

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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Secretary
United States International Trade Commission
500 E Street S.W.
Washington, DC 20436

Re: U.S.-Chile Free Trade Agreement: Potential
Economywide and Selected Sectoral Effects, 68
Fed. Reg. 18673 (April 16, 2003)

To the Commission:

The International Intellectual Property Alliance (IIPA), a coalition of six trade associations (named below), each representing a significant segment of the U.S. copyright-based industries, strongly supports the earliest adoption by Congress of the U.S.-Chile Free Trade Agreement (Chile FTA). These member associations collectively represent over 1,100 companies producing and distributing materials protected by copyright laws throughout the world — all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).

From the standpoint of the U.S. copyright community, this agreement sets out high standards of protection and enforcement for copyrights and other intellectual property, higher than those now prevailing in any bilateral or multilateral agreement, other than the U.S.- Singapore FTA. It builds on the standards currently in force in the WTO TRIPS Agreement and in NAFTA, with the goal to update and clarify those standards to take into account not only the experiences gained since those agreements entered into force, but also the significant and rapid technological and legal developments that have occurred since that time. For example, this FTA incorporates the obligations set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The full implementation of the WCT and WPPT both in Chile and on a global basis at the earliest possible date is a critical goal of the copyright industries. Unfortunately, however, the Chile FTA has transition periods (described further below), which delay the significant benefits that early implementation of these treaties' obligation would bring to U.S. industry and to the U.S. and Chilean economy. These treaties provide the essential legal infrastructure for e-commerce through obligations that assist right holders in safeguarding the transmission of valuable copyrighted works over advanced networks like the Internet and by providing higher standards of protection for digital products generally.

In this letter, IIPA will highlight the major advances made by the Chile FTA in the area of copyright protection and enforcement. It will also detail what we believe are the shortcomings of this agreement. Our review will necessarily be summary in nature and we refer the Commission to the report of the IFAC-3, the governmental advisory committee on intellectual property, which provides a more detailed evaluation. The President of IIPA serves as the Chairman of that advisory committee and assisted in preparing that report. It is a report mandated by the Congress in the Trade Act of 2002 and can be found on the USTR website at <http://www.ustr.gov/new/fta/Chile/ac-ifac3.pdf>. The IFAC-3, representing all facets of the IP industries, taking into account both the positive and negative elements of the agreement, nevertheless endorsed this FTA.

Overview of the Chile FTA IPR Chapter *vis a vis* Copyright Protection and Enforcement

The Chile FTA, once fully implemented, will contain the highest level of protection in the Latin American region and we believe it will assist Chile in attracting new foreign investment and new trade in valuable digital and other intellectual property-based products, particularly in the area of e-commerce. Given the increasing importance of intellectual property creation to economic growth in the U.S. and in both developed and developing economies, IIPA believes this FTA will be critical to the growth path for Chile and, if all the positive elements of the FTA are followed by other countries in the region, will be beneficial to those countries as well. As the Commission knows, the copyright-based industries are among the fastest growing and most productive of any sector of the U.S. economy, employing new workers in higher paying jobs at over three times the rate of the rest of the economy, creating new revenue at over two times that rate and contributing close to \$90 billion to the economy through foreign sales and exports.¹ Our industries' principal barrier to trade is the lack of effective protection and enforcement of our intellectual property, resulting in piracy rates that cause more than \$22 billion in losses annually to the copyright industries alone. This FTA, fortified by the even stronger agreements to follow it, will be instrumental, we hope, in reducing these losses and in contributing to even faster global growth for all these important industry sectors.

Some of the most important highlights of this FTA are:

- Protection for sound recordings and performances, which, except for the national treatment provision (discussed below), comes closer than any other bilateral or multilateral agreement to equalizing protection of these works with those of books, films, computer software and other protected subject matter. Because the Internet and digitization are fast making distinctions among types of works increasingly irrelevant, if not dangerous, this is a particularly important advance for U.S. interests.
- Provisions which will require the full implementation the WCT and WPPT in a manner very close to the position taken by the U.S. Congress in its implementation of these critical treaty obligations, including (a) full and express protection for temporary copies; (b) full protection for the interactive transmission of protected works; and (c) detailed articles on protecting against the circumvention of technological protection measures, which are used by copyright owners to protect against unauthorized access and exploitation of their works, with only the most narrow exceptions. These provisions fall short, in some respects, from their counterpart provisions in the Singapore FTA.

¹ See Copyright Industries in the U.S. Economy: The 2002 Report, by Stephen Siwek of Economists, Inc., prepared for the International Intellectual Property Alliance, available at http://www.iipa.com/copyright_us_economy.html.

- Extension by Chile of the term of protection for protected subject matter closer to that afforded in the U.S.
- A provision ensuring that Chile, like the U.S. has already done, will issue decrees or other similar orders mandating use of legal software by government agencies.
- A provision establishing that there can be no hierarchy of rights as between works subject to author's rights and those, like performances and sound recordings, subject to protection under a neighboring rights regime. This is an important clarification of provisions in current Chilean law, which could be interpreted to create such a hierarchy.

The significant strengthening of enforcement mechanisms and obligations by national governments is increasingly critical to the copyright industries – good laws without effective enforcement are simply not sufficient. This FTA makes a number of significant advances and clarifications:

- A provision expanding presumptions with respect to the existence of a copyright and of its ownership. This will greatly streamline enforcement and prevent unnecessary delays in enforcing rights in national courts.
- A provision clarifying TRIPS obligations with respect to courts' imposing deterrent and fully compensatory civil damages, including that the courts must "consider" the use of the retail price of the product (rather than other measures prevalent in some countries, like the price of the pirate copy) as a measure of the right holder's loss.
- A provision that Chile must implement a system of statutory damages in copyright cases, like in the U.S. This is a critical element to ensure that the civil enforcement system is effective in infringement cases.
- Strengthened and clarified provisions on seizures of pirate product, implements and associated documentary evidence and improved forfeiture provisions.
- Provisions requiring that customs and criminal authorities act *ex officio* without the need for a right holder complaint -- critical elements in achieving effective enforcement.
- Improved and clarified criminal provisions – key to reducing piracy levels. These include ensuring that the TRIPS requirement to criminalize piracy "on a commercial scale" includes non-profit-motivated unauthorized reproductions and/or transmissions of protected works over the Internet, as in the NET Act provision of U.S. law.
- Language that will provide further assurances that penalties actually imposed on infringers in criminal cases will be sufficient to deter piracy.
- A provision on the scope of limitations on remedies against service providers for the infringing reproduction and transmissions occurring over their facilities.

Problems in the Chile FTA IPR Chapter

IIPA highlights below, from the substantive copyright text, some of the key deficiencies which we would not want carried forward to other agreements in the future.

- IIPA is particularly disappointed that full national treatment is not the rule of this agreement, as it is in the Singapore FTA. Instead, there is a carve-out subjecting to reciprocity certain elements of protection for sound recordings and performances. In our view, no bilateral agreement entered into by the U.S. should have any other rule than full national treatment. This derogation goes even further afield than that in the NAFTA, which only affected the rights of performers in certain cases.

- Unfortunately, the language appearing in the Singapore FTA expressly mandating that Chile cannot subject the retransmission of television signals to compulsory licenses is absent. While IIPA does not believe Chile can adopt compulsory licenses in this case consistent with existing international norms, we would have preferred the express provision.
- IIPA had objected to the exception to the protection for temporary copies provided in a footnote. This provision was subsequently changed to exempt computer programs from its coverage, tracking the manner in which such exception is set out in the EU Copyright Directive. While this is a welcome improvement, IIPA prefers that no specific exception, other than the general language for exceptions to all exclusive rights, be provided in any FTA and that any other limitations on remedies for infringement (where temporary copies may be involved) be those contained in the provisions dealing with Internet Service providers.

Among the most serious deficiencies in this FTA are the long transition periods delaying Chile's implementation of their FTA obligations in the copyright and enforcement area. The Singapore FTA established transition periods of six months and one year from entry into force. This agreement instead:

- Establishes a four-year transition period to implement the enforcement obligations in the agreement. Given that the text makes only minor changes from Chile's existing TRIPS obligations – virtually the same changes that Singapore agreed to – such transition period is unnecessary and highly prejudicial.
- Establishes a two-year transition period to protect temporary copies. This is incomprehensible given that such obligation already exists under Chile's Berne Convention, TRIPS Agreement and WCT/WPPT obligations.
- Establishes a four-year transition period to implement the right of communication to the public for record producers and performers. Since Chile already has such an obligation with respect to interactive transmissions pursuant to its adherence to the WPPT, it is inexplicable that a "delay" from an already existing international obligation was agreed to!
- Establishes a five-year transition period to implement Chile's already existing WCT/WPPT obligation regarding protection against circumvention of technological protection measures – one of the most important obligations in these two critical treaties.

These deficiencies are serious. However, taken as a whole, the agreement is an advance in the level of protection in Chile and IIPA recommends the early approval of the U.S.-Chile FTA by the U.S. Congress.

Thank you for the opportunity to comment on this important trade agreement.

Sincerely,



Eric H. Smith
President
International Intellectual Property Alliance