

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# CHILE

## EXECUTIVE SUMMARY

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Chile is an important market for the copyright industries. On a positive note, Chile is taking steps to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, two treaties which recognize higher levels of copyright protection needed in this digital age. While there are signs that Chile is moving to further streamline its various copyright and copyright-related consistent with its bilateral and multilateral obligations, significant enforcement problems still exist.

The levels of copyright piracy in Chile remain quite high for such a developed market. Last year, Chile passed a new criminal procedure law which was supposed to improve the old and inefficient criminal system. Although this law is a promising step toward improved enforcement, it is still too early to assess any progress on the traditionally slow prosecution of infringement cases and the usually low, non-deterrent criminal sentences imposed upon defendants. Civil enforcement is slow and ineffective. Chilean law fails to provide for civil *ex parte* search procedures, an important enforcement tool required under the TRIPS Agreement. IIPA recommends that Chile remain on the Watch List for 2001.

### ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.5	25%
Sound Recordings / Musical Compositions	5.0	30%	NA	NA
Business Software Applications <sup>1</sup>	47.0	50%	47.7	51%
Entertainment Software <sup>2</sup>	41.0	80%	NA	78%
Books	1.0	NA	NA	NA
<b>TOTALS</b>	<b>96.0</b>		<b>50.2</b>	

<sup>1</sup> BSA estimates for 2000 are preliminary.

<sup>2</sup> IDSA estimates for 2000 are preliminary.

IIPA recently provided comments to the U.S. government regarding the scope of intellectual property rights provisions for the negotiations of a Free Trade Agreement (FTA) with Chile.<sup>3</sup> In addition, Chile currently participates in the Generalized System of Preferences (GSP) program, a trade program that offers preferential trade benefits to eligible beneficiary countries. An important part of the GSP discretionary criteria is that Chile provide "adequate and effective protection of intellectual property rights."<sup>4</sup>

## **COPYRIGHT PIRACY IN CHILE**

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Business software piracy rates in Chile were estimated at 50% in 2000, with estimated trade losses due to piracy amounting to \$47.0 million, representing a slight decrease from 1999.

The recording industry experienced a dramatic decrease in unit sales of 40% in 2000, compared to 1999. Most of the impact is related to a sudden increase in piracy. Pirate CD-Rs (recordable CDs) can be found all around the major cities (mainly Santiago) and in ferias around the country. More and more domestic piracy is popping out everywhere and the levels of piracy went up in more than 100% versus 1999 levels. The *carabineros* (police) are trying to be helpful but it is not a high priority for them, and deficiencies in the law and the delays in the courts greatly exacerbate the situation. Chile's border measures are also ineffective. Iquique continues to be considered as a center for traffic materials destined to pirate replicators around the country and, in some cases, connected to operations in Peru and Paraguay.

For the audiovisual industry, the main piracy concern in Chile in 2000 continues to be the 40% video piracy rate. Although back-to-back duplication in video stores forms an important part of the overall pirate video system in Chile, the more organized counterfeit video reproduction and distribution structure is of primary concern. A relatively small number of criminals, with national distribution networks through flea markets, street vendors and even directly to video stores, run the piracy industry in Chile. These pirates also sell the materials that facilitate individual back-to-back copying in video stores, such as professionally printed cover sheets. The country's flea markets, such as Bio-Bio in Santiago, and the increasing number of street vendors, are of particular concern. These unregulated distribution points, which are nearly 100% pirate, are a direct competition to the potential legitimate video market, making it even harder for otherwise legitimate retailers to compete. The black markets are increasingly linked to organized crime and other pirate distribution systems.

Cross-border piracy is an additional concern in Chile. MPA Chile investigations reveal a growing trend toward obtaining pirate video product from Peru. Cooperation from the Chilean Customs Office has been hampered by the slow implementation of TRIPS, which Chile joined on January 1, 2000. Parallel imports of original, unauthorized Region 1 DVDs are a growing cause of

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<sup>3</sup> See Letter of the International Intellectual Property Alliance to the Trade Policy Staff Committee on the Proposed U.S.-Chile Free Trade Agreement, January 29, 2001. This letter is available on the IIPA's Website, <http://www.iipa.com>, and at USTR's Reading Room in Washington, D.C.

<sup>4</sup> In 1999, \$338 million of Chilean imports to the United States benefited from the GSP program, accounting for 12% of its total imports to the U.S. For the first 11 months of 2000, \$391.9 million of Chilean goods entered the United States under the duty-free GSP code, representing a 26.2% increase over the same time period last year.

concern to the legitimate home video industry in Chile. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Chile are estimated to be \$2 million in 2000.

The IDSA estimates the piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Chile to have risen slightly to 80%. This high level of piracy in turn causes an estimated \$41 million in trade losses due to videogame piracy in this market in 2000.

The book publishing industry report that its main problem in Chile involves photocopies of university texts. Most of those are translations of U.S. titles, produced by U.S. subsidiaries in Mexico and Chile. There are private copy shops located near universities, and university-run photocopy facilities on campuses. An estimated 30% of the potential market is being lost through illegal copying. There is also a high VAT charged on books (18%) which makes books among the most expensive in Latin America. In contrast, other countries have zero rates or concessionary rates on books, 50% to 60% below VAT rates. Some pirated trade books have appeared in Chile, presumably produced by Mexican sources. There appear to be no commercially pirated textbooks. Estimated trade losses due to book piracy in Chile are \$1.0 million for 2000.

## **COPYRIGHT ENFORCEMENT IN CHILE**

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IIPA members have identified several deficiencies in the Chilean enforcement system which do not meet the threshold of full TRIPS compliance. For example, Chile does not provide for deterrent criminal penalties and civil damages that would help prevent further infringements. It is difficult to secure prosecutions, convictions or adequate deterrent sentences in the Chilean judicial system. Raids carried out by the police and the Public Ministry can be relatively effective, but it is very rare for a case to reach the verdict stage. In the few cases that do reach judgment, the sentences are regularly suspended, and the defendants are never incarcerated. Furthermore, Chile has failed to set up effective and TRIPS-compliant border control mechanisms through its customs system. For example, there appears to be no provision by which a rightholder can stop entry into Chile of suspect pirate product, even when there are clear indicia of infringement.

Moreover, as a general rule, the civil courts are relatively slow in issuing relief to the rightholder. This could be solved by making it simpler for rightholders to prove their cases, particularly their losses, through the adoption of statutory damages. Importantly, Chile fails to provide the critical TRIPS-mandated remedy of *inaudita altera parte* (ex parte) searches and seizures, a measure which is particularly important for the business software publishing community. Chilean law requires that advance notification be given to the suspected party, and this notice obliterates the effectiveness of this remedy.

### **Criminal Penalties and Procedures**

The ineffective application of penalties has been an enduring problem in Chile. The Chilean courts do not apply the penalties for infringement currently available under the law. Although distribution of pirated software is theoretically punishable by incarceration up to 540 days, it is difficult to secure prosecutions, convictions or adequate sentencing. Raids carried out by the police and the Public Ministry can be relatively effective, but it is very rare for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being

adjudicated. In the few cases that do reach judgment, sentences are suspended for an undetermined period of time without ever being effectively applied; consequently, defendants are never incarcerated for copyright infringement.

To fix these and other deficiencies, last year Congress passed a new set of rules on criminal procedure (Código de Procedimiento Penal). These new rules provide for a separation of the functions of preliminary investigation and decision-making. Under the previous criminal procedure, both functions were performed by the criminal judge. According to the new law, the preliminary investigation is now conducted by the prosecutor, and the decision is taken by the criminal judge. This new system is supposed to alleviate the work load of the judges and to lead to increased procedural efficiency. Because the new rules have only recently taken effect, it is still too early to assess whether they will provide better protection for intellectual property rights.

BSA brought thirteen criminal cases in 2000 and there is still no decision or verdict awarded.

The recording industry initiated anti-piracy actions in Chile for the first time during 2000. 211 raids were conducted, and 70 indictments issued. Eleven defendants were convicted in 2000 (all involving cases brought in 1999); no defendants in 2000 received convictions.

## **Lack of Effective Civil *Ex Parte* Search Remedy**

Chile fails to grant *inaudita altera parte* (*ex parte*) proceedings in civil cases. In every civil case in which an expert is needed, the law mandates notification of the other party. Requiring notification allows a defendant time to remove/erase all traces of piracy or to take other steps to protect him/herself from the inspection. Thus, even when granted, inspections often fail. In order to avoid notification of a defendant, the right holder has to hire both a private investigator to inspect the premises, and a notary public to record the results of the inspection. This adds expense to the process and makes it less effective because private parties bear the entire burden and expense of investigation.

## **Civil and Administrative Procedures and Remedies**

Chile's civil courts are relatively slow in issuing relief to copyright rightholders. Civil copyright infringement cases can take two or more years before being adjudicated. For example, the BSA conducted 16 actions against end-user defendants in 2000, of which eight cases were settled through private negotiation. However, the BSA could not reach an agreement with the other eight defendants and consequently resorted to civil actions against them. This system does not provide expeditious remedies to prevent infringements, as required by TRIPS.

In addition, Chilean copyright law does not provide for statutory damages in its law. Statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages, are a feature of copyright legislation in a growing number of countries. For example, statutory damages incorporated in Brazilian copyright legislation – and recently increased – have resulted in penalties at deterrent levels.

Chile lacks an administrative agency or authority charged with enforcing the copyright law. Some copyright rightholders, such as business software publishers, sometimes resort to

administrative actions to supplement criminal and civil anti-piracy campaigns. Several countries in this hemisphere, such as Peru, Mexico and now the Dominican Republic, have given administrative agencies specific authority to conduct some anti-piracy inspections and levy administrative sanctions.

## **Ineffective Border Measures**

As mentioned above, Chile's lack of effective border measures has permitted individuals in Chile to act in concert with pirates located on other territories—notably Peru and Paraguay. Additionally, there is an urgent need to promote more and more effective border measures. Iquique continues to be considered a hub of blank cassettes and compact discs, en route to pirate replicators around the country, extending to Peru and Paraguay. Iquique is also the center of traffic of business software applications with several destinations around the country and also Argentina, Brazil, Paraguay and Peru.

Chile fails to establish effective border measures through its customs regulations. For example, there is no provision by which a right holder can prevent the entrance of suspect merchandise into Chile, even when there are indicia of intellectual property rights violations.

## **COPYRIGHT LEGAL ISSUES IN CHILE**

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### **WIPO Treaties**

Chile is a signatory to both of the WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Chamber of Deputies approved bills to ratify both treaties in June 2000. The Senate will now be considering these bills when its session resumes in March 2001. The Chilean government has announced that these bills will be passed during 2001. Moreover, since November 2000, the IIPA members have sustained talks with the Chilean government to encourage Chile to adapt its local legislation to be TRIPS-compliant and to ratify the WIPO treaties.

### **Copyright Law of 1970, as Amended**

IIPA believes that it is critical that — with respect to copyright — the FTAA IPR chapter include, on a technologically neutral basis, the obligations of the two WIPO Treaties, as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities and that reflect the TRIPS obligations to which the countries of this hemisphere are already subject.

IIPA members have identified several deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended). For example, protection for compilations of unprotected facts is unclear; both NAFTA and TRIPS require protection of compilations of data or other material. A non-exhaustible rental right for computer programs does not appear expressly. While the copyright law does provide producers of sound recordings with a rental right, it is not clear whether this right is non-exhaustible, as required by NAFTA and TRIPS. The Chilean law

does not provide authors or producers of sound recordings with an express right to authorize or prohibit the importation of copies of their works or recordings made without their authorization, as required by NAFTA; there appears to be a criminal penalty for this action, but because the underlying right is not clear, more certainty in the exclusive rights section of the copyright law must be provided.

While the Chilean law creates a right in the producer of a sound recording to publicly perform, broadcast and communicate its work, the law ties this right to the exercise of the right to the author of the underlying musical composition; the rights of the record producer should be independent or parallel to the author's right. Chilean law also contains specific percentages regarding the remuneration for publishing contracts and performances of works; these should be left to contractual negotiations between the parties and NAFTA provides an obligation permitting the free and unhindered transfer of rights by contract. NAFTA also requires that criminal penalties and civil remedies be available for the manufacture, import, sale, lease or other making available of equipment for encrypted satellite signals, and these should be added to Chilean law. The copyright law also contains overbroad exceptions regarding the use of photographs which are incompatible with the Berne Convention and TRIPS. These examples of substantive deficiencies in the Chilean copyright law should be considered illustrative, not exhaustive.

IIPA notes that while some amendments to the copyright law were proposed in the early 1990s, comprehensive reforms of the copyright law which were presented to the Chilean Congress in the mid-1990s were not adopted.