

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2010.

**Executive Summary:** The copyright industries remain very concerned about the twin problems of inadequate legal reform and high piracy levels in Chile. Hard goods piracy remains at steady levels and Internet piracy is already a major obstacle for the development of a new digital economy. Although industry cooperation with Chilean criminal enforcement authorities generally is good, especially from the Carabineros, there appears to have been a drop in the number of street actions in 2009. There have been some encouraging actions taken against Internet sites distributing infringing products. At the end of the day, only few copyright prosecutions are undertaken and even fewer result in deterrent sentencing, due largely to inadequate minimum penalties in the law.

Chile was the first U.S. trading partner in Central and South America to sign a Free Trade Agreement (FTA) with the United States, which provides high level copyright and enforcement obligations. The deadlines for Chile's implementation of its copyright and enforcement obligations all have passed and implementation is still incomplete. After almost three years of work on copyright- and enforcement-related FTA legislation, the lengthy and rather contentious process, including a presidential veto, is coming to a conclusion, as the Constitutional Court is now reviewing the bill. Unfortunately, the new legislation still contains substantive gaps that may result in confusion and, even worse, undermining the ability of rights holders and enforcement authorities to combat piracy, especially in the online environment. Furthermore, legislation has not even been drafted to implement the FTA obligations on technological protection measures, a deadline long overdue.

The Chilean government needs to elevate national attention to copyright enforcement and develop specific actions to significantly reduce hard goods and Internet piracy. With 2010 being an election year in Chile, there is uncertainty and concern as to whether or not the new government will move forward on full and proper FTA implementation and support a national program that would promote respect and enforcement of copyrighted content.

**Priority actions requested to be taken in 2010:** The copyright industries recommend that the following five groups of actions be taken in the near term in Chile in order to improve the adequate and effective protection of copyrighted materials there:

**Fully implement its FTA copyright legislative-related obligations to:**

- Implement copyright and enforcement legislation that would fully satisfy FTA IPR obligations including addressing the industries' longstanding calls to: (a) establish effective internet service provider (ISP) liability provisions to meet its FTA obligations, including notice and take down procedures; (b) increase the level of deterrent civil and criminal sanctions for copyright infringement; (c) provide an effective civil *ex parte* search remedy; and (d) establish statutory damages.
- Implement FTA technological protection measures (TPMs) obligations and enforce FTA anti-circumvention provisions (both criminal and civil).
- Take immediate steps to complete and fully implement its 2001 government software legalization decree, and adopt provisions to regulate the acquisition and management of software by government agencies.



### **Improve criminal enforcement:**

- Instruct the police (Carabineros) to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Iquique, Concepción, and Valparaíso.
- Have the police place more emphasis on investigating pirate manufacturing and distribution centers and operations.
- Instruct the civil police and administrative authorities to take actions prohibiting the sale of pirated materials in the streets.
- Pursue more criminal actions against internet piracy
- Have the police coordinate their investigations and actions with customs officials at international airports, seaports and border areas, as well as with Finance Ministry officials.
- Pursue more prosecutions and impose deterrent-level criminal sentences.
- Initiate more raids 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 both in the law (without TRIPS-incompatible procedures) and in-practice.

**Improve border enforcement:** Chilean Customs should establish a system to track blank optical media imports, coordinate with rights holders to ensure accurate invoicing, limit the entry of blank media, institute a reference price for CD-Rs and DVD-Rs, and create an approved importers' register.

**Announce a national anti-piracy campaign:** The Ministry of the Interior should develop and launch a national anti-piracy campaign with specific action-oriented elements aimed at specific enforcement efforts, improved interagency cooperation, and enhanced public awareness.

## **COPYRIGHT LAW ISSUES IN CHILE**

IIPA and its members strongly support the FTA and for many years have urged Chile to fully and promptly comply with its FTA and international obligations.<sup>1</sup>

**The U.S.-Chile FTA<sup>2</sup> :** While Chile did timely amend its copyright law to implement much of the FTA's first set of substantive copyright obligations (those due upon the FTA's entry into force on January 1, 2004), a series of transition periods (ranging from two to five years) anticipated that additional law amendments were necessary for Chile to meet its bilateral obligations. Chile has failed to meet several of these transition periods and, as a consequence, is out of complication with its FTA obligations.

Chile had a two-year transition period to provide protection to temporary copies (Articles 17.5.1 and 17.6.1). There appears to be no express protection for temporary copies in the law and the reproduction right is very broad. The new 2010 legislation creates certain exceptions to temporary copies. The FTA contains a four-year transition period (due January 1, 2008) for Chile to implement the following enforcement obligations:

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<sup>1</sup> For the history of Chile under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2010 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

<sup>2</sup> 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](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html). For an earlier review by IIPA of 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](http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf).

- Adopt provisions on limitations of liability for Internet Service Provider (ISP) liability and notice and takedown provisions (Article 17.11.23);
- Provide for a right of communication to the public and non-interactive digital transmissions (Article 17.6.5);
- Provide for legal remedies for rights management information (Article 17.7.6);
- Provide for pre-established damages (statutory damages) in civil judicial proceedings (Article 17.11.9);
- Provide for civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (Article 17.11.12);
- Provide for various border measures (Articles 17.11.17 through 17.11.21).

Finally, Chile also has failed to implement its already existing WCT and WPPT obligations regarding protection against circumvention, including preparatory acts, of technological protection measures (TPMs) in accordance with the FTA (see FTA Articles 17.7.5.a and c).

**Copyright law reform in 2009, and adoption in 2010:** Chile has been working on legislation to amend its copyright law (Law No. 17336) since 2007 to address some (not all) of the FTA issues cited above. The new legislation was an effort to comply with the FTA's requirements regarding critical issues such as criminal enforcement, limitations and exceptions to copyright and provisions concerning limited liability for Internet Service Providers (ISP's). The process has been slow and arduous,<sup>3</sup> and the ultimate outcome is disappointing on several key issues.

During 2009, there was a lot of debate and work on the copyright/FTA bill. In early January 2009, several meetings of the joint legislative committee were held but much of the work did not resume until Congress came back into session in March 2009, where a very full agenda of copyright amendments faced them. On September 9, 2009, the Senate passed amendments to the House bill. The bill was then sent to another joint commission to review critical issues involving ISP liability provisions, and it made additional revisions. That package was then sent to the House, which rejected some of the joint commission recommendations, yet left some, not all, of the ISP provisions in place. On November 13, 2009, the final document was adopted by the joint commission and forwarded to the executive.

On December 10, 2009, President Bachelet exercised a presidential veto in which she re-inserted some language on ISP liability provisions which appears to be taken, in part, from the earlier Senate bill. The bill received a final vote at the Senate on January 13, 2009 and is waiting for the President's signature and official publication. The law currently is being reviewed by the Constitutional Court. There remain some very troubling issues with certain elements in this legislative package.

- Provisions on ISP liability. The provisions on Internet Service Providers' liability are essential to ensure the distribution and enforcement of legitimate content over the Internet. This issue demanded a lot of attention during 2009<sup>4</sup> and unfortunately the results are not satisfactory. It seems that the Chilean system has created more problems than solutions; here are a few examples.

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<sup>3</sup> To recap the initial legislative efforts, in 2007, the Chilean Administration proposed legislation aimed at implementing the remaining FTA copyright and enforcement obligations (but not TPMs). That package, Bill No. 5012-03, was drafted primarily by the Ministry of Culture, and was introduced in Congress by the Administration in May 2007. Despite concerns raised with Chilean officials and Members of Congress by local copyright industry colleagues and by IIPA members through the U.S. Government, this bill passed the Chamber of Deputies on October 10, 2007. The bill moved to the Senate, where it was voted out of the Education Commission on December 5, 2007, and forwarded to the Economic Commission on December 11, 2007. Then, in 2008, a joint Senate committee comprised of officials from the Culture, Education, Technology and Economy Committees was created to review this copyright package. Over 200 more amendments from legislators and the private sector were submitted to this joint committee. Hearings were held in late 2008, and the copyright industries' representatives spent much the rest of the year attending hearings and meeting with Chilean legislators as well as meeting with ministry officials. The committee decided to review all these amendments from the start. By the end of 2008, the joint committee had only held hearings that addressed proposed provisions affecting libraries. The problematic provisions of ISP liability, criminal sanctions and mandatory arbitration on collective management of rights cases were not then discussed.

<sup>4</sup> In fact, much of the controversy in crafting these provisions was started by the inadequate proposals found in the first bill offered by the Administration and passed by the House in 2007, a bill that failed in many respects to track the FTA. For example, it would have effectively created incentives for Internet service providers to refuse to cooperate with copyright owners rather than achieve the kind of cooperation and flexibility that is demanded by the current strains on copyright protection. The entire section on notice and takedown procedures was troubling, as it would have required rights holders to request and obtain a court order to remove the infringing content, a process totally out-of-step with international practice. Rights holders

- The chapter on “Internet Service Providers Limited Liability Provisions” (Chapter III, articles 85-L to 85-U) generally tracks the safe harbors in the FTA (articles 85-L to 85-Ñ). However, for the voluntary removal of infringing content, the new law requires that ISP’s must have “effective knowledge” of the infringement in order to remove infringing content. The final section of article 85-Ñ requires judicial notification from a court of law to provide such level of knowledge to the ISPs. In other words, rights holders’ notifications are not effective as a source of “effective knowledge,” and for that reason the final section of article 85-Ñ severely limits the possibilities for a voluntary cooperation program between ISPs and right holders in Chile.
  - Article 85-O requires ISPs to have a contractual policy to cancel subscribers’ contracts but only when those subscribers have been convicted twice for copyright infringement. Considering the infrequency of prosecutions in Chile, this condition will likely never be met in reality, and even if someone managed to be caught twice, it is very unlikely that a cancellation sanction would be applied before the passage of many years. This is quite the opposite of a forward looking, flexible and modern approach to deterring online infringement.
  - Article 85-U creates a “stand alone” obligation for ISP’s to inform its subscribers (in five days after reception) about notifications received from rights holders. Since there is no obligation attached to this provision (nor any sanction for non-compliance) it will be very difficult to determine its effectiveness without an additional agreement between the parties involved.
  - Article 84-T establishes a procedure for ISPs to notify customers that are infringing copyright, and that procedure offers three options to the customers: (a) “guilty” (and content is removed by the ISP), (b) remain silent (and the ISP will remove content after ten days), or (c) challenge the notification by “insisting” in maintaining the content on-line. Unfortunately, the provision does not limit and/or define the basis for any such challenge. Hence the customer may just insist in keeping the files online and the ISPs have to do it; this is simply an untenable result. Article 84-T also requires ISPs to notify the customers by “certified mail” which will make such notification lengthy and costly. In sum, it seems that, even with the veto, the Chilean legal landscape has created an incomplete and unworkable notice and takedown system for hosted content, and one that does not comport with either the letter or the spirit of the FTA. Furthermore, it would appear that this provision relates only to content which is hosted on the ISP’s server given that it discusses removal of the content by the ISP--something that can only be accomplished where the content is stored on the ISP’s network. So not only does this fail to deal with P2P, but it creates a “notice plus notice” architecture for hosted content, instead of the “notice and takedown” procedures required by the FTA.
- Civil ex parte remedy and statutory damages: Unfortunately, no provisions are included to strengthen the civil ex parte search remedy nor are there any provisions establishing statutory damages. Some industry colleagues are considering whether further work should be undertaken to approach the Supreme Court to try to obtain an instruction for the civil courts in order to have effective *ex parte* searches.
  - Bonds for injunctions: The veto also includes a bond requirement for all and every application for an injunction that rights holders file. Such requirement will be a big obstacle in practice due to the large number of potential cases.
  - Overbroad exceptions to protection: Many of the objectionable proposed exceptions in the October 2007 bill, such as those for libraries in the digital environment and those involving computer software, remain in the final bill and seem incompatible with the FTA. For example, provisions on reversed engineering are too broad; the exception is not limited to the circumvention of TPMs, does not cover research and development activities within that exception, and does not restrict such to achieve interoperability (which is the FTA standard). Also, the exceptions involving

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would have had to petition a civil court, which then would have 48 hours to issue an order for the ISP to withdraw or block the infringing content. This section appears to afford a huge liability loophole for ISPs, not a limitation on liability. Voluntary cooperation from the ISPs would have been limited only to hosted content and would not cover actions needed in peer-to-peer piracy (P2P) situations.

libraries would potentially allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Finally, the specific tri-partite language in the FTA must appear as a chapeau for the entire new chapter on limitations/exceptions, thereby clearly applying to all the enumerated exceptions.

- **Continuing low mandatory minimum criminal sentences:** The bill does not increase the minimum sanctions for infringements. As a result, industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions and there will be no improved deterrence applied in copyright cases in-practice. Efforts in a separate legislation (discussed below) may go part of the way toward implementing more deterrent criminal sanctions for piracy. Sanctions should clearly apply in cases involving Internet piracy, especially involving those who upload protected copyrighted materials. Any proposals that suggest that a "profit" motive is required in piracy cases should be stricken, as that is neither an FTA- nor TRIPS-compatible standard.
- **Mandatory arbitration:** The new law contains amendments on mediation and arbitration. The recording industry is concerned that these new proposals on mandatory arbitration (Articles 100 and 100*bis*) would jeopardize the right of the collecting societies to establish their own performance rights rates.

**Bill on illegal commerce and piracy:** A bill on Illegal Commerce and Piracy (Bill 5458 of June 2007) was passed in the Constitutional Committee of the Senate, and it provides for sanctions and fines up to 800 UTM (monetary units), especially in cases of repeat offenders. An important feature of the bill is that it would apply the concept of "criminal association," as defined in Article 293 of the Penal Code, for cases of copyright piracy, and provide for gradually increasing fines according to the gravity of the infringement and to the hierarchical level within the criminal organization of the defendant. Penalties would range from 61 days to 5 years (this is the same minimum as the current law, but the maximum has been increased from 3 years under current law up to 5 years). More importantly, under this bill, the penalty under Article 293 of the Penal Code for criminal association would result in an additional sentence. Another key feature of this bill is that it allows for "controlled delivery" of pirate products, similar to the mechanism that exists under anti-drug trafficking legislation. On November 12, 2008, the Senate approved the bill and made some modifications, and the bill was sent back to the lower house. On December 3, the lower house rejected some of the modifications added by the Senate, and this led to the formation of a Joint Committee (5 Congressmen and 5 Senators) that will review the project and draft a "consensus text." The timeframe for this review is not yet known. To be clear, an important element of this initiative was actually addressed by the recent amendments to the Intellectual Property Law (discussed above). The new Article 83 there now includes an aggravated penalty where copyright piracy (as described on Article 81) is committed by an offender making part in a group or "association" specifically created for the purpose of committing copyright piracy.

**Net Neutrality Bill (2008):** There is a bill to establish a "net neutrality" principle protecting consumers and Internet users. This initiative was submitted to Congress in March 2007 by a small group of representatives and is still in the legislative process with no urgency from the government side. The Bachelet Administration gave little attention to this initiative, and it is expected that the proposal will remain pending in 2010.

**Regulation for municipal fines for street piracy (2007):** A regulation issued by the Santiago municipal government in 2007 establishes fines for those who acquire illegal goods from street vendors. The name of the measure is "Plan Santiago Seguro" ("Safe Santiago Plan"). Local police are enforcing this measure, levying fines against pirate shoppers. This is a positive development and should dissuade potential consumers from purchasing pirate products. All members of the national anti-piracy committee (CONAPI) support the plan.

**Laws affecting judicial processes (2007):** The Chilean Congress passed legislation aimed at streamlining judicial processes by changing the criminal procedure code and was related exclusively to the Industrial Property law. It increased fines for offenders and cleared the way for civil actions to be taken against infringers. It also gave judges greater freedom to order preventive incarceration, and also gave the police the authority to search locations without a warrant in the case of a flagrant crime. In sum, this created a more agile relationship between prosecutors and judges. It appears that, in general, the police prefer to act with a written court order when conducting raids of labs and copyright facilities. Most rights

holders continue to file specific complaints with the police based on the "public action" nature of this crime. This process is working, the police respond adequately to the complaints filed by the rights holders. The ex officio tool however, is limited because police still cannot search closed premises without a judicial order, and they are reluctant to search even open locations without a formal complaint by the rights holder. When the police find a target they believe warrants searching, they approach the rights holders and seek a formal complaint upon which to proceed. (Police act ex officio outside Santiago; in the capital they may ask rights holders to file a complaint on some major cases.)

**Trans-Pacific Partnership FTA:** Chile is an initial TPP negotiating partner. IIPA views the TPP negotiations as an opportunity to make progress on Chile's outstanding IPR obligations under the U.S.-Chile FTA.

## COPYRIGHT PIRACY IN CHILE

**Optical disc piracy, street piracy and border issues:** Widespread "street piracy" remains visible in Chile. Street vendors ("*ambulantes*") cover their pirate wares 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. Police actions against the street vendors are frequent but do not produce permanent changes in the street piracy situation. The film, music and the business software industries continue to report another kind of piracy, called "in-house piracy." People who work in companies, offices and educational institutions are asked to sell pirated materials (usually CDs with films, games, software). These in-house vendors use catalogues distributed by email or in paper, receive the requests, fulfil the order and then receive payment from the distributor. Finally, Chile is a major port of entry for blank optical disc media coming from Asia. The illegal importation and smuggling of pirate goods from Perú seriously affects the northern cities of Arica, Iquique and Antofagasta. Some products are imported through the Port of Iquique, falsely identified and re-exported to other countries.

**Internet piracy is growing:** Chile continues to have one of the highest broadband penetrations in the region. There were over 8.36 million Internet users in Chile in 2009, representing 50.4% of the population (up from 45% the year prior, according to [www.internetworldstats.com](http://www.internetworldstats.com)). This is a 376% rate of growth over the last decade (2000-2009). There has been a large increase in bandwidth in the country which now reaches up to 15 megabits. The growth of broadband and capacity facilitates quick illegal downloading. All the copyright sectors believe that the Internet-based piracy will grow in the future because of the expansion of broadband Internet connections. Peer-to-peer (P2P) file-sharing is the most predominant form of Internet piracy in Chile, with the ARES and GNUTELLA networks being the most popular.

The music and recording industry reports that Internet piracy is its biggest piracy problem in Chile, now exceeding the hard goods problem significantly. The local recording industry estimates that over 400 million songs of local and international repertoire are now being downloaded annually in Chile. Pirated copies on the Internet are readily available for download and are used as source materials to burn CDs/DVDs for distribution in the streets. The recording industry estimates that about 25% of all downloading and burning is done in Internet cafés. 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 changing nature of the music business can be seen as the largest chain store selling music (Feriamix) closed 11 locations last year due to poor sales; that chain has 43 stores still operating.

Another growing problem is the cyber links posted on forums and social sites. A clear example of this is the site "Chilewarez", one of the most popular social communities in the Internet in Latin America, which allows registered users to post and exchange thousands of music files. Two years ago, the recording industry's national group (IFPI Chile) submitted the case to the competent authorities for criminal investigation but the prosecutors did not pursue it. Today Chilewarez (which has reformulated itself under the name "Chilecomparte") remains as the biggest threat to the music industry in Chile because of the thousands of illegal music links posted in its musical communities. The recent creation of cyberlockers and hyperlinks, located on national and international sites, allows direct downloading from hosting sites (Rapidshare, etc.), over P2P sites.

**Business software piracy:** The Business Software Alliance (BSA) reports that there was no improvement in the reducing business software piracy in Chile during 2009. Street piracy, in-house piracy (also known as end-user piracy) and Internet piracy are the primary piracy forms damaging this sector. Preliminary estimated U.S. trade losses due to business software piracy in Chile was \$113 million in 2009, with a 65% level of piracy.<sup>5</sup>

Street piracy for software continued unabated in 2009. Police actions against the street vendors are frequent but do not produce permanent changes; the number of ambulantes selling pirate optical disc products containing software has remained at constant levels. Santiago, Valparaiso, Arica, Iquique, San Antonio and Talcahuano are the cities where piracy of goods is widespread, due to their size and/or because of their location beside ports or border with other countries.

Another kind of piracy is end-user piracy, which not only includes the piracy made in the privacy of the home, but also in companies, offices and educational institutions. The vendors use catalogues distributed by email or in paper, receive requests, accomplish them providing the pirated copies and receiving the corresponding payment. 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. Retailers who prepare computer hardware for clients as well as in-house and external IT advisors often load unauthorized copies of software to computers and business networks. 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 been able to reduce these problems. Adopting appropriate provisions to regulate the acquisition and management of software by government agencies is a critical solution, and one required by the FTA. Unfortunately, the software legalization provisions of the 2001 Decree have still not been implemented nor enforced in any measurable way. In 2010, BSA plans to increase the number of cease and desist letters it issues and also run more judicial raids at commercial and educational organizations in order to produce more awareness about the need to protect software and halt piracy.

BSA also is concerned about the rapid growth of internet based piracy in Chile, in all its formats--illegal posted sites, P2P, hyperlinks, cyber-lockers, etc.

**Piracy of music and sound recordings:** The recording industry, led by IFPI Chile, reports no specific change to report in the nature and scope of music piracy during 2009. Physical piracy, primarily in the form of pirate CD-Rs and DVD-Rs, is over 50%, and the cities with highest piracy rates are Santiago, Concepción, Iquique and Valparaiso. The physical piracy is still a problem, but Internet piracy is growing fast as sales of physical product decline. The most common Internet-based piracy is the exchange of illegal music files through P2P networks (especially ARES, Gnutella and Limewire) and cyberlocker links posted on social sites such as Chilecomparte. There are no reports of serious problems involving mobile music piracy yet. IFPI reports that the recording market in Chile suffered an overall 17% decrease in 2009 (this is due to a 27% drop in CD sales but a 13% increase in digital sales, due mostly to mobile-related business done by record companies and telephone companies). Estimated trade losses due to piracy of music and sound recordings in Chile was \$18.4 million in 2009, with a 68% level of piracy. The lack of an effective anti-piracy campaign--both physical and online--as well as the trend in the copyright reform to essentially dilute ISPs' responsibility for Internet piracy, may make Chile a hostile environment to operate a music company.

**Camcord piracy:** In 2008, the Motion Picture Association (MPA) also saw the first camcords come out of Chile, and trainings were conducted for cinema employees on how to spot illegal camcording in theaters. Unfortunately, 2009 saw an increase in full camcords sourced from Chile with three MPA member companies fully camcorded from Chilean theaters.

**Book piracy:** The publishing industry remains concerned about the widespread use of photocopies of textbooks and reference books, primarily at the university level. Private copy shops are conveniently located near universities, copying

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<sup>5</sup> BSA's 2009 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Chile, following the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.bsa.org](http://www.bsa.org). 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 final 2009 statistics will be available later this year.

in some cases entire books at the request of students and teachers. In other cases, shops create unauthorized "coursepacks," containing extensive excerpts from different works on a common subject. Enforcement and education officials should take a more active role in ensuring that campus areas do not become piracy havens. In addition, commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors.

## **COPYRIGHT ENFORCEMENT IN CHILE**

The local anti-piracy coalition (known as CONAPI, Comisión Nacional Anti-piratería) was created in 2001 and is composed of members of both the private sector and public agencies. Its 20+ members include the sound recording, software, publishing and audiovisual industries, and maintain a close relationship with the local chamber of commerce. Tax and customs authorities participate as non-voting observers in order to remain current on industry concerns.

CONAPI played a useful role in its first years, promoting more anti-piracy actions and calling the attention of the government to major issues affecting copyright industries in Chile. However, in recent years CONAPI lost energy and became just a forum for rhetorical discussions. In particular, CONAPI failed to address the two most relevant issues in the country for copyright industries: the Intellectual Property Law reform and the Internet Piracy problem. Both problems remain unattended by CONAPI.

**Inadequate civil *ex parte* actions and slow civil cases:** BSA continued to bring only civil actions in Chile last year. Inadequate preparation and training on intellectual property issues for most judges and their staff remains a major problem, along with weak civil provisions. BSA has to constantly explain the nature of its requests to judges. BSA does acknowledge that, over the years, this problem seems to have diminished slightly as judges become more familiar with the relevant legal issues, but there is much room for improvement. BSA believes that this incremental improvement is due to continued training and public awareness that all the industries are providing in Chile, as well as better information among Chilean agencies about their international and bilateral trade and intellectual property obligations.

During 2009, BSA conducted more civil raids than the prior year, handling almost 50 actions in Chile. Civil *ex parte* actions are a critical remedy for the business software community. BSA reports that in 2008, Chilean judges continued to improve their response to civil complaints and accepted more BSA requests for *ex parte* raids, and this is a commendable achievement. However, despite this progress, BSA is still struggling with a very difficult provision of Chilean law regarding *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. BSA continues to move forward on this issue and are hopeful that with the new copyright law, the judges (including the judicial police's IPR branch, BRIDEPI) will improve their understanding of IP issues and software piracy specifically.

**Criminal anti-piracy enforcement:** The recording industry has an active criminal anti-piracy campaign in Chile, but reports disappointing results in 2009. The business software industry did not bring criminal actions in Chile in 2009, but they are working with police and tax officials to educate them on software issues in anticipation of possible future criminal cases.

The recording industry's anti-piracy group (IFPI Chile) assisted police last year. IFPI Chile reports that hard goods raids continue to be focused in Santiago and Valparaiso. 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. There have been more than 20 procedures with direct participation of IFPI. The police taking *ex officio* actions in cases of piracy street and some laboratories. Customs also works on its own but eventually requests a complaint from the right holders. Unfortunately, IFPI reports that the number of street raids decreased significantly in 2009. Compared to 2008, police authorities carried 44% fewer operations in 2009. The decrease shows less interest from the authorities in pursuing

piracy cases and no attention from the Judicial Power because of the lack of prosecutions. Also, the smaller numbers of actions reveals that private sector is trying to invest more resources on Internet actions where new legitimate businesses are trying to flourish. Customs authorities also failed to conduct high scale seizures actions to stop contraband of raw materials destined to piracy. In sum, the recording industry notes that this reflects a significant deterioration in what had previously been good efforts and good support in anti-piracy operations with government authorities. The recording industry also took actions in the Internet space (see below).

MPA reports that it received good cooperation from the authorities on an anti-camcording action against a prolific camcorder in Chile. In May 2009, MPA cooperated with police to catch a well-known and prolific camcorder in Chile that is also a well-known Internet pirate with connections to pirate groups throughout Latin America. The suspect uploads illegal copies of movies to numerous pirate sites in Latin America and has created and synced many illegal Spanish subtitles to the movies he releases on the Internet. The police seized his camera but released him because he was not arrested for a flagrant crime. This case is currently before the local district attorney of Concepcion to prove the existence of a crime against intellectual property.

There are two overwhelming problems in getting effective criminal enforcement in Chile. First, the national police (Carabineros), the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. The Carabineros, particularly the organized crime investigations department, continue to be a major support for anti-piracy actions in Chile. Second, judges usually impose only the lower range of penalties, which are not deterrent. This lack of deterrent convictions is because the Criminal Procedures Code and the Penal Code gives copyright piracy the treatment of a misdemeanor and that empowers prosecutors to enter into agreements with the accused (specially first-time offenders). Those agreements have the practical effect to substitute the criminal prosecution for community services and a commitment not to violate copyright for a certain period. Due to the application of such policy, none of the 16 people indicted for music piracy in 2009 were convicted. In sum, General Attorney's office needs to prioritize copyright violation cases and instruct Prosecutors to file charges at least in most important cases.

**Few prosecutions and no convictions:** Very few criminal prosecutions were brought in 2009, in either the hard goods or the online environment.

The recording industry reports that 69 raids on physical piracy were carried out during the year and 287,249 pirate copies seized along with 608 CD/DVD burners were seized in the operations. 31 people were arrested but only 16 individuals were indicted in 2009 for music piracy; none of them were prosecuted and instead, plea agreements were signed with the accused to avoid trials.

The historical problem in Chile is that it is difficult to secure deterrent penalties in-practice. Although the distribution of pirated material is theoretically punishable by incarceration of up to 540 days (a low term compared to the rest of the region), it is difficult to secure convictions and adequate sentencing. In the few cases that do reach judgment, sentences are suspended for an undetermined period. Legislative reform is needed and the sanctions in the pending copyright bill must be placed at a deterrent level. This is why the recent legislative efforts to require higher mandatory minimum sentences were so important, and the fact that these minimums were not increases remains troubling.

**Internet piracy and cybercrime cases:** Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes. The Cyber Crime Brigade has been active and helpful on many Internet anti-piracy actions. However, prosecutions remain difficult, as exemplified by the prosecutors' refusal to bring a case against Chilecomparte.cl (formerly Chilewarez)

The recording industry maintains an active Internet anti-piracy campaign. During 2009, a total of 252,211 cyberlocker links, 5,699 permalinks on blogs, 3,103 P2P links and 25 forums were removed. 1,739 pirate products were also removed from virtual auction sites. As with physical piracy, the industry hopes to continue fighting piracy through local teams. A major concern in Chile continues to be "Chilecomparte.cl" which is a social site allowing registered users to create communities entirely dedicated to music and audiovisual pirate contents. As happened in the past, Specialized Prosecutor's

Office had shown a very poor interest in the case, not giving attention to the fact that Chilecomparte is the biggest local source for unauthorized distribution of pirate music.

**ISP cooperation:** The new law contains provisions on ISP liability and the liability and cooperation with rights holders will be tested in 2010. It has yet to be finalized and implemented.

The local recording industry group has been urging the attention of Chilean government to set up roundtable negotiations with ISPs to reach agreement that may settle major differences raised during the copyright law reform process. For example, for the past two years several copyright groups are participating in two such roundtable groups: (1) the "Public/Private Commission," with members from all copyright industries, Ministry of Foreign Affairs, Ministry of the Interior, police and tax authorities, and (2) the Ministry of Culture's Working Group, established at the request of the Senate to develop suggested language for copyright reform legislation. Neither of these commissions are actively working today as the legislative process drew to an end last year.

Last year, Chilean ISPs tended to cooperate in those situations that involve hosted content. For example, the music industry specifically notes that it has achieved a certain level of cooperation from major Chilean ISPs. There is a notice and take down procedure in place for web pages and blogs (where the content is stored on the ISP server). In contrast, that same level of ISP cooperation with rights holders does not exist on cases involving P2P file-sharing. Much of the infringing content is found on foreign websites. However, during 2009 Chilean ISPs did not cooperate at all regarding P2P networks and links posted on social sites (they had no incentive, as no law was in force regarding their liability). This situation is not expected to improve during 2010 in view of the results obtained in the Intellectual Property Law reform where sanctions will be only imposed by judicial order.

**Inadequate border enforcement:** Chile's Iquique port is a transshipment point for blank media from Asia entering Colombia, Peru and Bolivia. The main problem that occurs is smuggling. In addition, the northern cities of Arica, Iquique and Antofagasta often serve as an entry point for blank optical disc media that is coming from Southeast Asia.

To better track imports of blank media, 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. The creation of an importers' register would also improve disclosure; such a system should also involve rights holders. There was no progress at all on these issues last year, and the interested industry will be reevaluating their strategy on this issue in view of the new government in Chile.

**Trainings:** Some of the copyright sectors were able to provide trainings to Chilean enforcement personnel last year. For example, BSA participates in at least two IPR seminars, including educational ones as well as public awareness-building events. The music recording industry, led by IFPI, conducted a training on Internet piracy for the Cybercrime team and the new intellectual property division in the civil police as well as the Carabineros' organized crime unit. In addition, IFPI Chile helped develop a program called "Children for Intellectual Property" sponsored by the U.S. embassy and with the participation of the Municipal Corporation of Viña del Mar, the civil police intellectual property unit, Project ACCESS and the University UNIACC. The program consisted of talks to children in six municipal schools of Viña del Mar to raise awareness at an early age about the dangers of illegal trade and piracy in the country.