

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Chile remain on the Watch List for 2004.

Overview of key achievements/problems: The intellectual property rights chapter of the U.S.-Chile Free Trade Agreement (FTA) provides for a high level of copyright and enforcement obligations. On the legislative front, Chile's long-stalled efforts to upgrade its current copyright law got back on track, and Chile adopted two sets of copyright law amendments during 2003 — one to implement TRIPS and the other to implement its immediate obligations under the FTA. More legislative work, however, will still need to be done to implement several FTA provisions (including the entire enforcement subchapter) which are subject to extended transition periods.

Copyright piracy in Chile has increased dramatically in certain sectors in recent years, especially as digital piracy becomes more prevalent. Unfortunately, the Chilean enforcement system fails to meet Chile's existing bilateral and multilateral obligations. 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 do not receive deterrent sentences. Furthermore, Chile's border controls are not effective. In addition, the civil courts are still relatively slow in issuing relief to rightsholders and adequate damages are difficult to achieve in civil cases. Civil *ex parte* searches can be avoided by the defendant, since the granting of civil *ex parte* searches can be tracked in a public electronic register before the provisional measure has been executed, using the "national identity number" of the defendant and/or the plaintiff.

Actions which the Chilean government should take in 2004: The Chilean government should engage in several simultaneous measures to improve copyright protection—

- Take concerted and organized criminal raids. New efforts could include, for example:
 - The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaiso.
 - 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.
- Actively pursue prosecutions and ensure judges impose deterrent-level criminal sentences;
- Consider bringing more raids and actions under organized crime legislation;

- Begin to develop legislation to implement the remaining elements (including enforcement) for which Chile was granted transition periods in the U.S.-Chile FTA; this would include addressing the industries' longstanding concerns with (for example):
 - Providing an effective civil *ex parte* search remedy;
 - Establishing statutory damages;
 - Increasing the level of criminal sanctions for copyright infringement;
 - Affording express protection of temporary copies;
 - Adopting provisions on technological protection measures and the enforcement of circumvention of such;
- Revise the January 2004 proposed anti-piracy bill which contains several provisions which do not affect the high levels of effective enforcement in either the FTA or TRIPS;
- Improve the speed of civil copyright infringement litigation;
- Take effective actions to improve border enforcement by amending the relevant laws and improving performance by customs officials;
- Have customs establish a system to track blank optical media imports and coordinating with rightsholders to ensure accurate invoices;
- Enhance governmental efforts to take up hold effective software asset management practices in order to implement the 2001 government software legalization decree.

CHILE
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.0	40%	2.5	25%
Records & Music	21.1	40%	14.0	35%	12.2	35%	5.0	30%	NA	NA
Business Software Applications ²	NA	NA	34.0	51%	46.3	51%	33.1	49%	47.7	51%
Entertainment Software	NA	NA	NA	NA	NA	NA	41.0	80%	NA	78%
Books	1.1	NA	1.1	NA	1.1	NA	1.0	NA	NA	NA
TOTALS ³	NA		51.1		61.6		82.1		50.2	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more information on Chile's history under Special 301, see IIPA's summary in this submission at Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>).

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$59.4 million and levels of 51% were identified as preliminary. BSA's 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 reflect losses to (a) all software publishers in Chile (including U.S. publishers) and (b) losses to local distributors and retailers in Chile.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Chile were \$76.5 million. IIPA's revised loss figures for 2002 are reflected above.

On December 11, 2002, the United States and Chile concluded a Free Trade Agreement (FTA), an agreement designed to facilitate trade and investment between the two countries. This FTA entered into force on January 1, 2004.⁴ The U.S.-Chile FTA incorporates the obligations set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The full implementation of the WCT and WPPT both in Chile and on a global basis at the earliest possible date is a critical goal of the copyright industries. Unfortunately, however, the Chile FTA IPR chapter has extended transition periods (ranging from two years, four years and five years) which delay the significant benefits that immediate implementation of these treaties' obligations would bring to U.S. industry and to both the U.S. and Chilean economies.⁵

COPYRIGHT PIRACY IN CHILE

Copyright piracy in Chile involving hard goods continues to be a serious problem, and more reports of local CD-R burning, optical media piracy and even Internet piracy continue. Over the last three years, IIPA provided public comments to the U.S. government regarding the FTA IPR negotiations with Chile. In a variety of contexts, IIPA has advocated the importance which Chile should place on taking immediate action to combat widespread piracy.⁶

As a result of the growing pirate CD-Rs, estimated losses due to sound recording piracy in Chile more than increased to \$21.1 million in 2003. 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 music piracy has increased over the past year, from 30% in 2000 up to 40% in 2003, mostly due to the shift from cassette piracy to CD-Rs. The *carabineros* (police) are trying to be helpful by concentrating in Santiago; however,

⁴ See Presidential Proclamation to Implement the United States-Chile Free Trade Agreement, December 320, 2003, available at <http://www.whitehouse.gov/news/releases/2003/12/20031230-2.html>. The U.S.-Chile FTA text is posted on USTR's website at <http://www.ustr.gov/new/fta/Chile/final/index.htm> (released April 6, 2003); USTR's summary of the IPR chapter is available at <http://www.ustr.gov/new/fta/Chile/summaries/Chile%20IP%20Summary.PDF>.

⁵ For IIPA's more detailed analysis of the strengths (and weaknesses) in the U.S.-Chile FTA IPR Chapter, see IIPA's Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.

⁶ For more historical background on copyright industries' concerns with Chile, please see to IIPA's 2003 Special 301 country report, available at <http://www.iipa.com/rbc/2003/2003SPEC301CHILE.pdf>. Prior to the FTA entry into force, Chile was a beneficiary country under the Generalized System of Preferences (GSP) program, which contains IPR criteria. During the first 11 months of 2003, \$475 million worth of Chilean imports to the United States benefited from the GSP program, or 13.2% of Chile's total exports to the U.S. between January and November; this represented a 2.8% increase over the same period in 2002.

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. As a result, the record industry continues to lose market share, with revenues dropping 9.2% and units sold dropping 18% in 2003.

According to the Business Software Alliance (BSA), the unauthorized use and copying of software by small to medium-sized businesses (multiple installations of a single-product license and other under-licensing or license misuse) is the most economically harmful forms of piracy for the business software industry in Chile, while piracy at the retail level is also prevalent, including hard disk loading and the sale of pirate software in all major cities, especially Santiago. Furthermore, with growing broadband penetration, Internet piracy has already become a matter of concern.

The audiovisual industry confirms that optical disc piracy is steadily increasing in Chile. MPA reports that seizures of optical discs passed VHS seizures in 2003 for the first time, composing 55% of seizures, up from less than one-tenth in 2002. Moreover, optical disc quality is increasing as well, with more high-quality pirate DVD-R available than before. This pirate product is locally produced, although some recorded (burned) product may come from Paraguay. Blank discs enter legally and illegally from Asia. Optical disc piracy is the primary concern of local theatrical executives, because it is increasing in volume and quality and because it encroaches upon the theatrical window. OD piracy is also a huge threat to the home video market. MPA also reports that back-to-back duplication of VHS tapes in video stores continues to be common in Chile. 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 black market, including the Bio-Bio market in Santiago, and the increasing number of street vendors, are of continuing concern. These unregulated distribution points, which are nearly 100% pirate, represent direct competition to the potential legitimate video market, making it even harder for otherwise legitimate retailers to compete. These black markets are increasingly linked to organized crime and other pirate distribution systems. With respect to the internet, Chile has the highest Internet penetration in Latin America (including at least 60,000 dedicated connections with broadband access). Investigation indicates an increasing incidence of both hard goods sales (DVD-R) and downloading via broadband, especially for later conversion to CD-R or DVD-R product for distribution. Estimated annual losses to the U.S. motion picture industry in Chile are placed at \$2 million in 2003.

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. 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 2003.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) continues to be a problem.

COPYRIGHT ENFORCEMENT IN CHILE

The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. Unfortunately, the FTA also contains a two-year transition period to expressly protect temporary copies; a four-year transition period to implement the enforcement obligations (including statutory damages) and a five-year transition period to implement Chile's already existing WCT/WPPT obligation regarding protection against circumvention of technological protection measures. Effective implementation of these provisions should begin now, not later.

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 may check the register to find out whether an *ex parte* search request has been filed against them before the inspection takes place. This notice obliterates the effectiveness of the remedy, because it affords 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 sometimes fail. In 2003, at least two BSA inspections failed for this reason. The U.S.-Chile FTA requires an effective civil *ex parte* remedy.

Police raids taken, but prosecutions are few: The local copyright industries have been active and generally report good cooperation with enforcement officials at the raiding level. Raids carried out by the Federal Civil Police and the Public Ministry can be relatively effective. However, only few prosecutions are brought.⁷ It is very rare indeed for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated.

For example, in 2003, the local recording industry (IFPI/Chile) 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. The recording industry's anti-piracy unit cooperated in 281 raids during 2003, which produced 47 indictments and no sentences. This level of activity is not sufficient to combat a 40% piracy rate in Chile.

In 2003, MPA coordinated with police to initiate 182 cases from raids, including 22 reproduction centers (notably, 19 of these were optical disc reproduction), seizing 21,278 pirate VHS videotapes and 22,280 pirate optical discs (DVDs and CD-Rs) as well as other equipment, such as 63 optical disc burners. Raids were conducted against clandestine laboratories, video retailers and street vendors, and accomplished with the cooperation of the *carabineros*. 142

⁷ 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. The new system is operating in the whole country, except for Santiago. Given that many copyright cases take place in Santiago, it is not yet possible to fully assess how efficient this new system is.

people were arrested, and 42 indictments were issued. Nevertheless, these indictments, along with over 700 pending cases, will inevitably lead to little, if any, deterrence since all sentences are minimal (average of three months) and all are immediately suspended. Although prosecution is slow and sentencing is not at deterrent levels, the Chilean Government's effort is, at least, serious, is not corrupt and is open to coordination with MPA and the local anti-piracy association.

For cybercrimes (including intellectual property violations) Chile's civil police created a group of specialized police approximately three years ago who are dedicated to investigating Internet crimes. This unit has generally performed well. The intellectual property cases (no more than 10) that they have investigated have been related to individuals engaged in hard goods sales.

During 2003, BSA filed one criminal action, which was dropped since the target agreed to pay compensation.

Criminal sentences not deterrent: 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 criminal process has always been cumbersome, costly, and time-consuming and without deterrent impact on the market for copyrighted products. Sixteen (16) criminal cases against pirate software resellers, some dating back many years, are still unresolved. Consequently, BSA has relied on civil enforcement, given the difficulties with criminal enforcement.

Slow civil process, no statutory damages: Chile's civil courts are relatively slow in issuing relief to copyright holders, with civil copyright infringement cases taking two or more years until judgment in cases of first instance. In 2003, BSA conducted 59 inspections against end-user defendants and settled 27 cases through private negotiation; 26 are under negotiation. However, BSA could not reach agreements with the other six defendants, and consequently resorted to civil actions against them; three of these actions ended with a settlement but the other three have not reached judgment. The Chilean copyright law still does not explicitly 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; the U.S.-Chile FTA requires that Chile soon implement statutory damages in copyright cases.

Ineffective border measures: The increasing amount of optical disc piracy coming from across the border is of great concern. To give an example of the size of the problem, MPA reported that Chilean Customs seized a shipment of 2,500 high-quality DVD-Rs from Paraguay in early 2003. 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. Chile has failed to set up and implement effective, TRIPS-compliant border control mechanisms. The U.S.-Chile FTA contains obligations regarding border measures.

COPYRIGHT LAW AND RELATED ISSUES IN CHILE

Copyright Law Reform in 2003

During 2003, Chile implemented two sets of amendments to its 1970 copyright law (Law No. 17.336); the first to better implement its long-overdue TRIPS obligations and the second to implement those provisions of the U.S.-Chile FTA which would enter into force on January 1, 2004. As a result, these amendments addressed many of the longstanding deficiencies and/or ambiguities in this law which IIPA and its members had identified as not satisfying the thresholds of obligations found in U.S. bilateral programs, the WTO TRIPS Agreement and the two WIPO Internet treaties.⁸

After years of legislative consideration, amendments to implement some of Chile's long overdue TRIPS obligations were adopted in the summer of 2003 (Law No. 19,912 of November 4, 2003). For example, these amendments addressed some basic customs procedures, clarified explicit protection under copyright for computer programs and compilations of data, and redefined several exclusive rights (including distribution, reproduction and communication to the public).

Furthermore, in order to implement its immediate FTA obligations, Chile again amended its copyright law in November 2003 (Law No. 19.914 of November 14, 2003). The copyright-related amendments accomplished the following: added a distribution right; increased the terms of protection; clarified the reach of the law to foreign rightsholders not domiciled in Chile; added the "making available" right; added certain key definitions; established civil and criminal sanctions to protect rights management information; clarified the rental right for computer programs, and removed a formality regarding the protection of photographs. Amendments were not made to those FTA obligations which were permitted transition periods.

New Anti-Piracy Bill Is Contrary to Its Objectives

After years of anticipation, President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, the reality of the bill is at odds with this stated purpose, and arguably may be inconsistent with the high enforcement standards of the U.S.-Chile FTA. The bill only slightly increases fines, but keeps prison sanctions at the same level, and allows judges to choose between these alternatives. Most likely this will result in judges imposing only fines and not imprisonment, thus flouting deterrence. Furthermore, the new bill fails to punish infractions done without financial benefits ("Animo de Lucro"). Reproduction without financial benefits is punished only once the amount of the damages exceeds 150 UTM (approximately US\$7,500) (1 UTM=29,650 Chilean pesos or US\$50). The bill also contains a chapter on copyright enforcement (statutory damages are not included), purportedly to implement TRIPS and FTA provisions on enforcement.

The Chilean copyright sectors also have criticized this proposed legislation.⁹ Clearly this bill will need major improvements in order to make it comply with Chile's FTA and TRIPS obligations.

⁸ For a historical sense of Chilean copyright efforts over the past decade, please refer to IIPA's 2003 Special 301 country report, available pages 372-373 at <http://www.iipa.com/rbc/2003/2003SPEC301CHILE.pdf>.

⁹ Stephan Kueffner, "Chile Private Sector Criticizes Planned 'Anti-Piracy' Law," Dow Jones Newswires, Jan. 23, 2004.

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. In order to confirm that all government agencies use computer software only as authorized, the U.S-Chile FTA requires that the parties adopt appropriate provisions to actively regulate the acquisition and management of software by government agencies (inventories of software present on agencies' computers and inventories of software licenses). Notwithstanding that this obligation is not subject to transition periods, the Chilean government has not yet fulfilled this commitment, and no steps have yet been taken by the Chilean government to comply. BSA urges the government to implement this commitment at once.

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.