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FEATURED Q&A

Why Is Software Piracy so Prevalent in Latin America?

Q Industry group Business Software Alliance released its annual global software piracy report last month, finding that four Latin American countries were in the top 20 of the world's worst violators of global piracy laws. Brazil came in fifth in terms of value of estimated pirated software at an estimated \$2.8 billion—a piracy rate of 53 percent. Also among the top 20 in terms of value were Mexico, Venezuela, and Argentina. Venezuela also had the dubious distinction of an 88 percent piracy rate. Why are Latin American countries so heavily represented on the list? What steps should they be taking to improve laws and enforcement efforts? What are the effects of software and IP piracy?

A Mariano Municoy, intellectual property lawyer at Moeller IP Advisors in Buenos Aires: "Software piracy in Latin America has been a serious problem for a long time for several reasons that have been addressed over the past 20 years and are beyond the scope of this brief. Yet, it is worth mentioning the (relatively speaking) very good level of education of the region's inhabitants, how easily software can be copied (for instance through reverse engineering, which in principle is not prohibited by most IP laws), the availability on the Web of information facilitating infringement and the historic income difference between developed and developing countries. Given

that most piracy is conducted by young and middle-aged people, the most effective tool is educating them about the negative effects of piracy and the social benefits of minimizing it, which is a trend already in place in the region. Improving local IP laws of the reported countries (where software 'per se' is not patentable) and investing in enforcing the existing regulations follows closely, as has been proven by the buzz over the criminal case against the Web site Taringa in Argentina. In this regard, of the four

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Ecuador's Correa Bars Ministers From Talking to Journalists

The government of Ecuadorean President Rafael Correa has prohibited cabinet members from giving interviews to journalists from privately owned media organizations. See story on page 2.

File Photo: Ecuadorean Government.

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NEWS BRIEFS

Correa Gov't Muzzles Ministers From Talking to Journalists

The government of Ecuadorean President Rafael Correa has ordered cabinet members not to give interviews to journalists employed by non-government news organizations, the Associated Press reported Tuesday. The government's policy coordination minister, Betty Tola, confirmed the policy, saying the aim is to "democratize information." Correa, who has filed several libel cases against journalists, has complained that privately owned media organizations are leading the opposition to his government.

Falkland Islands Plans Referendum on Political Status

The government of the Falkland Islands announced on Tuesday that it plans to hold a referendum next year to vote on its political status, the BBC reported. The announcement comes ahead of Thursday's 30th anniversary of Argentina's surrender to Britain, which ended the Falklands War. Gavin Short, chairman of the islands' legislative assembly, said the referendum is being held to "show the world just how certain we are about" remaining a British overseas territory.

Brazil's 4G Wireless Auction Nets \$1.3 Billion

A Brazilian wireless auction raised \$1.3 billion as carriers bid for frequencies for fourth generation (4G) cell service, Reuters reported. The winning companies are required to build 4G networks in the host cities of the Confederations Cup by April 2013 and also must assume some responsibility for providing broadband coverage in rural areas.

Telefônica Brasil, América Móvil, Tim Participações and **Oi** each won blocks of the spectrum.

Political News**Chávez Lays out Agenda, Seeks to Make Socialism 'Irreversible'**

A day after leading a rally of tens of thousands of supporters and formally registering for re-election, Venezuelan President Hugo Chávez on Tuesday presented his agenda, which calls for the country to pass "the point of no return, to make the transition to socialism irreversible," the



Chávez

File Photo: Venezuelan Government.

Associated Press reported. Chávez's government inserted the 23-page "Bolivarian Socialist" plan into state-run newspaper *Ciudad CCS* and also distributed it online. Among the plan's main objectives is "guaranteeing the continuity and consolidation of the Bolivarian Revolution in power." The document includes large national goals, such as increasing Venezuela's food production by 45 percent. The country currently imports the majority of its food. It also includes specific tasks, such as speeding up the building of a factory to assemble appliances in Venezuela from Chinese parts, as well as more mundane details about pig farms, neighborhood committees, oil drilling and fertilizer production. Chávez's opponent in the Oct. 7 presidential election, former Gov. Henrique Capriles, has argued that Chávez's policies have seriously harmed the economy and scared away would-be investors. Capriles has criticized Chávez's expropriations of private businesses and has said that he would work to boost private investment if he is elected.

Company News**Wal-Mart Bribery Investigation Widens to Brazil, China**

An investigation by **Wal-Mart Stores** into alleged bribery now includes a review of the company's operations in Brazil and

China, Reuters reported Tuesday, citing a letter from U.S. lawmakers who were briefed on the matter. Earlier this year, the world's largest retailer acknowledged that it was investigating allegations that some of its executives in Mexico bribed officials there in order to aid the company's expansion. The allegations came to light in a *New York Times* story that reported in April that **Wal-Mart de México** executives orchestrated \$24 million in bribes and that company leaders engaged in a cover-up. Details about the expanding investigation into the retailer's operations in Brazil and China were included in a letter from Democratic Representatives Elijah Cummings of Maryland and Henry Waxman of California. The legislators are the ranking members of the House Oversight and the House Energy committees, respectively. Outside attorneys for Wal-Mart briefed the legislators on May 21 about the Bentonville, Ark.-based company's efforts to comply with the Foreign Corrupt Practices Act, a U.S. law that prohibits companies from bribing foreign officials. The letter from Cummings and Waxman was sent Tuesday to Wal-Mart's chief executive officer, Michael Duke. The lawmakers requested that Duke allow the cooperation of some witnesses in a congressional probe into the bribery allegations and also asked him to turn over more documents. Wal-Mart has previously said it is "committed to a full and independent investigation," adding that "it would be inappropriate for us or others to come to conclusions before the investigation is complete."

ING to Pay \$619 Million to Settle Claims it Violated U.S. Sanctions

Netherlands-based **ING Bank** has agreed to pay \$619 million in order to settle a case brought by the U.S. government that it violated U.S. sanctions against countries including Cuba and Iran, the Justice Department announced Tuesday. The fine is the largest-ever against a bank in connection with the violation of U.S. sanctions, officials said. From the early 1990s until 2007, ING Bank violated federal and New York state laws by moving more than \$2 billion on behalf of Cuban and Iranian

entities through the U.S. financial system, according to court documents. The money was moved in more than 20,000 transactions, the documents added. "ING Bank knowingly and willfully engaged in this criminal conduct, which caused unaffiliated U.S. financial institutions to process transactions that otherwise should have been rejected, blocked or stopped for investigation under regulations" of the Treasury Department's Office of Foreign Assets Control, or OFAC, said a statement from the Justice Department. Among the violations, ING Bank processed payments for its Curaçao branch on behalf of Cuban customers without making clear the origin of the payments, according to court documents, which added that the Amsterdam-based bank also used misleading payment messages, shell companies and misused its internal suspense account. "For more than a decade, ING Bank helped provide state sponsors of terror and other sanctioned entities with access to the U.S. financial system, allowing them to move billions of dollars through U.S. banks for illicit purchases and other activities," Assistant U.S. Attorney General Lisa Monaco said in a statement. The bank's actions involved violations of the International Emergency Economic Powers Act and the Trading With the Enemy Act, the Justice Department said. In a statement, ING said its banking unit will cover the penalty through a provision it took in the first quarter, Reuters reported. The bank has worked to improve compliance with the law, closed its representative office in Cuba in 2007 and has severed its relationships with banks that are sanctioned, ING said. "The violations that took place until 2007 are serious and unacceptable," ING's chief executive officer, Jan Hommen said in a statement. Three other major banks have previously settled with U.S. and state authorities in New York over allegations they concealed the movement of money through the U.S. financial system on behalf of sanctioned clients. **Credit Suisse** agreed to forfeit \$536 million in 2009, **Lloyds TSB Bank** agreed to pay \$350 million that year and **Barclays** settled charges for \$298 million in 2010.

Featured Q&A

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Latin American countries mentioned, only Mexico has signed an international trade agreement tackling piracy (NAFTA). This was a very important contribution back then (in 1994, when software copyrights had not been implemented in those countries), but its content should have been updated and expanded already. Software and IP piracy violates economic and moral rights of software authors, disincentivizes the progress of competitive local software industries and promotes multiple related crimes including illegal labor, money laundering and non-payment of taxes."

A Richard Neff, founder of Neff Law Firm in Los Angeles: "Business piracy rates have hovered in the 50 percent range in most major Latin American markets for nearly a decade, without much improvement. Venezuela is an outlier, where civil society has all but died and piracy rates have increased. I believe there are at least three reasons why high rates persist: (1) The low-hanging fruit thesis: many of the larger organizations, including some governments, have long been using legal software, leaving piracy rates much higher in small businesses that have been relatively untouched by antipiracy efforts; (2) Possible underinvestment in combating piracy: some of the major software publishers in the early fight against software piracy have invested much less in the effort over the past decade; (3) Dysfunctional governments and judiciaries: police, prosecutors and courts struggle with scarce resources, and corruption takes an inestimable toll. As an in-house lawyer at Ashton-Tate and as BSA chairman and director, we ran up against corruption often, which militates against countries like Mexico, Argentina and Brazil ever having piracy rates as low as those in Canada, the United States and the United Kingdom. Chile is a notable exception to regional corruption, and Brazil is slowly improving. So what can be done? First, technology can be used to fight piracy.

Companies can use various mechanisms to track excessive use, or even disable such use. Second, new delivery mechanisms such as the cloud (SaaS systems) very much reduce piracy. The software resides on remote servers, so there is nothing for pirates to copy and distribute. Finally, it is worth noting that societies that create intellectual property are better at protecting it. Latin America is not a major innovator, but it is beginning to generate more intellectual property."

A Rodger Correa, compliance marketing director of the Americas at Business Software Alliance: "Latin American countries are heavily represented in our ongoing Piracy Study as this is a region of tremendous importance to the global economy. The region also contains two significant economic drivers of growth for Latin America, namely Mexico and Brazil. The use of unlicensed software denies software copyright owners their rights to compensation for their work, an effect which ultimately cascades throughout the larger local economy. IP theft in general is a global economic drain, stifling not only IT innovation, but job creation across all sectors of the local and global economy. It is also intrinsically dangerous to the security of IT networks as unlicensed software is often fraught with viruses, malware and spyware which can debilitate IT systems. When you acquire authorized software, you are buying a license to use the program under agreed terms. Failure to abide by those terms means you are then subject to legal action resulting in fines, claims for damages and even confiscation of equipment or personal liability. Steps that governments around the world can take to effectively reduce software theft are: increasing public education and awareness of software piracy and IP rights in cooperation with industry and law enforcement; modernizing protections for software and other copyrighted materials; strengthening enforcement of

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IP laws with dedicated resources, including specialized enforcement units, training for law enforcement and judiciary officials; and leading by example by using only fully licensed software, implementing software asset management programs and promoting the use of legal software in state-owned enterprises and among all contractors and suppliers."

A **Marc P. Misthal, partner at the intellectual property law firm of Gottlieb, Rackman & Reisman, P.C. in New York:**

"Latin American countries have weathered the recent financial difficulties better than some other nations, which makes them an attractive market for counterfeiters just as they are for legitimate businesses. Some Latin American countries have trade agreements with the United States, making it easier for them to transport goods into the United States. Virtually all Latin American countries already have anti-counterfeiting laws in place and are members of the WTO (meaning that they have signed the TRIPS Agreement). Education is really the key. Counterfeiting is generally not law enforcement's highest priority, but if they can be taught how counterfeiting negatively impacts governments and economies, they may start to see things differently. Thinking a little more 'out-of-the-box' may also be helpful. New York City has been successful in taking action against landlords who rent space to counterfeiters, going so far as to seize buildings. Perhaps something like this might work elsewhere. Stronger border protection would also help anti-counterfeiting efforts. Counterfeiting is often seen as a 'victimless' crime, but this is not the case. Counterfeiters do not pay taxes, depriving governments of income. Their workers are often treated poorly, and workplaces do not conform to local laws and regulations, resulting in unsafe working conditions. And often the proceeds of counterfeiting are used to fund other illicit activities."

A **Harley Lewin, partner at McCarter & English in New York:** "There is a culture in Latin American that not only allows copying but largely views it as something of a full employment act. An example is the street vendors who are often referred to as the secondary or underground economy. They are largely tolerated, if not encouraged, as a means to keep low-income persons employed when the normal labor market is not growing sufficiently. This culture is one of the biggest reasons that Latin American countries are so highly represented on the BSA list. The steps for improvement are clear. Enhance the power of customs to not only stop goods at the border, but also to conduct investigations against those who are successful in importing fake products. Second, develop a trained judiciary knowledgeable in IP law and put the cases before those judges. Third, educate the population. As long as the population does not think that counterfeiting is a bad thing, the market for fakes will remain. Fifth, enhance legal remedies. Counterfeiting must be put on par with other serious crimes if you want law enforcement to treat it seriously. Sixth, in certain countries, develop a dedicated police unit, free of corruption, to avoid leaks. Most understand that IP theft results in a loss of jobs. The unseen effects are worse. Counterfeiters don't pay sales tax, which means a decrease in the funds for badly needed municipal services. Finally, the nature of counterfeiting has changed. It is no longer a casual 'mom and pop' type event. Rather, it is highly organized, tightly run and more profitable than narcotics. The money derived from the sale of fake products now finds its way back to organized crime and perhaps, even worse, terrorist organizations."

The Advisor welcomes reactions to the Q&A above. Readers can write editor Gene Kuleta at gkuleta@thedialogue.org with comments.

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