

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# CHILE

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Chile remain on the Watch List for 2003. Serious improvement in criminal raids, prosecutions, judgments and border controls is urgently needed, as are changes to implement effective civil *ex parte* searches and damage awards. The recently concluded U.S.-Chile Free Trade Agreement (FTA) contains a chapter on intellectual property rights. IIPA and its members look forward to reviewing the IPR chapter in detail, after the text is released to the public.

**Overview of key problems:** Chile must take immediate action to elevate the attention of its police and civil authorities to heighten the priority of anti-piracy enforcement. Copyright piracy in Chile has increased dramatically in certain sectors, notably music CDs. Deficiencies in the Chilean enforcement system fail 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 establish and implement effective, TRIPS-compliant border controls. Its civil *ex parte* search remedy is deficient; advance notice must be given to the target, thus making the provision essentially useless. Chile is known for slow prosecution of infringement cases and low, non-deterrent criminal sentences imposed upon defendants. Estimated trade losses due to piracy in Chile were \$76.5 million in 2002. On the legislative front, Chile's long-stalled bill to upgrade its current copyright law to TRIPS standards falls far short of accomplishing that goal, and furthermore, it fails to come close to meeting the higher standards of protection required under the two WIPO Internet treaties and those found in the new bilateral FTA with the U.S.

**Actions which the Chilean government should take in 2003:** The Chilean government should engage in several simultaneous measures to improve copyright protection—

- Take concerted actions to conduct raids and prosecutions against piracy, and to apply deterrent-level criminal sentences;
- Acknowledge that the pending amendments to the copyright law (the Miscellaneous Bill) are inadequate, and take steps to expeditiously draft proposals to improve the 1982 copyright law to, at a minimum:
  - Fully implement the obligations of the WIPO treaties, including a full panoply of exclusive rights to rightsholders
  - Afford an effective civil *ex parte* search remedy
  - Afford statutory damages
  - Increase the level of criminal sanctions for copyright infringement;
- Improve the speed of civil copyright law litigation;
- Take action to improve border enforcement by amending the relevant laws and improving performance by customs officials;
- Continue and enhance its efforts to implement sound and effective software asset management practices in order to comply with its 2001 government software legalization decree.

**CHILE**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.5	25%
Records & Music	14.0	35%	12.2	35%	5.0	30%	NA	NA
Business Software Applications <sup>2</sup>	59.4	51%	46.3	51%	33.1	49%	47.7	51%
Entertainment Software	NA	NA	NA	NA	41.0	80%	NA	78%
Books	1.1	NA	1.1	NA	1.0	NA	NA	NA
<b>TOTALS</b>	<b>76.5</b>		<b>61.6</b>		<b>82.1</b>		<b>50.2</b>	

## THE U.S.-CHILE FREE TRADE AGREEMENT

On December 11, 2002, the United States and Chile concluded the Free Trade Agreement (FTA) designed to facilitate trade and investment between the two countries. The text of the U.S.-Chile FTA IPR chapter has not yet been made public. According to USTR's Trade Facts press release,<sup>3</sup> the IPR chapter includes the following elements (bullets are USTR's text):

### Copyrights: Protection for Copyrighted Works in a Digital Economy

- Ensures that only authors, composers and other copyright owners have the right to make their works available online. Copyright owners maintain all rights even to temporary copies of their works on computers, which is important in protecting music, videos, software and text from widespread and unauthorized file sharing via the Internet.
- Copyrighted works and phonograms are protected for extended terms, consistent with U.S. standards and international standards.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$35.0 million at 49% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Office of the U.S. Trade Representative, "Free Trade with Chile: Significant New U.S. Access to South America's Most Dynamic Economy," Dec. 11, 2002, pages 5-6 at [http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile\\_summary.pdf](http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf).

- Strong anti-circumvention provisions to prohibit tampering with technologies (like embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet.
- Ensures that governments only use legitimate computer software, thus setting a positive example for private users.
- Limited liability for Internet Service Providers (ISPs), reflecting the balance struck in the U.S. Digital Millennium Copyright Act between legitimate ISP activity and the infringement of copyrights.

#### IPR Enforcement: Tough Penalties for Piracy and Counterfeiting

- Criminalizes end-user piracy, providing strong deterrence against piracy and counterfeiting.
- Chilean government guarantees that it has the authority to seize, forfeit and destroy counterfeit and pirated goods and the equipment used to produce them. IPR laws will be enforced against goods in transit, to deter violators from using U.S. or Chilean ports or free-trade zones to traffic in pirated products. *Ex officio* action may be taken in border and criminal IPR cases, thus providing more effective enforcement.
- Mandates both statutory and actual damages under Chilean law for IPR violations. This serves as a deterrent against piracy, and provides that monetary damages can be awarded even if actual economic harm (retail value, profits made by violators) cannot be determined.

Over the last two years, IIPA has provided public comments to the U.S. government regarding the FTA IPR negotiations with Chile.<sup>4</sup> IIPA was vocal in supporting a U.S. position which would support an IPR chapter that must: (a) be TRIPS- and NAFTA-plus; (b) include, on a technologically neutral basis, the obligations in the 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. We also advocated the importance of Chile taking immediate action to combat widespread piracy. During the end-game of the negotiations, IIPA expressed concern over the adequacy of the then-pending Chilean proposals on IPR, services and e-commerce.<sup>5</sup>

IIPA looks forward to reviewing and evaluating the text of the U.S-Chile FTA IPR chapter once it is made public. On January 29, 2003, President Bush notified the Congress of his intention to enter into an FTA with Chile.<sup>6</sup>

Chile presently benefits from preferential trade benefits under 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

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<sup>4</sup> See the IIPA's January 29, 2001 Letter to the Trade Policy Staff Committee on the Proposed U.S. - Chile Free Trade Agreement at [http://www.iipa.com/rbi/2001\\_Jan29\\_Chile\\_FTA.PDF](http://www.iipa.com/rbi/2001_Jan29_Chile_FTA.PDF) and the IIPA's December 12, 2001 Letter to the International Trade Commission on the Proposed U.S.-Chile Free Trade Agreement at [http://www.iipa.com/pdf/2001\\_Dec12\\_ChileFTA.pdf](http://www.iipa.com/pdf/2001_Dec12_ChileFTA.pdf).

<sup>5</sup> See IIPA November 5, 2002 Letter to Ambassador Robert B. Zoellick on the Chile FTA, available at [http://www.iipa.com/rbi/2002\\_Nov5\\_CHILE\\_FTA.pdf](http://www.iipa.com/rbi/2002_Nov5_CHILE_FTA.pdf).

<sup>6</sup> White House press release, Notice of Intention to Enter Into a Free Trade Agreement with Chile, January 30, 2003, available at <http://www.whitehouse.gov/news/releases/2003/01/print/20030130-25.html>.

“adequate and effective protection of intellectual property rights.”<sup>7</sup> In the multilateral realm, Chile is a WTO member and is obligated to have already implemented both the letter and the spirit (performance) of the TRIPS Agreement.

## COPYRIGHT PIRACY IN CHILE

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Copyright piracy involving hard goods continues to be a serious problem, with trends of local CD-R burning, optical media piracy and even Internet piracy being reported.

The recording industry continues to report that pirate music 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 place 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 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 level of piracy has increased over the past year, from 30% in 2000 up to 35% in 2001 and 2002, mostly due to the shift from cassette piracy to CD-Rs. As a result of the growing pirate CD-Rs, estimated losses due to sound recording piracy in Chile more than increased to \$14.0 million in 2002. The legal market for music and recordings that began in 2000 continued to decline in 2002. 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 audiovisual industry reports that there is an increasing incidence of optical disc and Internet piracy in Chile, and some new incursions of signal theft. Video piracy remains a big problem, according to the Motion Picture Association of America (MPAA). Back-to-back duplication in video stores is prevalent, but organized reproduction and distribution of counterfeit videos and optical discs is of primary concern. These counterfeit videos and CD-Rs are found throughout the country in flea markets, street sales and 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 overall audiovisual piracy rate is estimated to be 40%. An increasing worry, especially involving pirate optical discs, is the illegal importation as contraband of product from Asia, directly or via Peru or Paraguay. These pirate optical discs are now being seen in video stores and in black markets. Iquique, for example, appears to be a

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<sup>7</sup> In the first 11 months of 2002, \$462 million worth of Chilean imports to the United States benefited from the GSP program, or 14.4% of Chile's total imports to the U.S. between January and November, representing a 2.2% increase over the same period in 2001.

center of contraband traffic of pirate optical disc. The country's black market, such as the Bio-Bio market in Santiago, and the increasing number of street vendors, present problems. 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. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Chile are estimated to be \$2 million in 2002.

Business software piracy rates in Chile were estimated at 51% in 2002, with estimated trade losses due to piracy amounting to \$59.4 million, according to the Business Software Alliance (BSA). One of the most devastating forms of piracy for the business software industry in Chile is the unauthorized use and copying of software by small to medium-sized businesses.

The Interactive Digital Software Association (IDSA) reports that there is piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Chile.

The book publishing industry continues to report 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.<sup>8</sup> 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 remained at \$1.1 million for 2002.

## **COPYRIGHT ENFORCEMENT IN CHILE**

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The Chilean enforcement system fails to meet Chile's existing bilateral and multilateral obligations—both in substance and by performance. 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 those few cases which do reach judgment, sentences are regularly suspended and the defendants are never incarcerated. Furthermore, Chile's border controls are not effective. In addition, the civil courts are still relatively slow in issuing relief to rightsholders. It is impossible to obtain an effective civil *ex parte* search, since advance notice must be given to the target. Adequate damages are difficult to achieve in civil copyright infringement cases.

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

Chile fails to grant *inaudita altera parte* (*ex parte*) proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register and are available to the public; such advance notice violates TRIPS Article 50. Thus, target companies have prior notice that an *ex parte* search request has been filed against them before the

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<sup>8</sup> "Chile holds the record for literary piracy in Latin America," Agencia EFE S.A., November 3, 2001.

inspection takes place. This notice obliterates the effectiveness of the remedy, because it allows a defendant the opportunity 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 2002, 25% of BSA's requested inspections failed for this reason; the Business Software Alliance (BSA) brought 24 civil cases, six of which failed because the companies had advance notice of the *ex parte* search request. The U.S-Chile FTA requires an effective civil *ex parte* remedy.

## **Criminal Penalties and Procedures**

**Procedures:** 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, although this law was passed in late 2000, it is still not operative in the entire country; it is being applied only in two of 13 Chilean regions. The law has a long transition period, so it is not possible to assess whether it will ultimately bring more efficiency to the system.

**Raids and suggested actions:** 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.

Several immediate actions could be taken by Chilean authorities to counter piracy:

- 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.

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.

During 2002, MPA coordinated with police to initiate 138 cases from raids (including 90 for retail sales of pirate works and 23 for pirate reproduction), seizing just over 30,200 pirate VHS tapes, close to 14,000 pirate optical discs (DVDs, VCDs and CD-Rs) as well as other equipment. Raids were conducted against clandestine laboratories, video retailers and street vendors, and accomplished with the cooperation of the *carabineros*. Approximate 350 people were arrests, and 62 indictments were issued. Nevertheless, MPA's local attorney continues to track 783 pending cases (619 in video retail outlets). Of those outstanding cases, MPA's attorney achieved eleven convictions for retail piracy and seven for street sales in 2002, however, all were either suspended sentences or probation, and notably, there were no sentences for duplication or distribution.

The book publishing industry conducted raids in 2002, but more government sensitivity to copyright infringements involving book piracy is needed. 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 previously reported 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.

## **Slow Civil Process, No Statutory Damages, 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 judgment. For example, in 2002 BSA conducted 24 actions against end-user defendants, of which six cases were settled through private negotiation and five more are under negotiation. However, BSA could not reach agreements with the other seven defendants, and consequently resorted to civil actions against them; none of these has yet reached judgment.

The 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 the U.S., Brazilian and Taiwanese legislation obviate the virtually impossible and time-consuming requirement that the value of

infringement damages, lost profits, etc. be proved. The U.S.-Chile FTA requires that Chile afford statutory damages in copyright cases.

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 the Dominican Republic, have given administrative agencies specific authority to conduct some anti-piracy inspections and levy administrative sanctions.

## **Ineffective Border Measures**

Chile has failed to set up and implement effective, TRIPS-compliant border control mechanisms. 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. The U.S.-Chile FTA contains border measures which Chile must implement.

The increasing amount of optical disc piracy coming from across the border is of great concern. Weak border enforcement has allowed individuals in Chile to act in concert with pirates located on other territories—notably Peru and Paraguay. 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.

## **COPYRIGHT LAW IN CHILE**

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The Chilean government must entirely revamp, revise and significantly improve its proposed legislation to amend the copyright law. The long-pending amendments to the copyright law are totally inadequate to meet existing bilateral IPR standards, multilateral standards, and the standards of the U.S-Chile FTA. In addition, Chile has made no progress on advancing its own promises made to the U.S. when the U.S. Secretary of Commerce and Chile's Acting Minister of Economy signed a Joint Statement on Electronic Commerce on February 18, 2001 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."

Chile has deposited its instruments of ratification to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), making it one of the first 30 countries which put these treaties into force. IIPA believes that it is critical that Chile amend its current copyright law to implement the obligations of both these treaties, treaties which respond to today's digital and Internet piracy realities.

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

Over the years, IIPA members have identified deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended) that 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 non-interactive 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 are 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 Miscellaneous Bill Amending the Law on Copyrights and Neighboring Rights**

On October 11, 1999, the government presented a bill to the Chilean Congress with the stated purpose of updating copyright legislation and customs matters 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 this “WTO Miscellaneous 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, the proposed amendments would protect computer programs (but not expressly as literary works), add rental rights, afford protection for databases, and include a section on border measures. However, the revised reproduction right does not cover clearly temporary copies. 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, nor 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 rightsholders on the other remains unchanged. 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).

The WTO Miscellaneous Bill has passed the Chamber of Deputies and is pending in the Senate. Reports indicate that the executive branch is pressing for its prompt approval in early 2003. The copyright industries have long opposed the passage of this bill as completely inadequate. The Chilean government and the legislative branch should scrap the Miscellaneous Bill and expeditiously prepare a comprehensive proposal which fully meets Chile’s bilateral and multilateral obligations.

## 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.<sup>9</sup> 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.

This was a significant step forward that demonstrated the government’s increased awareness of the value of managing its software assets in a systematic and thorough manner. We understand that the government is implementing this Executive Order to ensure any new software it acquires is duly licensed. BSA urges the government to extend its implementation to existing software assets throughout the government. Good software asset management practices can best be achieved through active public-private sector partnership. We urge the government of Chile to work closely with the private sector in implementing these practices.

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<sup>9</sup> 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.