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Secretary Mauricio Braga
Intellectual Property Office
Ministry of Citizenship
Via e-mail: consulta.lda@cidadania.gov.br

Submission of BSA | The Software Alliance to the Ministry of Citizenship Regarding the 2019 Review of the Brazilian Copyright Law

BSA| The Software Alliance[1] (BSA) is the leading advocate for the global software industry before governments and in the international marketplace. Our members are at the forefront of software-enabled innovation that powers the global economy and helps businesses in every industry compete more effectively. Because copyright policy is a critically important driver of software innovation, we are deeply appreciative for this opportunity to provide comments as part of the Ministry of Citizenship's review of the Brazilian Copyright Law.

We commend and support your efforts to review the law, which needs to be updated to reflect the technological advances that have taken place since its enactment over two decades ago. We share the thoughts below on the following topics to contribute to your review process:

- Legal Remedies and Safe Harbors
- Information Analysis

LEGAL REMEDIES AND SAFE HARBORS

Like other desirable digital content, software is subject to extraordinarily high volumes of infringement. We therefore support policies that ensure that legal remedies are available

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[1] *BSA's members include: Adobe, Akamai, Apple, Autodesk, Bentley Systems, Box, Cadence, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens PLM Software, Sitecore, Slack, Splunk, Symantec, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.*

for right holders to address copyright, including in the online environment. To ensure such policies will not stifle the Internet's potential as a medium for free expression, innovation and digital commerce, it is critically important to provide online service providers with appropriate safe harbors from liability for infringing (or otherwise unlawful) content posted by third parties. Such safe harbors should not be conditioned on any obligation by the internet service provider (ISP) to monitor or filter infringing activity as such obligations would weaken incentives for innovation and threaten the dynamism and values that have made the Internet so valuable.

Safe harbors play a critical role in balancing the needs of rights holders whose copyrighted works are subject to high volumes of online infringement and those of responsible providers of cutting-edge online services. Safe harbors provide intermediaries with clear incentives to behave responsibly in operating their services, including by acting expeditiously to remove infringing content in response to appropriate notices from rights holders, while ensuring that bad actors remain subject to appropriate penalties.

In April 2014, the Government of Brazil enacted the Internet Framework Law ("Marco Civil da Internet", Law 12,965/2014) which establishes that internet service providers are not liable for content generated by a third party, unless they fail to act upon receiving specific judicial notice to remove content (Marco Civil da Internet, Articles 18 and 19). Copyright rights are not within the scope of this provision, however, as specific legislation is required to address intermediary liability that involves copyrighted works (Marco Civil da Internet, Article 19, paragraph 2).

"Notice and Takedown" is a process not currently codified by the Brazilian Copyright Law. Although the Brazilian Superior Court of Justice has once ruled that notice and takedown principles apply to assess internet provider liability, the ruling does not address the issue completely, and due to the nature of the Brazilian legal system, it is unclear how, if at all, the ruling would apply to other cases.

Recommendation: We recommend a notice and takedown provision be incorporated into the Brazilian Copyright Law. It is very important to ensure that the appropriate safe harbors from liability for infringing content posted by third parties be provided to ISPs by the copyright law. Such safe harbors should not be conditioned on any obligation by the ISP to monitor or filter infringing activity.

INFORMATION ANALYSIS

Information Analysis is a form of software-enabled analytics that allows organizations to unlock the value of information that was once hidden in data sets too large, too diverse, and too volatile for humans to process.

With economists estimating that Artificial Intelligence (AI) will create up to $15 trillion in global value by 2030, and AI's impact in almost every sector, governments around the world are racing to put in place policies to ensure AI benefits their citizens. Over just the past two years, more than two dozen countries have published national strategies or roadmaps to outline policy approaches for meeting their AI ambitions. Brazil is also currently considering its own AI Strategy. Because data is a critical input for the development of many forms of AI, it is no surprise that many of these plans involve a close examination of how strategic data sets can be made more widely available.

Developing algorithms that power AI systems requires researchers to develop mathematical models that are trained using vast quantities of data. Information analysis is the process by which such training data is generated and used to train AI models. For instance, developers have now created a "Seeing AI" app that helps people who are blind or visually impaired navigate the world by providing auditory descriptions of objects in photographs. Users of the app can use their smartphone to take pictures, and Seeing AI describes the people and objects in the photograph. To develop a model capable of identifying the objects in a picture, the system was trained using data from millions of images depicting thousands of common objects, such as trees, street signs, landscapes, and animals.

A copyright law provision to allow information analysis is very important to spur innovation. The issue is that the machine learning process may involve the temporary creation of machine-readable reproductions of the material used in machine learning. (In the case of Seeing AI, that would be the millions of photographs used to train the computer vision models that enable the app to identify objects.) Because the incidental copies created as part of the machine learning process are made for the sole purpose of analyzing the factual (i.e., non-copyrightable) information from lawfully accessed content and are unrelated to the creative expression embodied in the underlying works, they do not substitute for the original or in any way undermine the legitimate interests of a copyright owner.

In the United States, for example, reproductions used for analysis or research are considered a fair use. But in legal systems that do not have a flexible fair use provision, which is the case of Brazil, there can be some uncertainty about the permissibility of such activity. It is therefore extremely important to create a specific data analysis provision to avoid any questions about the non-infringing nature of data analysis uses. This will help foster innovation through the continued use of data analysis for innovation purposes, without potential barriers that the threat of potential legal sanctions for copyright infringement could pose.

Expressly recognizing a data analysis exception to copyright infringement is a trend that we are observing in various markets. Japan, Singapore, and the European Union have recently incorporated TDM exceptions to their copyright regimes. The Standing Committee on Industry, Science, and Technology of the Canadian Parliament has also recently recommended the adoption of a data analysis exception.

Recommendation: Brazil should and adopt a specific data analysis provision to avoid any questions about the non-infringing nature of data analysis uses.

We would like to once again thank you for the opportunity to participate in this consultation process that we hope will contribute to the enactment of a copyright law amendment that be balanced, and will allow further innovation and economic growth spurred by the digital economy to occur Brazil.

We look forward to continuing participating in this important discussion and stand ready to answer any questions you may have.