

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

CHILE

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2007.

EXECUTIVE SUMMARY

The copyright industries in the IIPA have very little positive news to report on progress on the numerous copyright law and enforcement issues (particularly growing piracy problems) we have highlighted over the past year. In response to USTR's request for comments on the Chile's 2006 out-of-cycle review, IIPA recommended in September 2006 that Chile be elevated to the Priority Watch List, given both the lack of progress on combating piracy and the slow process of legislative reform. The current situation is of particular concern given that Chile was the first U.S. trading partner in the Americas to sign a Free Trade Agreement (FTA), which provides a high level of copyright and enforcement obligations. Although the FTA entered into force on January 1, 2004,¹ some of the copyright and enforcement obligations were subject to transition periods, many of which will come due in 2008. The Chilean government should engage in several simultaneous measures to improve copyright protection, including a public declaration expressing the political will to fight piracy on a national level and announcing specific actions in that regard.

PRIORITY ACTIONS IN 2007

Fully implement the copyright and enforcement obligations in the FTA: Develop and adopt 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 calls for:

- Increasing the level of criminal sanctions for copyright infringement;
- Adopting provisions on technological protection measures (TPMs) and the enforcement (both criminal and civil) against their circumvention;
- Providing an effective civil *ex parte* search remedy;
- Establishing statutory damages;
- Affording express protection of temporary copies;
- Providing protection to encrypted program-carrying satellite signals;
- Establishing ISP liability in concert with the FTA obligations; and
- Adopting appropriate provisions to regulate the acquisition and management of software by government agencies.²

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.

² 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

Improve criminal enforcement: Concerted and organized enforcement efforts should 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 Valparaíso;
- 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;
- More criminal actions against illegal downloaders of music, movies, and software should be initiated;
- The police should coordinate their investigations and actions with customs officials at international airports and border areas, as well as with finance ministry officials;
- More prosecutions should be pursued and the courts need to impose deterrent-level criminal sentences;
- More raids should also be initiated using organized crime legislation.

Improve civil remedies: The speed of civil copyright infringement litigation must be improved and an effective civil *ex parte* search remedy must be afforded in law and in-practice (as mentioned above);

Improve border enforcement: Customs should establish a system to track blank optical media imports and coordinate with rightsholders to ensure accurate invoicing. The border program would greatly benefit from limiting the ports of entry for blank optical discs, instituting a reference price for CD-Rs and DVD-Rs and creating an approved importers' register. In addition, custom and tax authorities may want to follow the distribution of these goods to a final consumer to ensure adequate tax payments.

Announce a national anti-piracy campaign: The Ministry of the Interior should develop and launch a national anti-piracy campaign which would contain specific action-oriented elements aimed at specific enforcement efforts, improved interagency cooperation, and enhanced public awareness. The IPR enforcement area of the civil police should play a critical role in the campaign.

For more details on Chile's Special 301 history, see IIPA's appendices, specifically, Appendix D (History) at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>), Appendix E (List of 301 placements) at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>), as well as previous years' country reports, at <http://www.iipa.com/countryreports.html>.

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 still has not fulfilled this FTA commitment, we understand.

CHILE
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2002-2006³

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ⁴	29.6	44%	22.7	51%	24.8	50%	21.1	40%	14.0	35%
Business Software ⁵	65.0	64%	55.0	66%	49.0	64%	42.0	63%	34.0	51%
Motion Pictures ⁶	NA	NA	10.0	35%	2.0	40%	2.0	40%	2.0	40%
Entertainment Software ⁷	NA	20%	NA	NA	37.9	70%	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.1	NA	1.1	NA
TOTALS	95.6		88.7		114.7		66.2		51.1	

COPYRIGHT LAW ISSUES IN CHILE

The U.S.-Chile FTA: 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 Chile FTA IPR chapter does contain extended transition periods (ranging from 2 to 5 years) which delayed the significant benefits that immediate implementation of these Treaties' obligations would bring to the copyright industry and to both the U.S. and Chilean economies.⁸ For example, Chile has a transition period to provide protection to temporary copies, establish effective technological protection measures, grant comprehensive public performance rights and non-interactive digital transmission rights, and adopt ISP liability and notice and takedown provisions. The longest transition deadlines will soon become due, and the IIPA and its members continue to urge Chile to fully and promptly comply with its WCT/WPPT and FTA obligations.

2003 copyright law reforms adopted: Chile has already amended its law to implement some of its substantive FTA copyright law obligations. During 2003, Chile adopted two sets of amendments to its 1970 copyright law (Law No. 17.336), the first to better implement its long-

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf.

⁴ Estimates for the recording industry in 2006 are based on a third-party survey in order to improve the accuracy of the statistics. The loss increase in 2006 is due to the inclusion of pirate DVDs in the calculation that are sold at a higher price.

⁵ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Chile, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

⁶ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁷ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁸ 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.

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. 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.

Proposed 2004 anti-piracy bill finally died: In January 2004, President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, the bill was not satisfactory and did not receive the full support of the copyright-based industries, and in fact, contained many deficiencies.⁹ While the goal of such reform was laudable, it was not a comprehensive attempt to fully implement the rest of the Chile FTA enforcement obligations. After much delay and legislation inaction in the House of Deputies' Economy Commission, we understand that this bill has, fortunately, died in committee.

2005 laws affecting judicial processes: The Chilean Congress passed a number of IPR-related bills in early December 2005. While much was directed at industrial property issues, there was some legislation which aimed at streamlining judicial processes by changing the criminal procedure code. The key changes which would improve IPR enforcement included: (1) giving judges greater freedom to order preventive incarceration, and (2) giving the police the authority to search locations without a warrant in the case of a flagrant crime. IIPA has been informed that these laws have the support of the local copyrights sectors. In fact, some report the new processes are being applied as part of new cases. However, this is not regularly producing jail terms unless the industry identifies a specific case as being particularly serious. On those occasions, some people have been incarcerated.

2005 efforts to impose dangerous exceptions: During 2005, several Chilean Government agencies reportedly were trying to amend the bill to incorporate very broad "fair use"-like exceptions which would allow copyrighted materials to be used without the rightsholders' authorizations. It is likely that these provisions, if included, would also meet with the objections of the copyright industries. The copyright industries have informed the Chilean Government of the inadequacies embodied in this bill and the need to reform it. The industries have been pressing for additional amendments to this bill, especially to increase criminal penalties. It seems that this project may have been merged with more recent initiatives (see below).

2006 proposed Copyright Law reform initiatives: Under the Bachelet Administration, authority for copyright has shifted from the Ministry of Education to the Ministry of Culture. During 2006, the Minister of Culture announced two initiatives affecting copyright, and the copyright industries, both Chilean- and U.S.-based, look forward to reviewing the proposed legislation.

The first legislative project involves a bill that will address some FTA compliance issues, including enforcement measures (perhaps including deterrent-level penalties and fines, statutory damages and *ex officio* authority), exceptions and limitations to rights and protection for technological protection measures. During 2006, this process moved forward, with internal draft legislation being circulated to other ministries, including the Ministry of the Secretary General of the Presidency, the Ministry of Foreign Relations and the Ministry of Economy. IIPA

⁹ See IIPA's 2006 Special 301 report on Chile for a full accounting of the problems in the proposed anti-piracy legislation, available at <http://www.iipa.com/rbc/2006/2006SPEC301CHILE.pdf>.

was told that this bill was to have been presented to the Congress by the end of 2006. The second legislative project reportedly involves comprehensive reform of the copyright law in 2007. Local industry was informed that Ministry of Culture intends to create consultative commissions, whereby private industries may participate in discussions over the legislative proposal, sometime in the second quarter of 2007. There also was a third project outstanding since 2005 which was to have expanded on exceptions permitted under the copyright law (see above).

Recent reports suggest that all three of these initiatives have been merged into one bill, but this bill has not yet been released to the public for review. Transparency in this legislative reform process is critical.

Alternative proposal on anti-piracy reform: A local intellectual property coalition known as CONAPI (of which MPA and the recording industry, IFPI, are members) presented in January 2004 to the Ministry of Culture a new, shorter and revised version of the Anti-Piracy bill which had been pending in Congress. This new bill is known as the “Ley Corta,” and the industries were seeking its fast-track congressional approval. CONAPI. Unfortunately, some government authorities amended the bill, significantly distorting its key objectives. The resulting project even put in jeopardy some existing anti-piracy tools in the law. As a result, CONAPI requested that the project be killed and no further legislative actions were taken.

COPYRIGHT PIRACY AND ENFORCEMENT IN CHILE

Piracy levels in Chile remain high for such a developed market in the region, with the copyright industries reporting no improvement in the piracy situation during 2006. Many industries continue to be very concerned over the growth in digital piracy and piracy involving hard goods remains a serious problem. The Chilean enforcement system fails in practice to meet Chile’s existing bilateral and multilateral obligations, and the industries report no noticeable improvement in 2006. The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. The FTA contains a four-year transition period to implement the enforcement obligations, and a five-year transition period to implement Chile’s already existing WCT/WPPT obligation regarding protection against circumvention of technological protection measures.

Street piracy remains notorious: Sidewalk vendors continue to sell their pirated wares, simply covering them with big towels printed with the cover image of movies, games, music or software. The buyer asks for the product, the seller makes a phone call, and in a few minutes a runner appears with the pirated product. In 2006, the situation worsened with these organized groups becoming more aggressive in their operations.

Importation of blank CDs: Chile continues to experience a significant problem involving the massive importation of blank CDs from Southeast Asia. Most of these blank CDs end up being used in the black market. The recording industry reports that this importation problem is especially serious in the Iquique region, where there is a free trade zone. In fact the port has become a gateway for blank discs destined for Bolivia, Paraguay and Brazil. The Motion Picture Association (MPA) reports that optical disc piracy remains a major problem in Chile. The latest estimate is that 160 million blank CD-Rs were imported in 2005. To address this problem, the government should establish a customs policy whereby all blank CD shipments must pass through “red light” proceedings. This procedure would require that every shipment of optical media be inspected for price and classification accuracy as well as legitimacy of exporters and

importers. To simplify such an operation, Chilean Customs may want to consider limiting the number of ports of entry for blank optical media, as have programs already implemented in Mexico and Paraguay. In addition, the creation of an importers' register will also improve disclosure; such a system should also involve rightsholders. No progress on establishing such a register was made in 2006.

Internet piracy is growing: Another important concern of all the copyright industries is the rapidly growing internet broadband penetration (Chile has one of the highest broadband penetrations in the region). The recording industry reports that the music piracy situation is worsening with the rapid growth of illegal downloads of music files over the Internet due to the increase in broadband lines, and access to peer-to-peer (P2P) sites have fueled this problem. The local recording industry association commissioned a third-party survey which revealed over 220 million songs of local and international repertoire are being downloaded annually in Chile.

The local recording industry association is addressing this problem by working with local Cyber-crime units to raid Internet cafés contributing to illegal downloads; it is also considering alternative actions against individual uploaders. The operation against Internet cafes covered 12 locations, mainly in Santiago, where authorities seized 21 computers and approximately 12 thousand optical discs. It is imperative to control the level of Internet piracy that is continuing on a regular basis. The industry estimates that about 25% of all downloading and burning is done in Internet cafes.

Business software piracy: The Business Software Alliance (BSA) reports that piracy accomplished mostly by burning machines (and not via Internet distribution) has become its most pressing problem in Chile. Commercial piracy conducted by integrators (such as OEMs) and by the hardware and software retailers is serious, and anti-piracy campaigns by BSA and its Chilean colleagues (ADS) have not reduced these problems. 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) remains the most economically harmful form of piracy for the business software industry in Chile. As with other industries, BSA is also concerned about Internet piracy in Chile.

Piracy of music and sound recordings: Piracy of music and sound recordings, primarily in the form of pirate CD-Rs, continues to wreak havoc in the Chilean market. A sharp decrease in the legitimate recording market during 2006 of 26% strongly suggests that music piracy in Chile is growing. Pirate music CD-Rs can be found all around the major cities and in *ferias* around the country. The police (*carabineros*) have made efforts to remove many street vendors in Santiago, Concepcion and Valparaiso but require more resources specifically allocated to fight piracy in order to intensify the campaign. Most of the pirate product found in Chile is produced domestically. 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 2006, the recording industry anti-piracy group (APDIF Chile) assisted police in identifying pirate locations, resulting in the seizures of approximately 300,000 recorded CD-Rs and DVD-Rs as well as 596 burners. Although these numbers reflect the goodwill of the police force, this is not sufficient to deter the sale of over 5 million pirate products. In addition, the industry has reached out to many local and state authorities during 2006 by conducting training seminars on piracy for police, prosecutors and tax auditors.

Audiovisual piracy: Back-to-back duplication of VHS in video stores continues to be common. The black market and the growing number of street vendors remain problematic. 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. MPA reports that there is a growing problem of “delivery piracy” in the offices of the main areas of Santiago. For example, a well dressed person, armed with a film catalog, goes into office buildings offering to sell copies of the latest movie releases. To fight this situation, MPA has started an “educational” campaign to the managers of these buildings, alerting about the illegal activity of these delivery service. More than 400 companies have been contacted by letters and phone calls. The audiovisual industry is also concerned about the growth of Internet piracy in Chile. Furthermore, signal piracy remains a significant problem in Chile, especially involving the creation of mini-head ends that receive pirate programs that are then provided to particular buildings, condominium associations and small towns. Unfortunately, the Chilean Government and its municipalities accept registrations from and grant licenses to pirate companies without investigation so long as those companies pay taxes.

Book piracy: 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 also produce pirate product. Commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors.

Entertainment software piracy: 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 pirate products imported from Asia and Paraguay

Police raids but no deterrent results: Police run raids, but prosecutions are rare. Raids carried out by the Federal Civil Police and the Public Ministry can be relatively effective. The recording and audiovisual industries report generally good cooperation with police units. The recording industry reports that raids continue to be focused in Santiago and Valparaiso but there is no change or improvement. Most raids are requested by the industry; the local authorities rarely initiate any type of actions. Flea markets such as Bio-Bio in the outskirts of Santiago are still plagued with pirate product. With respect to the theft of satellite signals, industry reports that the government does not pursue investigations or enforcement actions; legal actions by the private sector have resulted in the closure of pirate services, but enforcement by the government of the sentences issued by courts is weak.

Although no specific, separate organized crime law exists in the Chilean criminal code, some provisions address organized crime activities and are stricter than those for piracy. Some industries have determined that in some locations piracy is in the hands of groups with the necessary resources to buy equipment and blank media, and set up replication facilities. As a result, the authorities should consider applying these provisions to these instances and other more serious cases. The recording industry reports that they have not succeeded in applying the organized crimes provisions in any case so far.

Inadequate border enforcement: Chile (primarily Iquique) continues to play a major role as an entry point for blank optical disc media that is coming from Southeast Asia with a final destination of Paraguay and/or Bolivia. Chilean authorities are aware of this fact but much improvement is needed in order to track and intercept these imports. The Chilean Government has not organized any type of border program to curtail importation of over 160 million blank optical discs known to end up as pirate product.

Internet piracy and cybercrime cases: For cybercrimes, including intellectual property violations, Chile's Civil Police created a specialized, dedicated force to investigate Internet crimes, which has generally performed well. The few intellectual property cases that they have investigated have been related to individuals engaged in hard goods sales. This unit should take a more active role in fighting Internet piracy. Toward that end, the recording industry organized a training seminar for some of this unit's members in 2006.

Inadequate civil ex parte remedy and slow civil cases: For years, Chile has failed 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. 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 violates TRIPS Article 50, and it also 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. This remedy is particularly important because the BSA conducts only civil (no criminal) actions in Chile. In addition, 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.

Criminal prosecutions are few and sentences are not deterrent: Only a small number of criminal copyright prosecutions are brought in Chile. It is very rare for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated. Although the distribution of pirated material is theoretically punishable by incarceration of 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 rarely incarcerated for copyright infringement. The recording industry reports 26 sentences issued in 2006 with 2 people incarcerated and 4 serving their time on a part time basis (they sleep in jail).

IPR TRAINING AND PUBLIC AWARENESS

In 2006, the music industry continued to reach out to many local and state authorities by conducting training seminars on piracy for police, prosecutors and tax auditors. They provided at least eight seminars in the course of the year including three on Internet piracy. The goal is to maintain this level of training during the current year.