

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Copyright piracy in Chile has increased dramatically in certain sectors, notably music CDs, and constitutes a serious problem for such a developed market. Piracy flourishes under a regime that focuses so little attention on the issue, and is exacerbated by deficiencies in the Chilean enforcement system, which fails to meet international and bilateral standards. For example, Chile does not provide for deterrent criminal penalties and civil damages that would help prevent further infringements. Chile has failed to set up and implement effective, TRIPS-compliant border control mechanisms. The critical TRIPS-mandated remedy of *inaudita altera parte* (civil ex parte) searches and seizures is also missing from its law. Chile is known for slow prosecution of infringement cases and the usually low, nondeterrent criminal sentences imposed upon defendants. Chile must take immediate action to elevate the attention of its police and civil authorities to heighten the priority of anti-piracy enforcement. On the legislative front, Chile's bill to upgrade its current copyright law to TRIPS standards falls far short in accomplishing the TRIPS-plus standards of protection which are being discussed in both the U.S.–Chile Free Trade Agreement (FTA) and the Free Trade Area of the Americas (FTAA). Further refinement of Chilean legislation is necessary. Lastly, more progress must be made on completing a comprehensive IPR chapter in the FTA negotiations. IIPA recommends that Chile remain on the Watch List for 2001, but warns that it will take a very dim view of promoting an FTA in the absence of clear improvements in the enforcement situation.

CHILE: ESTIMATED TRADE LOSSES DUE TO PIRACY (*in millions of U.S. dollars*) and LEVELS OF PIRACY: 1999 - 2001

INDUSTRY	2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.5	25%
Sound Recordings / Musical Compositions	12.2	35%	5.0	30%	NA	NA
Business Software Applications ¹	35.0	49%	33.1	49%	47.7	51%
Entertainment Software	NA	NA	41.0	80%	NA	78%
Books	110	NA	1.0	NA	NA	NA
TOTALS	50.3		82.1		50.2	

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$47.0 million at 50% were identified as preliminary. In mid-2001, BSA released its final 2000 figures, and those revised figures are reflected here.

IPR Negotiations in the U.S.–Chile FTA

IIPA has provided public 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.² IIPA supports a U.S. position which, at a minimum, must: (a) be TRIPS- and NAFTA-plus; (b) include, on a technologically neutral basis, the obligations in the soon-to-enter-into-force WIPO Copyright and Performances and Phonograms treaties (WCT and WPPT); and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities.

Much more progress must be made in the FTA IPR Negotiating Group. Issues related to both the scope of substantive rights and enforcement measures have not been resolved (see IIPA recommendations for the FTA IPR obligations, below). IIPA believes it would be unfathomable for an FTA to be negotiated and approved by the U.S. Congress that does not provide effective protection for the copyright-based industries. Furthermore, Chilean officials must effectively and promptly address the growing piracy problem in Chile now, or this risks becoming an impediment to U.S. approval of the FTA itself.

It is important to keep in mind that 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."³

COPYRIGHT PIRACY IN CHILE

Sadly, the level of attention given to copyright theft by Chilean authorities is diminishing, not increasing. As a result, piracy is flourishing.

Pirate CD-Rs (recordable CDs) can be found all around the major cities (mainly Santiago) and in *ferias* around the country. Most of the recording piracy found in Chile is actually produced in Chile. For example, blank CD-Rs enter Chile (as contraband, undervalued items or even legally), but the unauthorized reproduction of music takes places locally with CD-R burners. Points of entry for the CD-Rs include the seaports of Valparaiso and Iquique, and the airport in Santiago. Iquique continues to be considered as a center for traffic materials destined for pirate replicators around the country and, in some cases, connected to operations in Peru and Paraguay. The number of street vendors selling pirate product continues to expand on a daily basis in many cities, including Santiago, Valparaiso, Vina del Mar and Concepción. Vendors hawking their pirate goods can even

² 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, as well as Letter of the International Intellectual Property Alliance to the International Trade Commission on the Proposed U.S.-Chile Free Trade Agreement, December 12, 2001, available at: http://www.iipa.com/rbi/2001_Jan29_Chile_FTA.PDF and http://www.iipa.com/pdf/2001_Dec12_ChileFTA.pdf respectively.

³ In 2000, \$419.3 million in Chilean imports to the United States benefited from the GSP program, accounting for 12.9% of Chile's total imports to the U.S. For the first 11 months of 2001, \$451.9 million in Chilean imports to the United States benefited from the GSP program, or 15.1% of Chile's total imports to the U.S. between January and November.

be found within 100 meters of the Presidential Palace. The mayor of Santiago has openly protected the street vendors selling piratical product, and has opposed police operations against the vendors. More recently, political pressure is being exerted on municipal mayors in Santiago to better supervise the issuance of permits to street vendors.

The dramatic decline in the legal market for music and recordings that began in 2000 continued into 2001: sales for the full year decreased by 23 percent. As a result of this decrease, most of the record companies in Chile had to reduce their staff by approximately 25 percent. The *carabineros* (police) are trying to be helpful by concentrating in Santiago; however, deficiencies in the law and the delays in the courts greatly exacerbate the situation. Moreover, the *carabineros* cannot enforce the law in the municipal flea markets where the local mayors control licensing procedures. Chile's border measures are also ineffective. The retail trade started to close dozens of stores countrywide. The level of piracy has increased over the past year, from 30% in 2002 to 35% in 2001, mostly due to the shift from cassette piracy to CD-Rs. As a result of the growing pirate CD-Rs, estimated losses due to audio piracy in Chile more than doubled to \$12.2 million in 2001.

For the audiovisual industry, the main piracy concern in Chile remains video piracy. Although back-to-back duplication in video stores forms a large part of the overall pirate video system in Chile, the more organized reproduction and distribution of counterfeit videos is of primary concern. These counterfeit videos (and CD-R copies) are found throughout the country in flea markets, street sales and even video stores. In addition, 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 continuing concern, especially as their numbers grow due to the highest rate of unemployment in a decade. 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. Parallel imports of original, unauthorized Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are a growing cause of concern to the legitimate home video industry in Chile. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Chile remain at an estimated \$2 million in 2001.

The book publishing industry reports that its main problem in Chile involves photocopies of medical texts and reference books, mostly at the university level. Most of these copies 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 commercial piracy, which affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors. For example, some of the most pirated authors in Chile include Isabel Allende, Marcela Serrano, Paulo Coelho, and Pablo Neruda.⁴ 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. Estimated trade losses due to book piracy in Chile are \$1.1 million for 2001.

Business software piracy rates in Chile were estimated at 49% in 2001, with estimated trade losses due to piracy amounting to \$35.0 million.

⁴ "Chile holds the record for literary piracy in Latin America," Agencia EFE S.A., November 3, 2001.

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 rose to 80% in 2000. Estimated 2001 trade losses and piracy levels due to videogame piracy in Chile are not available.

COPYRIGHT ENFORCEMENT IN CHILE

Several deficiencies in the Chilean enforcement system fail to satisfy Chile's TRIPS obligations. 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 indications of infringement.

In addition, 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

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. Chilean police are among the more honest police forces in all of Latin America. However, municipal inspectors responsible for supervising the flea markets have fallen to corruption. Chilean courts do not apply the penalties for infringement currently available under the law. Although distribution of pirated material is theoretically punishable by incarceration up to 540 days (1½ years, a low term compared to the rest of the region), it is difficult to secure prosecutions, convictions or adequate sentencing. 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.

The Chilean Congress passed a new set of rules on criminal procedure (*Código de Procedimiento Penal*) in 2000. 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 this 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 workload of the judges and to lead to increased procedural efficiency. However, the law is still not operative in the entire country. It is currently

being applied only in 2 out of 13 Chilean regions. Therefore, it is too early to assess whether this law will bring more efficiency to the system.

Actions in 2001: The recording industry initiated anti-piracy actions in Chile for the first time during 2000, in which 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. In 2001, IFPI/Chile (the industry's anti-piracy association) conducted 162 "street" raids. A total of 308,627 CDs, CD-Rs and audiocassettes were seized from these actions. Fourteen hundred and twenty three (1,423) persons were arrested but only twenty-six (26) were processed through the judicial system. A total of seven persons from the 26 processed are in pre-trial prison detention. Three of the 26 were convicted or pled guilty but all received suspended sentences. Two cases resulted in fines of \$1,000. Most of these operations were conducted as a result of the individual interest from some officials within the *carabineros* force. The actions were not directed by an overall government plan to fight piracy.

The local recording industry (IFPI/Chile) has teamed up with the Chilean *carabineros* by issuing a "Zero Tolerance Piracy Decree," in which both groups maintain a visible public presence in the greater Santiago area during nighttime hours, Monday through Saturday. However, the *carabineros* terminate their operations at noon Saturday, which leaves the rest of Saturday and all-day Sunday for the pirates to hawk their products with total impunity. During the weekends, most of the pirate activity takes place in the municipal flea markets, where the *carabineros* seldom take action, due to political ramifications with the local mayors. With respect to the end-of-2001 holiday season, the *carabineros* did conduct a successful anti-piracy street campaign, but this only took place in the major downtown areas of Santiago; little or no action was taken against the municipal flea markets.

With respect to business software actions, BSA brought one criminal case in 2001, which is still pending decision.

The book industry conducted raids last year, but reports there is little government sensitivity to copyright infringements involving book piracy. The industry, led by La Cámara Chilena del Libro, intends to focus its efforts even more in all areas, including enforcement, legislative efforts, judicial training and public communications.

IDSA reports that in 2001, there were several Customs seizures that resulted in the initiation of investigations and the filing of criminal complaints against the importers of pirate Nintendo® videogames. The Talcahuano Customs Office seized a 20-foot container loaded with counterfeit videogame consoles and cartridges. A total of 2,280 consoles were confiscated. Each console included a counterfeit cartridge with 600 videogames. Two additional raids were conducted by the San Antonio Customs Office. One container carrying 9,880 counterfeit consoles was seized, with 76 built-in videogames. The second container had a total of 6,480 counterfeit consoles, all with built-in videogames. In August 2001, two separate seizures of counterfeit Nintendo® videogame products was made at the Santiago airport. Nintendo's local representatives discovered pirate merchandise imported via courier from Hong Kong, resulting in the seizure of 400 printed circuit boards containing printed Nintendo® videogames. In a separate action, Customs seized over 100 counterfeit Game Boy and Game Boy Color videogames. The products were shipped from Ciudad del Este, Paraguay to the Santiago Airport. These cases have yet to be resolved.

Possible Actions for Chilean Authorities to Take: Several immediate actions could be taken by Chilean authorities to counter this piracy problem, for example:

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaíso.
- The police should investigate pirate manufacturing and distribution centers and operations. Similarly, street vendors should be arrested and prosecuted so that this pervasive problem is tackled.
- The civil police and administrative authorities should also act to prohibit the sale of pirated materials in the streets.
- The police should coordinate their investigations and actions with customs officials as well as finance ministry officials, given the problems with piratical materials entering Chile and persons avoiding tax collections.

Lack of an 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.

Slow Civil Process and No Administrative Alternative

Chile's civil courts are relatively slow in issuing relief to copyright holders. Civil copyright infringement cases can take two or more years before being adjudicated. For example, the BSA conducted 12 actions against end-user defendants in 2001, of which seven cases were settled through private negotiation. However, the BSA could not reach an agreement with the other five defendants, and consequently resorted to civil actions against them.

In addition, Chilean copyright law does not provide for statutory damages. 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. Certain copyright holders, 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

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

For example, IDSA reports that in September 2001, a shipment of 20,000 pirate PlayStation® products left Malaysia destined for Santiago, Chile. Although the shipment was stopped in Switzerland, the Swiss customs authorities refused to hold the goods and released them for shipment. Chile continues to allow the entry of such clearly pirate products at its borders. Other IDSA member companies worked with Chilean customs, and criminal cases have been brought (see discussion above).

COPYRIGHT LEGAL ISSUES IN CHILE

WIPO Treaties

Chile deposited its instruments of ratification to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty with WIPO April 11, 2001. IIPA believes that it is critical that Chile amend its law to implement the obligations of both these treaties, treaties which respond to today's digital and Internet piracy realities. In fact, the U.S. and Chile have a Joint Statement on Electronic Commerce, signed on February 18, 2001 by the U.S. Secretary of Commerce and Chile's Acting Minister of Economy, which states, in relevant part: "The protection of copyright will be assisted by the prompt signing, ratification, and implementation of the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty."

Copyright Law of 1970, as Amended

IIPA members have identified several deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended) which do not meet the threshold of TRIPS/NAFTA compliance. For example, protection for compilations of unprotected facts is unclear. The law fails to grant record companies and performers with necessary exclusive rights to control digital transmissions of their phonograms and performances, whether through interactive or noninteractive means. In addition, while the present law creates a right in the producer of a sound recording to publicly perform, broadcast and communicate its work, the law, at least in theory, subjugates this right to the exercise of the right to the author of the underlying musical composition. The rights of the record producer must be independent or parallel to the author's right, as contemplated in Article 1 of the WPPT, which Chile has already ratified. 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. 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 adopted in the early 1990s, comprehensive reforms of the copyright law which were presented to the Chilean Congress in the mid-1990s were not adopted.

WTO Bill and Copyrights and Neighboring Rights

On October 11, 1999, the government presented a bill to Congress with the stated purpose of updating copyright legislation to comply with WTO TRIPS as well as the Chile–Canada and Chile–Mexico Free Trade Agreements. In mid-2001, the industries were able to review a copy of the then-latest version of that bill only to discover that it does not even come close to implementing Chile's current TRIPS requirements, let alone implementing the obligations of the WIPO treaties (of which Chile has already deposited its instruments). For example, while the proposed amendments would protect computer programs, they fail to expressly protect such as literary works. The revised reproduction right does not cover clearly temporary copies. The bill does add rental rights, affords protection for databases, and has a section addressing border measures. However, the bill does not increase the level of criminal penalties for infringement. There are no provisions regarding the WIPO treaties' "right of making available" as applied to producers of phonograms, or the provision of exclusive rights of communication with respect to non-interactive digital transmissions. Chile's WPPT/TRIPS inconsistent provision establishing a hierarchy of rights as between authors on the one hand and neighboring-rights holders on the other is also left unaddressed. Nor are there any provisions on technological protection measures or rights management information. Clarification and/or further amendments are needed to address industry concerns regarding statutory damages, the availability of expeditious civil *ex parte* searches, and clarification that criminal actions are "public" actions (initiated by the government).⁵ We understand that this bill is still pending in Congress, with low priority.

Government Software Management

Governments that make legal software use a priority not only comply with their international obligations to protect software copyrights but also set an example for private industry. In May 2001, President Lagos issued an executive order called "Instructions for the Development of the Electronic Government" (Decree No. 905 of 11 May 2001), which included a guideline for the executive branch to properly license software. While this decree sounded promising, it does not provide practical or specific guidelines for its own implementation. It fails to impose a system of compliance, such as tracking software registrations. There are no specific mechanisms on how to achieve full and effective management of software in government agencies. It only covers the executive branch of government, not other branches. BSA reports there was an August 2001 deadline for the heads of the various agencies to report on how they were going to implement this project; we do not have any specific information as to whether such reports were filed. Despite this executive order, software piracy in the government sector continues to be high; there has been little compliance with the Executive Order.

⁵ IIPA and its members reserve the right to propose additional amendments to this legislation.

The unauthorized use and copying of software by businesses and government entities — “end-user” piracy in the private and public sector — result in greater losses to the U.S. and global economies than any other form of piracy faced by any copyright-based industry. In many nations, government entities are among the largest users of software. Thus the failure of many governments to require and to oversee legal software use within national, provincial, and local agencies results in huge revenue, job, and tax losses and tends to perpetuate a lax attitude toward intellectual property protection in the economy as a whole. This, in turn, discourages investment and innovation in the software and technology fields and stunts a nation’s economic potential in these critical areas.