



January 29, 2001

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 518
Washington, DC 20508

Re: Request for Public Comments on the Proposed
U.S.-Chile Free Trade Agreement, 65 Fed. Reg.
78253 (December 14, 2000)

To the Committee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the December 14, 2000 Federal Register a notice requesting public comment on the proposed U.S.-Chile Free Trade Agreement. The International Intellectual Property Alliance (IIPA) hereby submits these comments which aim at the levels of copyright protection and enforcement which should be contained in this Agreement.

The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations (listed below) that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries -- in bilateral and multilateral efforts to improve copyright laws and enforcement around the world. These associations represent almost 1,500 U.S. companies producing and distributing materials protected by copyright laws throughout the world -- all types of computer software including business applications and entertainment software (such as videogame CDs and cartridges, personal home computer CDs and multimedia products); motion pictures, television programs and home videocassettes; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

In December 2000, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2000 Report, the eighth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment and trade. The latest data show that the "core" U.S. copyright industries (those industries that create copyright materials as their primary product) accounted for 4.9% of U.S. GDP, or \$457.2 billion in value-added in 1999. In the last 22 years (1977-1999), the core

copyright industries' share of GDP grew more than twice as fast as the remainder of the economy (7.2% vs. 3.1%). During these 22 years, employment in the core copyright industries more than doubled to 4.3 million workers (3.2% of total U.S. employment) and grew nearly three times as fast as the annual rate of the economy as a whole (5.0% vs. 1.6%). In 1999, the U.S. copyright industries achieved foreign sales and exports of \$79.65 billion, a 15% gain from the prior year. The copyright industries' foreign sales and exports continue to be larger than exports of almost all other leading industry sectors, including automobiles and auto parts, aircraft and agriculture.

COPYRIGHT PROTECTION IN THE INTELLECTUAL PROPERTY RIGHTS CHAPTER OF THE U.S.-CHILE FREE TRADE AGREEMENT (FTA)

IIPA believes that the negotiation of an IPR Chapter in the proposed U.S.-Chile FTA Agreement must closely track U.S. and industry proposals in the Free Trade Area of the Americas (FTAA). It is critical that such a chapter not be available as a vehicle to undermine by, in any manner, establishing a "ceiling" to the obligations that will be pressed for in the FTAA context. This means that the U.S. proposal to Chile must, at a minimum: (a) be TRIPS- and NAFTA-plus, (b) include, on a technologically neutral basis, the obligations in the soon-to-enter-into-force WIPO Copyright and Performances and Phonograms Treaties (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Indeed, there appears to be increasing consensus among the 34 nations involved the FTAA negotiations that the FTAA intellectual property rights chapter must be a forward-looking, technologically neutral, document that sets out the most modern copyright obligations.

In putting forward the U.S. negotiating position, the new Administration must remain mindful of the existing negotiating environment in the bilateral arena. The U.S. already has agreed to an FTA -- with Jordan and has tabled a text with Singapore. It is critical for the Chile text to be consistent with these agreements/proposals and with the text now being considered in the FTAA IP context. Of course, there will be country-specific issues that must be addressed as well, but overall it is critical that consistency be maintained in the U.S. negotiating position.

A. Substantive Copyright Obligations Must Be at a High Level

Stated briefly below are some of the key elements which should be included in the U.S.-Chile FTA. For the purpose of these public comments, this list identifies the most important areas that must be covered. These points should not be interpreted as possible specific treaty language.¹ Existing obligations in TRIPS and the WCT and WPPT should be included and there should be other specific provisions such as the following:

- **Right of reproduction:** The right of reproduction, for both works and objects of neighboring rights, should include a specific and express reference to the right including both permanent and temporary copies in line with the Berne Convention, TRIPS and both WIPO Treaties.

¹ IIPA reserves the right to provide additional comments to U.S. government officials on any specific matters related to the copyright and enforcement provisions of the Chile-U.S. FTA IPR Chapter.

- Right of importation: Copyright holders (which include authors, performers, producers of phonograms and their successors in interest) should have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the rightholder.
- Right of communication to the public: Copyright holders should have the exclusive right to authorize or prohibit the communication to the public of their works, performances or phonograms, by wire or wireless means, including the making available to the public of their works, performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Subject to the tripartite test in Article 13 of TRIPS and corresponding articles of the WCT and WPPT, this right may be subject, in the case of performers and producers of phonograms, to certain national exceptions or limitations for traditional free over-the-air broadcasting and similar uses.
- Right of making available [e.g. distribution]: Copyright holder should have the exclusive authorizing the making available [e.g. distribution] to the public of the original and copies of their works and phonograms through sale or other transfer of ownership.
- Unfixed performances: Performers should have the right to authorize or prohibit (a) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and (b) the fixation of their unfixed performances.
- First publication with respect to performers and producers of phonograms: A performance or phonogram should be considered first published when it is published within 30 days of its original publication.
- No formalities for rights of performers and producers of phonograms: With respect to all rights of performers and producers of phonograms, the enjoyment and exercise of the rights provided for in this Agreement should not be subject to any formality.
- Term of protection: The term of protection of a work, performance or phonogram should be calculated on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and where the term of protection of these are calculated on a basis other than the life of a natural person, the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram or, failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance or phonogram.
- Retroactivity provisions: Each country should apply the provisions of Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (and Articles 9.1 and 14.6 of the TRIPS Agreement) to the subject matter, rights and obligations provided for in this FTA.
- Contractual rights: Any person acquiring or holding any economic rights should be able to freely and separately transfer such rights by contract as provided in the NAFTA. Any person acquiring or holding any such economic rights by virtue of a contract, including contracts of employment

underlying the creation of works and phonograms, should be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.

- Technological measures: A provision must be included which tracks the WCT and WPPT obligations on making illegal the circumvention of technological measures and ensures that devices, services and components thereof are fully covered. The U.S. Digital Millennium Copyright Act (DMCA) should provide the model for how the treaties must be implemented by Chile in its national law. Adequate and effective legal remedies, both criminal and civil, must be incorporated into the enforcement text. This is an essential element of a protection system that is adapted to the digital and Internet Age, where new threats of piracy are already upon us.
- Protection of rights management information: Adequate and effective legal remedies should be afforded to protect rights management information from unauthorized alteration and removal. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of copyrighted materials.
- Protection for encrypted program-carrying satellite signals: As provided in the NAFTA, criminal and civil liability should be afforded encrypted program-carrying satellite signals that has been decoded without the authorization of the lawful distributor of the signal.
- Narrow exceptions to protection: Each country should confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.
- Government legalization of software: Each country should issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use only computer software authorized for intended use. Such instruments should actively regulate the acquisition and management of software for such government use.

IIPA members have identified several deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended) which do not meet the threshold of TRIPS/NAFTA compliance. For example, protection for compilations of unprotected facts is unclear; both NAFTA and TRIPS require protection of compilations of data or other material. A non-exhaustible rental right for computer programs does not appear expressly. While the copyright law does provide producers of sound recordings with a rental right, it is not clear whether this right is non-exhaustible, as required by NAFTA and TRIPS. The Chilean law does not provide authors or producers of sound recordings with an express right to authorize or prohibit the importation of copies of their works or recording made without their authorization, as required by NAFTA; there appears to be a criminal penalty for this action, but because the underlying right is not clear, more certainty in the exclusive rights section of the copyright law must be provided.

While the Chilean law creates a right in the producer of a sound recording to publicly perform, broadcast and communicate its work, the law ties this right to the exercise of the right to the author of the underlying musical composition; the rights of the record producer should be independent or parallel to the author's right. Chilean law also contains specific percentages regarding the remuneration for publishing contracts and performances of works; these should be left to contractual negotiations between

the parties and NAFTA provides an obligation permitting the free and unhindered transfer of rights by contract. NAFTA also requires that criminal penalties and civil remedies be available for the manufacture, import, sale, lease or other making available of equipment for encrypted satellite signals, and these should be added to Chilean law. The copyright law also contains overbroad exceptions regarding the use of photographs which are incompatible with the Berne Convention and TRIPS. These examples of substantive deficiencies in the Chilean Copyright Law should be considered illustrative, not exhaustive. IIPA notes that while some amendments to the copyright law were adopted in the early 1990s, comprehensive reforms of the copyright law which were presented to the Chilean Congress in the mid-1990s were not adopted.

B. Effective Remedies for Piracy and Other Infringements in Chilean Law and In-Practice

The TRIPS Agreement was the first international treaty ever to deal with the enforcement of intellectual property rights. Of course, these TRIPS obligations must be the baseline of any enforcement provisions in a Chile FTA. Despite the existence of these international obligations, a large number of countries, including Chile, fail to comply with these enforcement obligations. Furthermore, it is in the area of enforcement that some of the greatest gains can be achieved, particularly if the FTA text takes the rather general TRIPS obligations and makes them more specific and clear as well as adds new specific obligations. We know this will have a direct benefit in improving the currently inadequate Chilean IP enforcement regime.

Below are a few key, illustrative (non-exhaustive) issues in the enforcement area that should appear as specific obligations in the U.S-Chile FTA:

- Civil ex parte cases: In civil cases, searches and seizures conducted *inaudita altera parte* should be statutorily implemented and requests should be acted upon and executed within a short period. Any security or bonding obligations should not result in unreasonably deterring recourse to these procedures.
- Level of fines and damages: Statutory maximum fines must be sufficiently high to act as a deterrent and actual fines and damage awards should be imposed by the judicial authorities at a level to make this deterrent effect credible by removing any gain to the infringer.
- Presumption of authorship and subsistence: To speed up the civil justice system by making it easier for rightholders and judges to bring cases to conclusion, Chile should provide that the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner shall, in the absence of proof to the contrary, be presumed to be such designated right holder in such. In the absence of proof to the contrary, it should also be presumed that the copyright or related right subsists in such subject matter. Such presumptions should also pertain in criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.
- Civil and criminal remedies should be expressly extended to cover violations of the technological measures and RMI obligations: All remedies and enforcement procedures applicable to

copyright infringement should apply to the obligations dealing with the circumvention of technological protection measures and with rights management information.

- Customs: Customs authorities should be primarily responsible for preventing infringing products from entering that its country's territory. Customs authorities should be able to initiate border measures *ex officio*, without the need for a formal complaint by an authorized private party or association or the right holder. Border measures should be applicable to goods in-transit and to goods destined for export.
- Ex officio actions: The competent authorities in each country should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or right holder.

IIPA members have identified several deficiencies in the Chilean enforcement system which do not meet the threshold of full TRIPS compliance. For example, Chile does not provide for deterrent criminal penalties and civil damages that would help prevent further infringements. It is difficult to secure prosecutions, convictions or adequate deterrent sentences in the Chilean judicial system. 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 the few cases that do reach judgment, the sentences are regularly suspended, and the defendants are never incarcerated. Moreover, as a general rule, the civil courts are relatively slow in issuing relief to the rightholder. This could be solved by bringing making it simpler for rightholders to prove their cases, particularly their losses, through the adoption of statutory damages.

Importantly, Chile fails to provide the critical TRIPS-mandated remedy of *inaudita altera parte* (*ex parte*) searches and seizures, a measure which is particularly important for the business software publishing community. Chilean law requires that advance notification be given to the suspected party, and this notice obliterates the effectiveness of this remedy. Furthermore, Chile has failed to set up effective and TRIPS-compliant border control mechanisms through its customs system. For example, there appears to be no provision by which a rightholder can stop entry into Chile of suspect pirate product, even when there are clear indicia of infringement.

C. Market Access Issues

At this time, IIPA and its members do not have any specific market access issues to share with the Trade Policy Staff Committee. If we learn of any such barriers, we will communicate them promptly.

CONCLUSION

We appreciate this opportunity to provide public comments on the key elements we believe should be included in the U.S.-Chile FTA.

Respectfully submitted,

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