial Property Code.[17] Under this code, the employer or contractor and the employee or subcontractor would share patent rights as tenants-in-common.

These legal presumptions as to ownership assumedly may be modified or supplemented by contract. Therefore, when executing agreements with Brazilian end-users or distributors, a foreign company should require the end-users or distributors to execute appropriate confidentiality or subcontract agreements with its employees or subcontractors. These confidentiality agreements should establish that the foreign company will own all rights in any modification or development of its software that employees or subcontractors may develop. As an additional precaution, these agreements should also require that the employees or subcontractors execute any instrument that may be appropriate to assign such ownership to the foreign company or to perfect such ownership in the company's name. As previously indicated, it remains unclear whether SEI would accept such provisions when imposed on a distributor.[18]

G. Assignment

The Brazilian Copyright Law governs assignment of authorship rights. To be valid, an assignment must: specify the rights to be assigned in writing; specify the terms of the assignment (e.g., time, place, and price); and be recorded with the agency or entity where the "original work" was first recorded.[19] Accordingly, an assignment of a copyright in software would need to be registered with INPI only if the software was previously registered with INPI.

H. Remedies

The Software Law establishes criminal penalties and civil remedies for copyright infringement. Criminal penalties include fines, imprisonment from six months to two years, and injunctive relief.[20] Civil remedies include damages, fines, and injunctive relief.[21] Before granting injunctive relief, however, in either a criminal or civil action, a Brazilian court must conduct a preliminary investigation to determine whether a prima facie case of infringement exists.[22] If this preliminary investigation is not conducted properly, the effectiveness of any eventual search and seizure order may be reduced because the infringer could receive warning of the search and dispose of the infringing software.

17. Industrial Property Code, Law No. 5.772 of Dec. 21, 1971, XXXV Lex. 1740-59 (Dec. 1971).
18. Industrial Property Code, *supra* note 17, art. 42.
19. Copyright Law, *supra* note 5, art. 53.
20. Software Law, *supra* note 3, arts. 35 and 38.
21. Software Law, *supra* note 3, art. 39.
22. Software Law, *supra* note 3, arts. 38, 39.

I. Statute of Limitations

The Software Law establishes a five-year civil statute of limitations from the date of infringement, but does not contain a criminal statute of limitations.[23] This criminal statute should be equal to the criminal statute for infringements of intellectual property rights, which is six months from the date that the owner receives notice of the infringement.

II. Marketing Considerations

The rules that govern marketing of software in Brazil are set forth in various intertwining policies and legislation. These policies and legislation include: the "market reserve" policy; software legislation; import regulations; foreign exchange policy; tax legislation; and dealer legislation.

A. Market Reserve

Brazil established the "market reserve" policy in 1981 to reserve for Brazilian-owned companies the manufacture of "mini, micro and super-micro" computer systems and their peripherals and accessories.[24] This policy may restrict foreign producers from exporting their systems to Brazil. The major difficulty under this policy is determining what systems fall within the reserved market.

The original legislation listed products that were embraced by the reserved market. This list is not complete. To determine the boundary of the reserved market, SEI used to rely upon a classification list developed by the United Nations that distinguishes among computer systems by size.[25] Technical advances have made this classification list obsolete. More recently, SEI has applied the "unofficial 4381 standard," whereby SEI presumes that Brazilian companies can manufacture any computer smaller than an IBM 4381. Under this standard, SEI should authorize the importation of a foreign-manufactured computer system whose internal capacity exceeds that of an IBM 4381.

Despite these unofficial standards, SEI retains great discretion in determining whether to authorize the importation of foreign-manufactured computer systems. In exercising this discretion, SEI essentially seeks to prevent the importation of

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23. Software Law, *supra* note 3, art. 40.

24. Normative Act No. 16 of July 10, 1981; *see also* Normative Act No. 24/83 of May 27, 1983; Normative Act 27/83 of Nov. 29, 1989; SEI Comminiqué Nos. 01/81 and 02/81 of Aug. 12, 1981; SEI Comuniqué No. 07/82 of Dec. 23, 1982; SEI Communiqué No. 08/83 of May 31, 1983; SEI Comuniqué No. 13/83 of Aug. 4, 1983; SEI Communiqué No. 16/83 of Sept. 20, 1983; SEI Comuniqué No. 004/84 of Jan. 30, 1984; SEI Communiqué No. 001/84 of Sept. 13, 1984; STI/SEI Normative Act No. 001/84 of Aug. 30, 1984; Informatics Law, Law 7.232 of Oct. 29, 1984, D.O. (Oct. 30, 1984) [hereinafter Informatics Law].

25. *Transborder Data Flows and Brazil,* Table A, II-2, "Classification Chart of Brazilian Computer Park, 1980," United Nations Centre of Transnational Corporations (1983).

computer systems that, in its opinion, are or *should become* available from Brazilian manufacturers. SEI's judgments depend on developments within the Brazilian computer industry, such as the introduction of locally manufactured systems or the formation of joint ventures between domestic and foreign computer manufacturers. In addition, SEI's judgments are often influenced by political pressures and changes in government personnel. Finally, these judgments also depend on the unique capabilities of the foreign system. The foreign producer must convince SEI of these unique capabilities before it can market its computer systems in Brazil.

In view of such considerations, it is often difficult to determine whether a particular "mini, micro or super-micro" computer may be imported into Brazil without conferring directly with SEI. SEI tends not to respond to "no-names" inquiries. Usually, to be effective, such inquiries should fully disclose the foreign manufacturer's identity and product line.

B. Software Legislation

On December 18, 1987, the Brazilian Executive Branch approved the long-awaited Software Law to govern the protection and marketing of software in Brazil.[26] During 1988, various government agencies issued regulations under this law.[27] The Software Law and its regulations (collectively, the Software Legislation) represent great strides in defining the legal rules applicable to software in Brazil. Still, many questions remain unresolved.

As discussed below, the Software Legislation provides that "non-national companies" generally may "commercialize" software in Brazil only through "national companies."[28] The agreement under which the "non-national company" authorizes the "national company" to commercialize software must generally be submitted to SEI for approval.[29] In addition, the software must be "enrolled" with SEI, unless it qualifies under one of several exceptions.[30]

1. *Commercialization*

Under Brazilian law, "to commercialize" means "to sell" or "to license." This concept, however, does not encompass a commission agency relationship. Thus, a foreign company may freely market its software to Brazilian end-users through a local commission agent, whether or not the agent is "national." In contrast, if the foreign company markets its software through a local distributor,

26. Software Law, *supra* note 3.
27. *See* Software Regulations, *supra* note 7; SEI Communiqué No. 93 of May 20, 1988; National Copyright Council Resolution No. 57 of July 6, 1988; INPI Normative Act No. 95, *supra* note 9.
28. Software Law, *supra* note 3, art. 28.
29. Software Law, *supra* note 3, art. 28; Software Regulations, note 7, art. 25.
30. *Id.*

the company must execute the distribution agreement with a "national company," subject to one significant exception.

a. National Company

A "national company" is defined as a company organized and principally domiciled in Brazil and under the permanent, exclusive, and unconditional control, whether directly or indirectly, of individuals who are domiciled and reside in Brazil.[31] Brazilian residents "control" a company if they: have decision-making power; own 100 percent of the voting capital and at least 70 percent of the total capital; and have "technical control" over the company (i.e., the power to determine the development, acquisition, and composition of products).[32]

This definition does not encompass all Brazilian companies; rather, it covers a small, but significant, group of Brazilian companies. In general, if a foreign company markets its software in Brazil through a local distributor, the company must execute the distribution agreement with a member of this group.[33] In effect, this group enjoys the exclusive right to distribute the software of foreign companies in Brazil, subject to one significant exception.

b. Exception

A foreign company may distribute software through a "national" or "non-national" company if the software operates on hardware manufactured by a "non-national company" whether manufactured locally or abroad.[34] Technically, under the "market reserve" policy, a "non-national company" may neither manufacture in Brazil nor import to Brazil "mini, micro or super-micro" computer systems.[35] Thus, if this exception is interpreted narrowly, a foreign company could distribute software through a "non-national company" only if the software operates on hardware other than a "mini, micro or super-micro" system.

This exception could, however, be interpreted more broadly. On occasions, SEI has permitted certain "non-national companies" (e.g., IBM, Unisys, Control Data) to distribute imported or locally manufactured computer systems that arguably fall within the reserved market. Thus, under a broader interpretation of this exception, a foreign company could also distribute its software through a "non-national company" when the software operates on any of these systems, even if the system is technically a "mini, micro or super-micro" computer.

31. Informatics Law, *supra* note 24, art. 12
32. *Id.*
33. Software Law, *supra* note 3, art. 28.
34. Software Law, *supra* note 3, arts. 12, 29(1).
35. Informatics Law, *supra* note 24, art. 9.

In practice, however, SEI will probably interpret this exception narrowly. In enrolling "non-national" software, SEI has unofficially taken the position that a foreign company may appoint a "non-national" distributor in Brazil. Yet, SEI will only allow such a distributor to license foreign software that runs on "non-national" hardware.[36] Therefore, a "non-national" distributor will be unable to license foreign software to run on "national" hardware.

This exception raises an additional question. Under the Software Law, "non-national companies" are specifically prohibited from remitting fees to foreign companies when the fees result from local distribution of their software.[37] Instead, the Software Law provides that such foreign companies will be assured, "as consideration for the commercialization of [their software], the remittances of dividends, subject to . . . the [applicable] limitations."[38] This provision implicitly assumes that the foreign company and local "non-national" distributor are *related.* Nevertheless, SEI has unofficially indicated that this provision will prevent the remittance of any software license fees, whether or not the foreign company and local distributor are *related.*

2. *Approval*

The approval requirement applies to any agreement under which the software of a foreign company will be distributed in Brazil.[39] This requirement does not apply to agreements that foreign companies may execute with local commission agents and to license agreements that foreign companies may execute with Brazilian end-users, provided that the end-users "import single copies of the software for their exclusive use."[40]

To comply with this requirement, the foreign company must submit the distribution agreement to SEI for approval.[41] SEI will not approve the agreement if it contains any "restrictive clause" or does not contain any "mandatory clause."[42] Furthermore, SEI may object to the agreement if the consideration the distributor must pay to the foreign company is deemed excessive.[43] If SEI does not approve the agreement, the distributor will not be entitled either to remit payments in foreign currency to the foreign company or to deduct such payments for local income tax purposes.[44] Moreover, SEI will refuse to enroll the software that is involved in the agreement.[45]

36. Software Law, *supra* note 3, art. 29.
37. Software Regulations, *supra* note 7, art. 18.
38. Software Law, *supra* note 3, art. 29(1).
39. Software Law, *supra* note 3, art. 28; Software Regulations, *supra* note 7, art. 25.
40. Software Regulations, *supra* note 7, art. 25(1).
41. Software Regulations, *supra* note 7, art. 25.
42. Software Law, *supra* note 3, arts. 27, 29.
43. Software Law, *supra* note 3, art. 29.
44. Software Law, *supra* note 3, art. 28.
45. *Id.*

a. Restrictive Clauses

The "restrictive clauses" include grants of exclusivity, limitations on production or distribution, and waivers of liability for malfunctions, defects, or copyright infringement.[46]

i. Exclusivity. If the prohibition is interpreted literally, it should apply mutually; the distributor should not be entitled to exclusive marketing rights in Brazil, and the foreign company should not be able to prohibit the distributor from marketing other products. As an exception, however, SEI may allow the foreign company to prohibit the distributor from marketing competing software.

ii. Limitation. The prohibition against limitations on production and distribution will prevent a foreign company from segmenting the Brazilian market, whether by geographic area or industrial sector. SEI, however, should accept restrictions on reexportation of software from Brazil, at least if required by foreign law (e.g., the U.S. Export Administration Regulations).

iii. Waivers. The prohibition against waivers of liability should not prevent the foreign company from limiting the remedies for malfunctions, defects, or infringements, provided that SEI deems any such limitation to be reasonable.

b. Mandatory Clauses

Although the Software Legislation specifies only one "mandatory clause,"[47] it refers to other obligations that probably must be reflected in the distribution agreement. The distribution agreement must establish which party will pay the applicable taxes in Brazil and must reflect the obligations as to warranty, support, and marking, discussed below.

i. Warranty Obligations. The distribution agreement presumably must ensure that: the software is of "proper technical quality"; the program has been properly recorded on the media; and if the program "functionally depends" on another program, these programs are compatible.[48] If any of these warranties are breached, the end-user may assert a claim against either the distributor or foreign company, "as well as their assignors."[49]

ii. Support Obligations. The distribution agreement must ensure that during the "technical validity period," the end-user will receive corrections for errors in the software at no charge and technical support to ensure the proper operation of the software.[50] Although the Software Legislation does not specify a minimum "technical validity period," SEI may require this period to extend throughout the enrollment term of the software. During this period, the foreign company may not withdraw the software from the Brazilian market without previously

46. Software Law, *supra* note 3, art. 27.
47. *Id.*
48. Software Law, *supra* note 3, art. 28.
49. Software Law, *supra* note 3, art. 26.
50. Software Law, *supra* note 3, art. 24.

notifying SEI, publishing a withdrawal notice, and indemnifying third parties against any damages they suffer from such withdrawal.[51]

iii. Marking Obligation. The distribution agreement presumably must ensure that the software media and its packaging bear, "in a readily legible manner," the enrollment number and "technical validity period" of the software.[52]

c. Consideration

SEI will object if the consideration a distributor must pay to the foreign company is "computed as a percentage of production or profit."[53] Instead, this consideration must be computed on a "fixed price per copy" basis and the price may not exceed the "average worldwide price" of the software.[54] To substantiate these prices, the foreign company must provide SEI with copies of its domestic and international price lists and discount tables.[55]

3. *Enrollment*

The enrollment requirement applies to software that does not qualify under the "single copy," "along with" or "resident and integrated" exceptions, described below.[56] Unless the software qualifies under one of these exceptions, enrollment is required to validate any "legal act" that pertains to the software (e.g., a license or distribution agreement).[57] In addition, the importer of the software would not be entitled to remit payments in foreign currency to the foreign company or to deduct such payments for local income tax purposes.[58] As indicated above, a local distributor may not remit or deduct payments if SEI has not approved the distribution agreement.[59] In effect, the enrollment requirement extends these two restrictions to end-users who import software that is not exempt from enrollment.

To comply with the enrollment requirement, the foreign company must submit the software to SEI for a "similarity test."[60] Under this test, SEI will enroll the software only if a "national company" has not developed "similar software" that has been enrolled with SEI.[61] SEI essentially seeks to protect "national companies" against competition from "non-national companies."

a. Exceptions

A foreign company will be exempt from the enrollment requirement if it exports "single copies" of software directly to Brazilian end-users for their

51. Software Law, *supra* note 3, art. 25; Software Regulations, *supra* note 7, art. 29.
52. Software Law, *supra* note 3, art. 23.
53. Software Law, *supra* note 3, art. 29.
54. *Id.*
55. *Id.*
56. Software Law, *supra* note 3, arts. 8(2), 30; Software Regulations, *supra* note 7, art. 14.
57. Software Law, *supra* note 3, art. 8(3).
58. *Id.*
59. Software Law, *supra* note 3, art. 28.
60. Software Law, *supra* note 3, art. 8(2).
61. *Id.*

exclusive use, exports software "along with" hardware directly to Brazilian end-users for their exclusive use, or exports software into Brazil that is "resident and integrated" in hardware which is "commercialized" together with the software.[62]

The "single copy" and "along with" exceptions apply only to direct licensing arrangements. Thus, if a foreign company relies on either of these exceptions, the company may not indirectly market its software to Brazilian end-users through a local distributor. In contrast, the "resident and integrated" exception should apply both to direct and indirect licensing arrangements. Therefore, when the foreign company relies on this exception, the company can also indirectly market its software through a local distributor, subject to the commercialization and approval requirements.

These exceptions raise numerous questions that SEI has not answered. Many questions concern the precise scope of each exception. Because the Software Legislation does not define certain important terms, SEI has substantial discretion to interpret these terms. Moreover, even when software falls within one of the exceptions to enrollment, SEI may still test it for "similarity," as discussed below.

i. "Single Copy" Exception. A foreign company should be exempt from the enrollment requirement if it directly exports single copies of software to Brazilian end-users for their exclusive use. This exception arguably was created to cover application software.

Although software imported under this exception should not be subject to the "similarity test," SEI may test this software for "similarity" under certain circumstances. For example, to remit payment to the foreign company, the end-user may seek to obtain an import permit from the Brazilian Import/Export Agency (CACEX) that authorizes the remittance. CACEX usually consults with SEI before issuing this permit. If SEI determines that "similar software" is available from a "national company," SEI may advise CACEX to deny the import permit. To avoid this possibility, the end-user should seek access to foreign exchange by registering a license agreement with the Central Bank of Brazil (the Central Bank).

Various questions remain unresolved under this exception. For example, because this exception specifically limits the foreign company to exporting single copies of software to Brazilian end-users, will the software require enrollment if a particular end-user imports more than one copy? If the end-user operates more than one computer system, must it create its own copies of the software to avoid the enrollment requirement? Does this exception also apply to imports of updates or revisions of the software? Answers to these questions must be sought from SEI.

62. Software Regulations, *supra* note 7, art. 14.

ii. "Along With" Exception. A foreign company should be exempt from the enrollment requirement if it directly exports software "along with" hardware to Brazilian end-users for their exclusive use. This exception arguably was created to cover operating software.

Software imported under this exception also should be exempt from the "similarity test." In practice, however, SEI tests this software for similarity. To import the computer system into Brazil, the end-user must obtain an import permit from CACEX. Before CACEX issues this permit, SEI must approve the software that is included in this system. Before giving this approval, SEI will determine whether a "national company" has enrolled "similar software." If such similar software has been enrolled, SEI will not approve the importation. SEI may also prevent the importation if SEI determines that the computer system falls within the reserved market.

Various questions also remain unresolved under this exception. For example, while this exception clearly applies to operating software, it may also encompass application software that is exported "along with" hardware to provide the end-user with a total processing solution. If so, to qualify under this exception, must an independent software developer indirectly license its application to Brazilian end-users through the hardware manufacturer, which acts as a value-added reseller? Must the application be physically delivered to the end-user "along with" the hardware? Does this exception also apply to imports of updates or revisions of the software? Again, answers to these questions must be sought from SEI.

iii. "Resident and Integrated" Exception. A foreign company should be exempt from the enrollment requirement if it exports software that is "resident and integrated" in hardware that is "commercialized" (i.e., licensed or distributed) together with the software. In a recent Communiqué,[63] SEI refers to "integrated and resident" software as "firmware."

Firmware imported under this exception also should be exempt from the "similarity test." In practice, however, SEI may test firmware for similarity under one of two procedures. First, when a Brazilian end-user or distributor applies for an import permit for the computer system, SEI will determine whether the system falls within the reserved market. In doing so, SEI may consider whether a "national company" has enrolled "similar" firmware in Brazil. Second, if the foreign company markets the computer system through a local distributor, the distribution agreement will require approval of SEI. Under the Software Legislation, SEI may not approve the agreement if a "national company" has enrolled "similar" firmware in Brazil.[64]

Various questions remain unresolved under this exception. For example, a foreign company should be exempt from enrollment under this exception if it

63. SEI Communiqué No. 318 of Dec. 21, 1988.
64. Software Regulations, *supra* note 7, art. 17.

exports to a Brazilian distributor firmware that is "incorporated" into a computer system. The "along with" exception should exempt a foreign company from the enrollment requirement if the company exports operating software together with the system; however, the "along with" exception applies only to software that is directly exported to end-users. If a portion of the operating software is embodied in tape or disk media, must the foreign company enroll this portion when it exports the computer system to a Brazilian distributor? Does this exception also apply to imports of updates and revisions of the firmware (e.g., exchange boards)? Again, answers to these questions must be sought from SEI.

b. National Company

"National companies" represent only a small, but significant, group of Brazilian companies. If a member of this group has enrolled its software with SEI, SEI will not enroll "similar software" that "non-national companies" may develop, whether or not they are organized in Brazil.[65] In contrast, if a foreign company or a Brazilian company that does not fall within this group has enrolled its software with SEI, SEI should still enroll "similar software" that other companies may develop, whether they are "national" or "non-national." Moreover, if a "non-national company" enrolls its software with SEI and a "national company" subsequently enrolls "similar software," SEI will prevent the "non-national company" from renewing the enrollment term of its software.[66]

c. Similarity Test

SEI will test the software of "non-national companies" for "similarity" when the software does not qualify under either the "single copy," "along with," or "resident and integrated" exceptions to enrollment.[67] Furthermore, under certain circumstances, SEI may also perform the "similarity test" on software that qualifies under one of the exceptions.

Under this test, SEI compares the software of a "non-national company" with software that "national companies" have enrolled with SEI. SEI will consider the software of "national" and "non-national companies" to be "similar" when the programs are "functionally equivalent," "execute substantially the same tasks," and "both comply with applicable national standards."[68] SEI has tried to clarify these definitions by regulation.[69]

i. "Functional Equivalency." "National" and "non-national" software will be considered "functionally equivalent" if they "have been developed

65. *Id.*
66. Software Regulations, *supra* note 7, art. 17(4).
67. Software Regulations, *supra* note 7, arts. 14, 17.
68. Software Law, *supra* note 3, art. 10.
69. Software Regulations, *supra* note 7. All quotations in this section are from art. 3 of this decree. This regulation implicitly focuses on application software.

independently," "have substantially identical operating characteristics," and "operate on similar equipment and in a similar operating environment."[70]

In determining whether "national" and "non-national" programs "have substantially identical operating characteristics," SEI will consider whether these programs "produce essentially the same effect" in terms of the "relevant parameters."[71] "Relevant parameters" are defined to include "memory capacity," "processing speed," and "transactional capacity with end-user interfaces."[72]

In determining whether "national" and "non-national" programs "operate on similar equipment and in a similar operating environment," SEI will consider whether both programs are compatible with "equipment, instruments, peripherals and operating systems already marketed in Brazil."[73] If both programs operate on a computer system that is available in Brazil, SEI may refuse to enroll the "non-national" program when the "national" and "non-national" programs "permit the same access to existing resources."[74] If the "non-national" program operates on a computer system that is not available in Brazil, SEI should enroll the "non-national" program only if SEI has or intends to approve the importation of this system into Brazil.

ii. "Execute Substantially the Same Tasks." "National" and "non-national" software will be considered to "execute substantially the same tasks" if end-users may use either program to "enter combinations of data to achieve the same result."[75] This definition focuses on the input and output of the programs. In contrast, the "functional equivalency" definition focuses on the technical specifications and operating environment of the programs.

iii. "Applicable National Standards." SEI has not issued national standards for purposes of the "similarity test." For this reason, it remains unclear how SEI will determine whether "national" and "non-national" programs both "comply with applicable national standards."[76]

d. Application

If a foreign company directly markets its software to Brazilian end-users or through a local commission agent and this software does not fall under one of the exceptions to enrollment, the company may apply for enrollment in its own name. Alternatively, if the foreign company will indirectly market such software in Brazil through a distributor, the distributor should apply for enrollment in its name. In either case, the enrollment application must include a description of the corporate structure and management of the applicant, a list of its shareholders, a

70. Software Regulations, *supra* note 7, art. 3(1).
71. Software Regulations, *supra* note 7, art. 3.
72. *Id.*
73. *Id.*
74. *Id.*
75. Software Regulations, *supra* note 7, art. 3(3).
76. Software Regulations, *supra* note 7, art. 3(2).

functional description of the software, its technical specifications, a copy of the software in object code, its "technical validity period," and any other information that SEI may require. To review this application, SEI should not require the applicant to disclose the source code for the software or other trade secrets.[77]

e. Publication

As part of the application process, SEI must publish a notice of the application that contains a brief description of the software in the Brazilian Official Gazette *(Diário Oficial da União)*.[78] Third parties will have thirty days from the date of publication to challenge the proposed enrollment by demonstrating that a "national company" has already enrolled "similar software" with SEI.[79] SEI must notify the applicant of such a challenge within thirty days of its receipt.[80]

f. Ruling

SEI must enroll the software or deny enrollment within 120 days after the filing date of the application or, if SEI has requested additional information, the date on which such additional information is filed.[81] Even if no third party challenges the enrollment, SEI may deny enrollment ex officio if it determines that a "national company" has already enrolled "similar software."[82] SEI will publish its ruling in the Brazilian Official Gazette.[83] If SEI fails to act within this 120-day period, the software will be deemed to have been automatically enrolled.[84]

g. Appeal

If SEI denies enrollment, the applicant can appeal to the National Council on Informatics and Automation (CONIN)[85] and, if necessary, should be able to appeal CONIN's decision to the Brazilian courts. CONIN has begun to take a more active role in informatics matters, meeting approximately once a month.

h. Classes

If SEI enrolls the software, it will do so under one of six classes.[86] These classes distinguish between the "national" and "non-national" "origin" of the

77. SEI Communiqué No. 93 of May 20, 1988, art. 3, D.O. (May 23, 1988). Another unresolved issue under the Software Legislation is whether a foreign company which exports its software to Brazil under one of the exceptions to enrollment must establish a "technical validity period" for the software. The Software Legislation does not contemplate a procedure that requires the foreign company to do so.

78. Software Regulations, *supra* note 7, art. 22.

79. *Id.*

80. Software Regulations, *supra* note 7, art. 22(2).

81. Software Law, *supra* note 3, art. 11.

82. Software Regulations, *supra* note 7, art. 22(1).

83. Software Regulations, *supra* note 7, art. 20.

84. Software Regulations, *supra* note 7, art. 17(5).

85. Software Regulations, *supra* note 7, art. 9.

86. The classes are: (i) software developed in Brazil by "national companies"; (ii) software developed in Brazil under SEI-approved arrangements between "national" and "non-national companies"; (iii) software developed by "non-national companies" whose technology and market-

software. They are used to determine whether the software qualifies for government financing and tax incentives and what types of remittances will be allowed for the software.

i. Term

The minimum enrollment is three years.[87] SEI may renew this term for "non-national" software only if a "national company" has not enrolled "similar software" in the interim.[88]

j. Updates and Revisions

If the foreign company releases updates or revisions of the software during the enrollment term, the company must enroll the update or revision when "it embodies functions or conditions of distribution that are distinct from those of the prior version."[89] Presumably SEI may test any such update or revision for "similarity." The Software Legislation does not specify whether the update or revision will be enrolled only for the balance of the enrollment term for the prior version of the software or for a minimum period of three years.

k. Disclosure

At the request of a third party, SEI may disclose certain information contained in the application that SEI deems of "public interest." Such information includes: the identity of the software owner; the licensee or distributor who markets the software in Brazil; the class number of the software; the term of enrollment; the processing environment of the software; and its "technical validity period."[90]

C. Import Regulations

Brazil's general import regulations require SEI's prior approval and establish import ceilings, import programs, and external financing requirements.[91] As explained below, these requirements generally will have less impact on a commission agency arrangement than on a distributorship.

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ing rights have been transferred to a "national company" under an agreement approved by the National Institute of Industrial Property; (iv) software developed in Brazil by "non-national companies"; (v) software developed by "non-national companies" whose marketing rights have been transferred to "national companies"; and (vi) software that does not fall within any of the first five classes. INPI will approve the transfer of technology agreement contemplated in class (iii) only if it concludes that the "national company" could not independently develop the technology for the program. Software Regulations, *supra* note 7, art. 13.

87. Software Law, *supra* note 3, art. 9.

88. Software Regulations, *supra* note 7, art. 17(4).

89. Software Regulations, *supra* note 7, art. 16.

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

91. *See, e.g.*, Central Bank Resolution No. 1.537 of Nov. 30, 1988, D.O.U. (Dec. 1, 1988) [hereinafter Import Regulations].

1. *SEI Approval*

SEI reviews and approves applications to import hardware into Brazil.[92] SEI usually prevents foreign companies from importing hardware into Brazil that falls under the reserved market. Moreover, SEI will prevent Brazilian residents from importing foreign hardware to be kept in a "stock inventory." Although SEI does not bar distributors from applying for an import license for hardware, SEI clearly favors imports by end-users.

2. *Import Ceilings*

Traditionally the Brazilian Government has imposed ceilings on annual aggregate imports of certain products by Brazilian residents. During 1988, Brazil did not impose ceilings on either imports of "informatics" products (i.e., hardware and software) by Brazilian residents for their own use or resale or imports of "fixed assets" by Brazilian residents for their own use. No ceilings on these imports are expected for 1989. If Brazil were to impose ceilings, they would more likely affect distributors who import "informatics" products for resale rather than end-users who import such products as "fixed assets" for their own use.

3. *Import Program*

Brazilian residents who "regularly" import products into Brazil must file an annual "import program" with CACEX before the beginning of each calendar year.[93] If CACEX approves this program, the importer will enjoy a preferential right to obtain import permits for the products specified in the program and may receive an increase in its import programs for future years. If the importer becomes a distributor of a foreign company during the year of an import program, the importer's ability to import the products of the foreign company may be limited under the then-current import program. In contrast, when an end-user qualifies as an "occasional importer," the end-user is not required to file an "annual program";[94] thus, it should not encounter this limitation.

4. *External Financing Requirements*

Strict external financing requirements apply to imports of machinery and equipment, spare parts and components, and other products.[95] Under these requirements, if the aggregate FOB value of an importer's prior imports during any calendar year exceeds U.S. $200,000, it must provide external financing as

92. Informatics Law, *supra* note 24, art. 8(6), Decree No. 90.755 of Dec. 27, 1984, art. 2(6), D.O. (Dec. 28, 1984), and SEI Communiqué No. 115 of June 24, 1988.

93. CACEX Communiqué No. 204 of Sept. 2, 1988, ch. III, D.O.U. (Sept. 16, 1988).

94. *Id.*

95. Central Bank Resolution No. 1.537 of Nov. 30, 1988, *supersedes* Central Bank Resolution No. 1.485 of May 25, 1988.

follows: two-year financing on machinery and equipment; 180-day financing on spare parts and components; and 90-day financing on other products.[96]

The external financing requirements generally apply to all import transactions, including those between related companies. Thus, imports of hardware should be subject to these requirements as "machinery and equipment" or "spare parts and components." Imports of software are more problematic. When software is imported together with hardware (e.g., the "along with" or "resident and integrated" exceptions), the software presumably will be treated as part of the hardware and the external financing requirements will apply. When software is imported alone (e.g., the "single copy" exception), it should not be subject to the external financing requirements, at least not if the end-user seeks access to foreign exchange by registering a license agreement with the Central Bank. In contrast, if the end-user obtains an import permit for this software, the software would apparently be treated as "other products" for the external financing requirements.

Because of these external financing requirements, a foreign company that markets computer systems may prefer to appoint a commission agent rather than a distributor in Brazil. An end-user and distributor will both be subject to external financing requirements; however, a distributor is likely to exceed the U.S. $200,000 limit before an end-user. In contrast, the external financing requirements should not affect a foreign company that only markets software through a local commission agent or distributor, provided that the end-user or distributor remits payment under the new foreign exchange rules discussed in the following section.

D. Foreign Exchange Policy

Despite the recent creation of the so-called "tourism" exchange rate, Brazil remains a "closed" foreign exchange jurisdiction.[97] Foreign exchange transactions must be negotiated through an accredited Brazilian bank.[98] In general, the Brazilian bank will not make a remittance in foreign currency unless the appropriate government agency has approved the underlying transaction. Thus, a Brazilian resident may remit payments for imports only if CACEX has issued an import permit for the goods.[99] Brazilian licensees may remit royalties under "transfer of technology" agreements only if INPI has approved the agreement.[100] Other remittances generally require approval of the Central Bank,

96. Import Regulations, *supra* note 91, art. 1.

97. Central Bank Resolution No. 1.552 of Dec. 22, 1988, D.O.U. (Dec. 23, 1988).

98. Law No. 4.131 of Mar. 9, 1962, art. 3, Vade-Mecum Forense 575 (9th ed., Editora Revista dos Tribunais, Sao Paulo, 1986).

99. Law No. 2.145 of Dec. 29, 1953, Vade-Mecum Forense, *supra* note 98, at 1699.

100. Normative Act No. 15 of Sept. 11, 1975, § 1, Vade-Mecum Forense, *supra* note 98, at 439.

which will approve or disapprove of the remittance based on regulations issued by the National Monetary Council (the Monetary Council).

Although the Software Law was enacted in 1987, the Monetary Council did not issue regulations establishing the remittance rights of Brazilian software end-users and distributors until recently. As a result, foreign companies encountered significant difficulties in obtaining payment of license, maintenance, and support fees. For example, while CACEX might issue import permits for computer systems in certain instances, CACEX generally refused to issue import permits for software. Thus, if a foreign company exported software into Brazil as part of a computer system, the importer could generally remit at least "lump-sum" fees in foreign currency as part of the invoiced cost of the system, subject to the various requirements discussed above.[101] In contrast, foreign companies that only exported software into Brazil or authorized a local distributor to reproduce their software in Brazil generally could not expect to receive payment of their license fees. Such companies could accept payment in Brazilian currency, but any such payment would remain "blocked" in Brazil.

In September 1989, the Monetary Council finally relented to the mounting pressure—both domestic and foreign—to resolve this situation by issuing Circular No. 1.534 (the Circular).[102] Although the Circular does not resolve all the open questions, it provides certain relief, and perhaps more importantly, indicates the exchange rate at which Brazilian end-users and distributors will obtain foreign currency to remit software fees to foreign companies. Specifically, the Circular establishes that remittances pursuant to the Software Law will be made at the so-called "tourism" exchange rate.[103] This rate is substantially higher than the "official" exchange rate, which most Brazilian software distributors hoped would ultimately apply to remittances of license and related fees. Accordingly, the Circular has left many local distributors somewhat dissatisfied; it also will undoubtedly increase the price of software in Brazil.

1. *Single Copy*

The Circular provides that "the acquisition of software in the form of a single copy, up to the limit of U.S. $20,000 or equivalent in other currencies, can be carried out by means of presenting [to an accredited bank] a pro-forma invoice, price list, intercompany debit note or equivalent document, including a prospectus, which sets forth the unitary price of the product, as well as the name and address of the foreign exporter that commercializes or distributes the program."[104] This provision should apply to all software imported under the

101. See *supra* section II.c.

102. Central Bank Circular No. 1534 of Sept. 15, 1989, § III, D.O.U. (Sept. 1, 1989) [hereinafter Circular].

103. Circular, *supra* note 102, art. 16.

104. Circular, *supra* note 102, art. 18.

"single copy" exception to enrollment established by the Software Law. Thus, end-users who import a single copy of a program for their exclusive use should be entitled to remit the license fees to the foreign supplier without approval of the Central Bank, provided that the amount of the fee does not exceed U.S. $20,000. Remittances in excess of this limitation will require the specific approval of the Central Bank.[105] The Central Bank has yet to offer guidance on when such approvals will be granted.

This provision raises various questions that remain unanswered. For example, does the U.S. $20,000 limitation apply to each software importation made by a Brazilian end-user, or is it a cumulative limitation applicable over some period of time? The Circular implies that the limitation applies on a "per transaction" basis. Will an end-user be entitled to remit fees under this Circular if it imports more than one copy of the program or duplicates the program for its own use in Brazil? As previously discussed, it is unclear whether these situations qualify under the "single copy" exception to enrollment; if not, the corresponding payments may be deemed to fall outside the scope of the Circular.[106] Can an end-user freely remit software maintenance and support fees under the U.S. $20,000 limitation? The Circular refers to the "acquisition" of software; accordingly, the remittance of such fees may require the approval of the Central Bank, particularly where the maintenance or support does not involve the importation of updates or revisions.

2. *Distribution*

The Circular provides that "up to the limit of U.S. $100,000 or its equivalent in other currencies, companies that distribute or commercialize computer programs of foreign origin enrolled by SEI, can effect financial transfers abroad relating to income generated by the sale of software, by fulfilling [certain enumerated] requirements."[107] To satisfy these requirements, the local company must present to the accredited bank: the distribution or commercialization agreement executed with the foreign company, together with the certificates of approval and enrollment issued by SEI; the certificate that evidences that the imported software has been released from customs; tax receipts that evidence that the programs have been sold to local end-users, together with certain information about these end-users (e.g., name and address); and a declaration executed by the local company in accordance with a prescribed form.[108]

Under this provision, "national companies" that import and distribute foreign software in Brazil should be entitled to remit license fees to foreign companies, provided SEI has approved the distribution agreement and enrolled the software.

105. Circular, *supra* note 102, art. 16.
106. *See supra* section II.B.3.i.
107. Circular, *supra* note 102, art. 19.
108. *Id.*

"Non-national companies" should not be entitled to make such remittances under the Circular. As previously discussed, although foreign companies should be able to distribute their software locally through "non-national companies" if they operate on "non-national" hardware, the Software Law specifically prohibits "non-national companies" from remitting fees based on such activities; instead a foreign company may be compensated only through the payment of dividends, which presumes that the "non-national" distributor and foreign company are related.[109]

This provision also raises various questions that remain unanswered. Again, does the U.S. $100,000 limitation apply on a "per transaction" basis, or is it a cumulative limitation applicable over some period of time? Because the Circular does not specify a period of time, the limitation presumably applies on a "per transaction" basis. If so, how is this limitation to be understood? For example, since the distributor must submit sales receipts to the accredited bank upon requesting the remittance, must all programs imported in a particular transaction be sold before the distributor may remit any license fees? Will partial or advance payments be allowed? What if the distributor reproduces the programs in Brazil? In this situation, the customs certificate obtained upon importing the master program presumably should allow the distributor to remit up to U.S. $100,000 in reproduction fees. If so, will the Central Bank approve additional remittances once this limitation has been exceeded?

E. Tax Legislation

Until recently, the taxation of software licenses and imports was unsettled. In principle, software license fees could be characterized as "royalties," which are subject to withholding income tax upon their remittance from Brazil.[110] Upon importing computer systems, however, the importers generally would not withhold this income tax on the portion of the invoiced price of the system attributable to its software component. Meanwhile, because the Central Bank would not authorize the remittance of license fees for "unbundled" software, it remained unclear whether such remittances would ultimately be subject to withholding income tax.[111] Similar confusion existed with respect to customs duties and import taxes. In the case of imports of computer systems, these duties and taxes were generally assessed on the invoiced price of the entire system. In the case of "unbundled" software imports, many practitioners argued that customs duties and import taxes should be assessed only on the value of the software media, since income tax presumably would ultimately be withheld on

109. *See supra* section II.B.1.b.
110. Decree No. 85.450 of Dec. 4, 1980, arts. 554, 555(I), D.O.U. (Dec. 5, 1980) [hereinafter Income Tax Regulations].
111. *See supra* section II.D.

the remittance of the license fees, which conceptually reflect the value of the program itself.

In September, 1989, the Brazilian Ministry of Treasury issued Treasury Ordinance No. 181 (the Ordinance), which establishes "the applicable rules for the taxation of software copyright related fees paid to individuals or legal entities resident or domiciled abroad.[112] The Ordinance also establishes the rules for determining the customs value of software imports. Although the Ordinance does not resolve all the outstanding questions, it represents a significant step toward settling how software licenses and imports will be taxed in Brazil.

1. *Copyright Fees*

The Ordinance provides that "copyright fees paid to individuals or legal entities resident or domiciled abroad upon the acquisition of computer programs (software) to be distributed and commercialized in Brazil or single copy software to be acquired by end-users in Brazil will be taxed pursuant to the provisions set forth in Articles 554 and 555(I) of the Brazilian Income Tax Regulations."[113] The Income Tax Regulations establish that income and capital gains realized in Brazil and paid to nonresidents are generally subject to withholding income tax at the rate of 25 percent.[114] In addition, the conversion of such payments from local to foreign currency is subject to a 25 percent "financial tax."[115] This financial tax is assessed on the remitted amount (i.e., net of withholding tax) and is borne by the local payor, unless otherwise agreed by the local payor and foreign payee.

The Ordinance does not define the term "copyright fees." As previously discussed, however, the Software Law extends copyright protection to computer programs "contained in physical media of any nature."[116] Accordingly, the 25 percent withholding income tax should apply to all software license and maintenance fees that Brazilian end-users or distributors may remit to foreign companies. Moreover, even if support fees are deemed not to constitute payments for the use of or right to use a copyrightable work, the remittance of these fees may still be subject to the 25 percent withholding income tax as general Brazilian source income.[117] The Ordinance does not specifically address the situation where software is imported into Brazil as part of a computer system. In these situations, income tax presumably must be withheld on the portion of the invoiced price attributable to the software component of the system, at least where the software license agreement specifies license or maintenance fees.

112. Treasury Ordinance No. 181 of Sept. 28, 1989, D.O.U. (Oct. 8, 1989) [hereinafter Ordinance].

113. Ordinance, *supra* note 112, art. 1.

114. Income Tax Regulations, *supra* note 110, art. 555(I).

115. Law No. 5.143 of Oct. 20, 1966, art. 10, D.O.U. (Oct. 24, 1966).

116. Software Law, *supra* note 3, art. 1; *see also* discussion *supra* section I.B.

117. Income Tax Regulations, *supra* note 110, art. 554.

2. *Customs Value*

Upon importing software into Brazil, the importer must pay certain customs duties and import taxes based on its "customs value."[118] The import taxes include a 40 percent import tax *(Imposto de Importaçao* or II)[119] and a 10 percent federal excise tax (*Imposto sobre Productos Industrializados* or IPI).[120] The II is generally assessed on the customs value of the import, plus transportation and insurance costs (i.e., the CIF value).[121] The IPI is generally assessed on the CIF value, plus customs duties.[122] In addition to these federal taxes, an importation may be subject to state value-added tax (*Imposto sobre Circulaçao de Mercadorias e Serviços* or ICMS) or services tax (*Imposto sobre Serviços* or ISS). It remains unclear which of these additional taxes applies to software imports, although the application of either tax will exclude the application of the other.

The Ordinance provides that the II and IPI will apply to the value of the software media.[123] It also states that "the customs value of the physical media will not include the cost or value of the program, provided that such cost or value is segregated from the cost and value of the physical media itself in the acquisition documents."[124] If these costs are not segregated, "the entire cost or value of the transaction will be used for purposes of determining customs value."[125] In such event, the portion of the cost attributable to the program presumably will also be subject to withholding income tax as a "copyright fee," at least where the software license agreement specifies license or maintenance fees. If the agreement contemplates a "royalty-free" license, it remains unclear whether the Brazilian tax authorities will attribute a portion of the invoiced price of the system to the software for withholding income tax purposes, even though custom duties and import taxes have been assessed on the full invoiced price

F. Dealer Legislation

To determine what marketing structure to use in Brazil, a foreign company should also consider the Brazilian dealer legislation.[126] Under this legislation, a local commission agent will be entitled to extracontractual indemnification if the principal terminates the agency without "just cause."[127] The dealer legislation does not apply to distribution agreements.

118. Decree Law No. 37 of Oct. 17, 1966, art. 5, D.O.U. (Nov. 21, 1966) [hereinafter Import Tax Decree].
119. Import Tax Decree, *supra* note 118, art. 22.
120. Law No. 5.172 of Oct. 25, 1966, art. 46, D.O.U. (Oct. 27, 1966) [hereinafter Fiscal Code].
121. Import Tax Decree, *supra* note 118, art. 3.
122. Fiscal Code, *supra* note 120, art. 47.
123. Ordinance, *supra* note 110, art. 2.
124. Ordinance, *supra* note 110, art. 2.1.
125. Ordinance, *supra* note 110, art. 2.2.
126. Law No. 4.886 of Dec. 9, 1965, D.O. (Dec. 10, 1965).
127. *Id.* art. 34.

1. *"Just Cause"*

Under the dealer legislation, a principal has "just cause" to terminate the agency agreement if the agent fails to exercise "due care" in performing its contractual obligations, the agent acts in a manner that adversely affects the principal's commercial standing, the agent fails to perform obligations that are inherent in the agency relationship, the agent is convicted of a crime that involves "moral turpitude," or a force majeure prevents the performance of the agreement.[128] When a foreign company drafts an agency agreement for use in Brazil, it should try to elaborate by contract on these definitions of the dealer legislation. Furthermore, the foreign company should establish a fixed term for the agreement and should avoid consecutive renewals. Such renewals may be deemed to convert a fixed-term agreement into an indefinite-term agreement. As such, an indefinite-term agreement could only be terminated with "just cause" or by payment of the termination indemnities described below.

2. *Indemnification*

To terminate an agency agreement, the principal generally must give the agent at least thirty-days' written notice of termination. Otherwise, the agent will be entitled to an indemnity equal to one-third of the commissions that the agent earned during the last three months of the agreement.[129] Furthermore, if the principal terminates the agreement without "just cause," the agent will be entitled to an additional indemnity equal to at least 1/20th of all commissions that the agent earned during the term of the agency.[130]

3. *Unwritten Agreements*

The dealer legislation applies to all agency relationships, whether or not they are reflected in writing.[131] Moreover, when a written agreement does not exist, the indemnity for unjustified termination is increased to 1/15th of all commissions that the agent earned during the term of the agency.[132]

III. Conclusion

The Software Legislation was a significant move toward establishing legal protection for software in Brazil. This protection will only be effective, however, if the Brazilian courts strictly enforce the provisions of the Software Legislation. Moreover, because the Software Legislation was also inspired by Brazil's market reserve policy, it does not completely open the Brazilian software market to foreign producers. Therefore, foreign producers can generally only license their

128. *Id.* art. 35.
129. *Id.* art. 34.
130. *Id.* art. 27(j).
131. *Id.* art. 27.
132. *Id. art. 27.*

software in Brazil if a "national company" has not developed and enrolled a similar program with SEI.

In any event, the Software Legislation has apparently satisfied most concerns that the United States had about the degree of copyright protection afforded to software in Brazil and its restrictions on foreign access to the informatics market, particularly after the recent clarification of the foreign exchange and tax rules applicable to software transactions. On October 6, 1989, the U.S. Trade Representative's Office announced that it had terminated a four-year investigation of Brazil's allegedly restrictive trade policies toward U.S. computer and electronics hardware and software.[133] In making this announcement, U.S. Trade Representative Carla Hills stated: "We welcome Brazil's efforts to modify its informatics policies in response to our concerns. . . . We are also pleased by Brazil's willingness to work constructively with us in our efforts to pursue improved business opportunities for our computer and other electronics hardware and software firms."[134]

133. 3 World Intellectual Property Report, No. 11, Nov. 1989, at 231 (BNA Int'l Inc., London, England).

134. *Id*