

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Chile be elevated to the Priority Watch List in 2005.

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. The FTA entered into force on January 1, 2004.¹ Some of the copyright law reforms required under the FTA had to be concluded upon date of entry into force, other provisions (including enforcement) are subject to a transition period.

On the legislative front, in early 2004, a new bill aimed at improving anti-piracy measures was introduced to the Chilean Congress. While the goal of such reform is laudable, the bill requires additional improvements, particularly in the area of increasing criminal sanctions to deterrent levels. It does not reflect a comprehensive attempt to fully implement the rest of the Chile FTA enforcement obligations. The bill is currently being reviewed by the Economic Committee in the House of Representatives, and there remain a number of legislative hurdles it must pass before being enacted into law. In addition, future legislative work is needed in order to implement several FTA provisions which are subject to extended transition periods.

With respect to piracy and enforcement, the copyright industries remain very concerned about the lack of improvement. Copyright piracy involving hard goods continues to be a serious problem, with digital piracy contributing to a dramatic increase in copyright piracy in Chile. Estimated 2004 trade losses due to copyright piracy topped \$106 million. The Chilean enforcement system fails in practice 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, and imports of pirated materials continues. Finally, the civil courts are still relatively slow in issuing relief to rightholders and adequate damages are difficult to achieve in civil cases. Above all, Chile does not have a national anti-piracy campaign that aims to combat the damages caused by the violation of intellectual property rights.

¹ The U.S.-Chile Free Trade Agreement is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

Actions which the Chilean Government Should Take in 2005: The Chilean government should engage in several simultaneous measures to improve copyright protection. In general, the government should publicly declare its will to fight piracy on a national level and announce specific actions in that regard.

Legislative

- Revise the January 2004 proposed anti-piracy bill, which contains several provisions which do not address the high levels of effective enforcement in either the FTA or TRIPS. The bill is expected to be voted on by the House of Representative's Economic Committee sometime in March 2005.
- 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):
 - Increasing the level of criminal sanctions for copyright infringement;
 - Providing an effective civil *ex parte* search remedy;
 - Establishing statutory damages;
 - Affording express protection of temporary copies; and
 - Adopting provisions on technological protection measures and the enforcement of circumvention of such.
- Adopt appropriate provisions (as agreed to in the U.S.-Chile FTA) to actively regulate the acquisition and management of software by government agencies (e.g., by examining software on agency computers and relevant software licenses); and
- Implement exclusive importation rights for local copyright holders.

Enforcement

The government of Chile should also take concerted and organized criminal raids. New efforts could include the following:

- 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 place more emphasis on investigating pirate manufacturing and distribution centers and operations;
- 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 at international airports and border areas, as well as with finance ministry officials;
- Pursue prosecutions and impose deterrent-level criminal sentences;
- Initiate more raids and actions using organized crime legislation;
- Improve the speed of civil copyright infringement litigation;
- Have customs establish a system to track blank optical media imports and coordinate with rightholders to ensure accurate invoicing;
- Initiate actions against illegal downloaders of music, movies, and software.

CHILE
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004²

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.0	40%	2.0	40%
Records & Music ³	24.8	50%	21.1	40%	14.0	35%	12.2	35%	5.0	30%
Business Software ⁴	41.0	63%	42.0	63%	34.0	51%	46.3	51%	33.1	49%
Entertainment Software ⁵	37.9	70%	NA	NA	NA	NA	NA	NA	41.0	80%
Books	1.0	NA	1.1	NA	1.1	NA	1.1	NA	1.0	NA
TOTALS	106.7		66.2		51.1		61.6		82.1	

COPYRIGHT LAW

The FTA and 2003 reforms: 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, 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.⁶

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

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2004spec301methodology.pdf. For more details on Chile's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Chile are posted at <http://www.iipa.com/countryreports.html>.

³ Estimates for the recording industry are based on a third-party survey in order to improve the accuracy of the statistics.

⁴ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Chile, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at the website <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$68 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁶ 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.

thresholds of obligations found in U.S. bilateral programs, the WTO TRIPS Agreement and the two WIPO Internet treaties.⁷

2004 anti-piracy bill is pending before congress: President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, upon closer review of the proposal, the bill is not satisfactory and has not received the full support of the copyright-based industries.

This anti-piracy bill (Boletín N° 3461-03) purports to accomplish two major amendments to current law: (1) replacing the section in the current copyright law on infringements, offense and penalties with a new chapter on same; (2) adding modifications to enforcement procedures, including precautionary measures and empowering certain courts. IIPA's analysis of the bill shows the following, in brief:

- Although the bill does incorporate some of the FTA enforcement obligations on criminal penalties, it does *not* significantly or effectively increase criminal penalties from current levels. For example, levels for minor offenses remain the same but only slight increases in fines are proposed (no increases in jail terms) for the revamped articles on copyright infringement. Several problems are clear. First, the level of proposed fines remains far too low to offer any deterrence. For example, infringers do not even pay the issued fines, and prefer to wait out their cases (some software cases have taken up to six years to be resolved). Second, it remains the case that the drafting formulation remains “fines or jail” for most offenses. In present practice, Chilean judges rarely issue any criminal sentences. For example, minimum sentencing (that is, house arrest) has been applied in the few audiovisual cases, despite good cooperation with police on raids. Industry officials have suggested that jail times should be increased to up to three years in order to constitute a deterrent (this higher level would halt automatic suspensions of sentences).
- On a positive note, the bill does include a fair number of FTA-related civil procedure and provisional measures.
- The bill does not address two issues—technological protection measures and statutory damages.
- Reproduction, absent financial gain, is punished only if the amount of the damages exceeds 150 UTM (approximately U.S. \$7,500).
- The anti-piracy bill fails to address other enforcement-related FTA issues, including:
 - Criminal and civil remedies for encrypted program-carrying satellite signals (Chile FTA Article 17.8).
 - Limitations on ISP liability (such provisions do have a four-year transition), including notice and take down provisions.
 - Judicial authority to impose fines or jail terms on infringers who do not comply with court orders in criminal cases to supply information (Chile FTA Article 17.13 — the bill does appear to afford some civil remedies only).

⁷ For a historical sense of Chilean copyright efforts over the past decade, please refer to IIPA's 2003 and 2004 Special 301 country reports at <http://www.iipa.com/countryreports.html>.

- The availability of civil *ex parte* search remedies (Chile FTA Article 17.15)—a historic problem, especially for the software industry.

The copyright industries have informed the Chilean government of the inadequacies embodied in this bill and the need to reform it. Furthermore, the copyright industries have been pressing for additional amendments to this bill, especially to increase criminal penalties. Currently, the bill is lodged in the House of Representatives' Economic Committee and is expected to be voted on by the committee sometime after the February recess, possibly in March 2005. The bill will then be analyzed by the Constitutional Committee. Once voted on by that committee, and passed, it will move to Senate committees, and, eventually, to the Senate as a whole. As a result, there remain a number of lobbying opportunities to seek modification of this bill.

Additional reform: Reports are also circulating that Chile intends to introduce additional amendments to its copyright law which would be aimed at exceptions and limitations to copyright protection. The copyright industries look forward to reviewing any such proposals and note that any such reform should be compatible with the U.S.-Chile FTA.

COPYRIGHT PIRACY

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.

Music piracy, primarily in the form of pirate CD-Rs, continues to wreak havoc. The recording industry reports that pirate music CD-Rs can be found all around the major cities (mainly Santiago) and in *ferias* around the country. However, the recording industry does not report a great deal of cooperation from the police (*carabineros*) in removing many street vendors in Santiago, Concepcion and Valparaiso. The *carabineros* require more resources specifically allocated to fight piracy in order to intensify the campaign. Most of the record 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. In 2004, the recording industry anti-piracy group (APDIF Chile) assisted police in identifying pirate locations, resulting in the seizures of approximately 250,000 recorded CD-Rs and 533 burners. Although these numbers reflect the goodwill of the police force, it is not sufficient to deter the sale of over 5 million pirate products.

The recording industry ordered a third-party survey (performed by Ipsos) on the impact of Internet music piracy. The results are disturbing, indicating that 19% of the population is engaged in downloading music from the Internet. Most of these people have broadband Internet access from their homes, offices, schools, or at Internet cafés, and either own or use CD burners. More than 60% of those songs downloaded find their way onto a CD-R. Based on this survey, the industry draws a very rough estimate of over 9 million songs being illegally downloaded per year.

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 form of piracy for the business software industry in Chile, according to the Business Software Alliance (BSA). 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.

Optical disc piracy has risen and is the major concern of MPA in Chile. Chile also has the highest level of Internet penetration, on a percentage basis, in all of Latin America—especially in the broadband segment—and there is an increasing incidence of both hard goods sales and downloading via broadband, especially for later conversion to CD-R or DVD-R product for further distribution. Back-to-back duplication of VHS in video stores continues to be common. The country's black market, and the increasing number of street vendors, is 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. The black markets, especially the Bio-Bio market in Santiago, have close links to organized crime and other pirate distribution systems.

Photocopies of medical texts and reference books (usually translations of U.S. titles produced by subsidiaries in Mexico and Chile) continue to plague the book publishing industry, primarily at the university level. Private copy shops are conveniently located near universities, and university-run photocopy facilities on campuses. The publishing industry estimates that 30% of the potential market is being lost through illegal copying. Commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors. In addition, a high VAT is charged on books (18%), which makes books sold in Chile 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.

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, with most pirated products imported from Asia and Paraguay. Internet café piracy is also problematic, with 200 unlicensed cafés in the country.

COPYRIGHT ENFORCEMENT

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.

IIPA and its members outline illustrative examples of specific enforcement problems encountered in Chile:

- 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 undercuts 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.

- The police run raids, but prosecutions are rare. Raids carried out by the Federal Civil Police and the Public Ministry can be relatively effective. The record and audiovisual industries have been active in Chile, and report generally good cooperation with police units. However, only a small number of prosecutions are brought. It is very rare indeed for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated.
- Criminal sentences are not deterrent. Although distribution of pirated material is theoretically punishable by incarceration up to 540 days (one and one-half 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 recording industry reports ten sentences issued in 2004 but none carried any type of incarceration.
- 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.
- Lengthy delays in both civil and criminal copyright infringement cases are the norm.
- Border enforcement measures are ineffective. Imports of optical disc piracy coming from across the border remain a serious concern. Iquique continues to be considered a hub of blank cassettes, compact discs, business software applications, and entertainment software products. The latest estimates show that over 40 million blank CD-Rs were probably imported in 2004, which would appear to be far out of proportion with legitimate demand.
- The Chilean government must fully implement government software management. 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 (e.g., inventories of software present on agencies' computers and inventories of software licenses). The Chilean government has not yet fulfilled this commitment.

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