

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2009.

Executive Summary: The copyright industries unfortunately have very little positive news to report on copyright legislative developments and piracy issues in Chile during 2008. Chile was the first U.S. trading partner in Central and South America to sign a Free Trade Agreement (FTA), 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 nowhere near complete. Chile has been working for almost two years on copyright enforcement legislation, but initial drafts contained numerous FTA-incompatible proposals. A Senate joint committee has started to hold hearings to consider a plethora of proposed amendments and the copyright sectors continue to work locally to improve this legislation. Meanwhile, copyright piracy levels remain high, with hard goods piracy at steady levels and Internet piracy increasing. Although industry cooperation with Chilean criminal enforcement authorities continues to be very good, both with street raids and online actions, the system breaks down as few prosecutions ever reach deterrent sentencing, due largely to inadequate minimum penalties in the law. The Chilean government needs to significantly elevate national attention to copyright enforcement and develop specific actions to significantly reduce hard goods and Internet piracy.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following 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:

- (1) Amend the copyright bill to fully satisfy FTA IPR obligations (the deadline of which was December 31, 2007). This would include addressing the industries' longstanding calls to implement key issues such as:
 - * Establishing ISP liability provisions to meet its FTA obligations, including notice and take down procedures;
 - * Increasing the level of deterrent civil and criminal sanctions for copyright infringement;
 - * Providing an effective civil *ex parte* search remedy; and
 - * Establishing statutory damages.
- (2) Take immediate steps to complete and fully implement its 2001 government software legalization decree, and adopt appropriate provisions to regulate the acquisition and management of software by government agencies.
- (3) Generate new legislation to implement its FTA obligations regarding technological protection measures (TPMs) and the enforcement (both criminal and civil) against their circumvention (the FTA deadline was December 31, 2008). Rights holders must be informed of progress on any legislative initiative and be able to provide input based on their considerable expertise on this issue.

Improve criminal enforcement: Concerted enforcement efforts by the Chilean government should include:

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Iquique, 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;
- Pursue more criminal actions against illegal downloaders of copyrighted content;
- The police should 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 and coordinate with rights holders 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. The free port of Iquique continues to be a significant point of entry for blank media that is then sent to the capital city of Santiago as well as Peru and Bolivia. Customs generally applies WTO standards when evaluating the legitimacy of declared values of goods. There is no effort towards a register of importers, but this information is relatively easy enough to obtain through existing sources, including the Central Bank, the privately operated database DICOM, and the Chamber of Commerce.

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.

COPYRIGHT LAW ISSUES IN CHILE

The U.S.-Chile FTA:¹ IIPA and its members have long urged Chile to fully and promptly comply with its FTA and international obligations. The Chile FTA IPR chapter contains various transition periods (ranging from two to five years) which delayed the significant benefits that immediate implementation of the two WIPO Treaties' obligations (WCT & WPPT) would have brought to the copyright industry and to both the U.S. and Chilean economies. While Chile did timely amend its copyright law to implement much of the first set of the FTA's substantive copyright obligations (those due upon the FTA's entry into force on January 1, 2004), the series of transition periods anticipated that additional law amendments were necessary for Chile to meet its bilateral obligations. The FTA transition deadlines on all copyright law and the copyright enforcement-related obligations have now passed, making Chile non-compliant with its FTA obligations. Meanwhile, Chile continues to benefit from the U.S.' implementation of its obligations.

Chile had a two-year transition period to provide protection to temporary copies (Articles 17.5.1 and 17.6.1). Although there appears to be no express protection for temporary copies in the law, the reproduction right is very broad. The fact that pending legislation may create certain exceptions to temporary copies indicates that this issue requires continued surveillance in order to ensure the FTA obligations are not compromised.

On the enforcement side, the FTA contains a four-year transition period (due January 1, 2008) for Chile to implement the following enforcement obligations:

- 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 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 has a five-year transition period (due January 1, 2009) to implement its already existing WCT & WPPT obligations regarding protection against circumvention of technological protection measures (TPMs) in accordance with the FTA (see FTA Articles 17.7.5.a and c). IIPA foreshadowed in our February 2008 Special 301 filing that Chile had not yet even begun to draft legislation on this TPM issue, and we are not aware that any drafting efforts on this issue took place in 2008.

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. For IIPA's review 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.

The copyright bill is still under consideration: Chile has been working on legislation to amend its copyright law (Law No. 17336) for almost two years to address the FTA issues cited above. The process has been slow and arduous, and is not yet complete.

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.

In 2008, it was decided that a joint Senate committee comprised of officials from the Culture, Education, Technology and Economy Committees, would be created to review this copyright package. Over 200 more amendments from legislators and the private sector were submitted to this Senate 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 in Valparaiso as well as meeting with ministry officials in Santiago. The committee decided to review all these amendments from the start, and is now taking into consideration previous modifications and amendments that had been proffered to strengthen the 2007 text of the bill. As of the end of December 2008, the joint committee had only held hearings that addressed proposed provisions affecting libraries. The equally problematic provisions of ISP liability, criminal sanctions and mandatory arbitration on collective management of rights cases (discussed below) have not yet been discussed. Reports indicate that the joint committee suspended most of its formal work for three months (until March 2009). Several meetings were held in January 2009, but there are no reports of meaningful progress. Some in the Chilean government indicate optimism that the Senate may vote on the bill in early 2009, though given the amount of proposals not yet discussed, it might be premature to be optimistic. There is a concern that the Ministry of Culture may be excluding some of the copyright industry rights holders from the reform discussions; it is hoped that the expertise of all rights holders would be encouraged in order to promote Chile's proper implementation of its FTA obligations.

Below is a summary of the copyright industries' key issues and concerns in the ongoing legislative package. As mentioned above, the industries' representatives have participated in the legislative reform process in Chile, and the U.S. government has also engaged the Chilean government on these issues. For example:

- Provisions regarding the **liability of Internet Service Providers** are essential to ensure the distribution and enforcement of legitimate content over the Internet. The 2007 bill failed in many respects to track the FTA. These provisions, as originally drafted, would have effectively created incentives for Internet service providers (ISPs) 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 contains troubling language, especially on notice and takedown procedures. The most glaring problem is that the 2007 bill 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 would have to petition a civil court, which then has 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 is limited only to hosted content, which is no longer the predominant way in which pirates distribute content and would not cover actions needed in peer-to-peer piracy (P2P) situations.
- Many of the proposed **exceptions to copyright protection**, especially for libraries in the digital environment and those involving computer software, are incompatible with the FTA. For example, provisions on reversed engineering are far too broad; the proposed 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). The exceptions involving libraries are also far too broad; they would potentially allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Furthermore, the business software industry is very concerned about the proper FTA implementation of the reverse engineering exceptions proposed in the original bill, and has been working to educate officials on the issue and its appropriate resolution. In addition, 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. An objectionable proposal on ephemeral copies serving as a limitation to the reproduction right has been submitted to this committee.

- While the overall restructuring of the **civil and criminal sanctions** section in the original bill appeared to reflect some improvement, several provisions omit key FTA language which would ensure appropriate criminal remedies for copyright infringement. Proposed provisions on statutory damages and actual damages require clearer drafting. 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 (efforts in a separate legislation (discussed below) may go part of the way toward implementing more deterrent criminal sanctions for piracy). Provisions regarding the destruction of infringing copies should be expanded to include the instruments and other equipment used to commit the infringements. 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.
- Another issue of concern involves new proposals requiring mandatory arbitration on performance rights rates. These proposals (Articles 100 and 100*b/s*) on mandatory arbitration would jeopardize the right of the collecting societies to establish their own rates.
- Finally, the current bill does not include any provisions on **technological protection measures**, which are FTA obligations that were to be implemented by the end of 2008. Some wonder whether the Chilean government might be considering including these measures in this comprehensive reform package.

Separate illegal commerce and piracy legislation: 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 UTMs (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 new legislation, the penalty under Article 293 of the Penal Code for criminal association would result in an additional sentence. Another key feature of this law 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. It is hoped that the bill, if it remains with acceptable provisions, could be adopted by mid-2009.

Municipal fines for street piracy: 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.

2005 laws affecting judicial processes: 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 essence, it created a more agile relationship between prosecutors and judges. Although it gives judges greater freedom and police the right to search locations without a warrant in certain cases, 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. As a result, police can request search orders from prosecutors. 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 Strategic Economic Partnership: In September 2008, USTR announced that it will launched negotiations to join the Trans-Pacific Strategic Economic Partnership, a comprehensive Free Trade Agreement (FTA) concluded by Brunei Darussalam, Chile, New Zealand and Singapore, as a means toward advancing Trans-Pacific wide economic integration. The U.S. and its partners will negotiate the terms of U.S. participation in this Agreement (formerly called the “P-4 Agreement”), which entered into force in 2006. As the talks move forward, IIPA expects that the U.S. will support the introduction of the high standards already in place in the IPR Chapters that the U.S. has negotiated to date, such as one with Chile.

CHILE Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ²										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ³	109.0	66%	103.0	66%	82.0	68%	55.0	66%	49.0	64%
Sound Recordings & Musical Compositions ⁴	21.0	66%	29.6	44%	29.6	44%	22.7	51%	24.8	50%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	10.0	35%	2.0	40%
Entertainment Software ⁶	NA	NA	NA	NA	NA	20%	NA	NA	37.9	70%
Books	NA	NA	NA	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	130.0		132.6		112.6		88.7		114.7	

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Optical disc piracy and street piracy: Widespread “street piracy” in Chile continued unabated during 2008. 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 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.

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.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA’s 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. 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/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA’s 2009 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

³ BSA’s 2008 statistics are preliminary, and represent the U.S. software publishers’ share of software piracy losses in Chile, following the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at 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.

⁴ Estimates for the recording industry in 2006 were 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 MPAA’s 2005 statistics used a methodology that analyzed both physical/“hard goods” and Internet piracy.

⁶ ESA’s reported 2004 dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.”

Business software piracy: The Business Software Alliance (BSA) reports that piracy accomplished mostly by burning machines is still its most pressing problem 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. 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. Adopting appropriate provisions to regulate the acquisition and management of software by government agencies is a critical solution, and one required by the FTA. The software legalization provisions of the 2001 Decree⁷ have still not been implemented nor enforced in any measurable way. In 2009, 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.

Piracy of music and sound recordings: The recording industry, led by IFPI Chile, reports that the level of physical piracy for recorded music in Chile was 66% of the total market in 2008. Simply put, widespread piracy of music and sound recordings, primarily in the form of pirate CD-Rs and DVD-Rs, continues to wreak havoc in Chile. CD-R and DVD-R piracy is the predominant form of piracy. Street vendors in Santiago are a very common image in main avenues but the amount of product offered is mixed with burned DVD's with movies. Some blank CD-Rs enter Chile (as contraband, undervalued items or even legally), but the major problem comes when the unauthorized reproduction of music takes place locally using CD-R burners. Last year there was a 38% drop in the amount of legal physical music products sold in Chile. Sales of some legitimate digital music products helped to mitigate the drop in CD sales such that the overall music market decline was 30% last year. However, Internet piracy (especially illegal downloads of music) is growing and severely hurting the music market.

Audiovisual piracy: The Motion Picture Association (MPA) reports that audiovisual piracy is still a large problem in the Chilean market, representing approximately 50% of the market. New theatrical releases obtained through the Internet can be found on the streets, and this pre-release piracy inflicts major harm across the entire film entertainment sector in Chile. These titles are copied in clandestine labs and then distributed in strategic regions of Chile's major cities. Pirated DVD-Rs are still the main source of hard goods piracy, both on the street and through hard goods sales over the web. Despite the fact that street vendors are a considerable problem, Internet piracy is becoming more critical every day. Last year MPA also conducted trainings for theater employees on how to spot illegal camcording in theaters.

Book piracy: Use of photocopies of textbooks and reference books continues to concern the book publishing industry, primarily at the university level. Private copy shops are conveniently located near universities, copying 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.

Internet piracy is growing: Chile has one of the highest broadband penetrations in the region. There were 1.4 million broadband connections in Chile as of June 2008, a 17% increase from June 2007, and most (84%) of these were home broadband connections. Chilean ISPs have increased by 100% the broadband capacity for home use (up to 8MB), and this will likely prompt users to more easily download infringing materials. There are approximately 7.4 million Internet users in Chile, representing 45% of the population (according to www.internetworldstats.com) 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) filesharing is the most predominant form of Internet piracy in Chile, with the ARES and GNUTELLA networks being the most popular. 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. The recording industry's national group (IFPI Chile) has already submitted the case to the competent authorities and are waiting for concrete action to stop this significant problem.

⁷ In May 2001, President Lagos issued an executive order called "Instructions for the Development of the Electronic Government" (Decree No. 905 of 11 May 2001), which included a guideline for the executive branch to properly license software. In order to confirm that all government agencies use computer software only as authorized, the U.S.-Chile FTA requires that the parties adopt appropriate provisions to actively regulate the acquisition and management of software by government agencies (e.g., inventories of software present on agencies' computers and inventories of software licenses).

The 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 (this is a sharp increase from the 220 million reported in a third party survey in 2005). 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.

MPA also acknowledges that Internet piracy is becoming more critical every day and is engaged in public campaign against the sale of pirated hard goods over the Internet. The recent creation of cyberlockers and hyperlinks, located on national and international sites, allows direct downloading from hosting sites (Rapidshare, etc.), over P2P sites. MPA has identified Chilean citizens who have been uploading illegal camcordings (video and audio) to the Internet. Santiago, Valparaíso, Concepción, Antofagasta, Arica and Iquique are the most affected cities in connection with Internet piracy.

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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.

Criminal Enforcement: There remains two overwhelming problems in getting effective criminal enforcement in Chile. First, the national police (Carabineros), the Prosecutor's Office and the Judicial Police, all of whom do good work, suffer from a lack of sufficient human resources. Second, the Chilean copyright law – whether in its current form or as proposed in the October 2007 amendment bill – provides relatively low penalties (the mandatory minimum range of sanctions is very low) and, as a result, judges do not impose higher sanctions in-practice.

Industry cooperation with Chilean criminal authorities continued to be very good in 2008. The Carabineros, particularly the organized crime investigations department, continue to be a major support for anti-piracy actions in Chile. Furthermore, the industries' working relationships with the Specialized IPR Prosecutors Unit created within the Judicial Police in January 2008 and the Economic Crime Prosecutors are also excellent. The audiovisual and recording industries have active criminal anti-piracy campaigns. The business software industry did not bring criminal actions in Chile in 2008, 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 in identifying pirate locations and carrying out 108 raids during 2008, resulting in seizures of one million blank CD-Rs, 233,433 recorded CD-Rs/DVD-Rs plus other equipment. 65 people were arrested. IFPI Chile reports that raids continue to be focused in Santiago and Valparaíso. 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. The recording industry also took actions in the Internet space (see below).

The motion picture industry reports that both the police and customs authorities continue to take *ex officio* actions, and do seek MPA support at both the raids (seizures) and at trial. MPA held several seminars and training sessions for these authorities in order to keep them updated on new piracy methods. During 2008, this cooperation resulted in improved relationships, especially with the police and the Specialized IPR police unit. MPA reports that during 2008, the motion picture industry achieved the following results. Raids were conducted against 35 burner labs, 8 optical disc distributors, 6 Internet site operators selling hard goods, 522 street vendors, 5 retailers and 1 rental store. Seizures resulting from these actions included 270,866 burned discs, 237 burners, 125 computers, 14 printers and 41,140 art inlays.

Work with prosecutors improved but few deterrent sentences are issued by courts: Both MPA and IFPI-Chile report that their work with Chilean prosecutors, especially with those charged with the investigation of IP crimes, improved during 2008. Investigations and prosecutions involving hard goods piracy were solid. Further improvement is necessary regarding

Internet piracy cases; this should be easy to achieve as Chile already conducts investigations on other Internet-related crimes like child pornography and identity theft.

MPA reports that prosecutions did take place in 2008. Of the raids detailed above, criminal actions/charges were filed against the following kinds of defendants: burner lab operators (37), optical disc distributors (8), Internet site operator–hard goods (3), street vendors (511), retailers (5), and rental store operator (1). Convictions were achieved in 9 cases (involving 1 Internet site operator–hard goods, 5 street vendors, 1 retailer, and 1 rental store operator). MPA indicates that, in general, the minimum sanction of a 61-day suspended sentence was applied, as most defendants were first-time offenders. The recording industry reports that 108 raids were carried out during the year and over 1.2 million units of blank and recorded CD-Rs as well as 700 burners were seized in the operations. Forty-four (44) people were indicted for various crimes connected to music piracy.

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 pending legislative efforts to require higher mandatory minimum sentences are essential to be included in the pending copyright reform package.

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 2008, BSA performed 38 civil raids 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 *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.

Internet piracy and cybercrime cases: Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes, which has generally performed well during 2008. The Cyber Crime Brigade has been very active and helpful on many Internet anti-piracy actions.

During 2008, the recording industry's anti-piracy team was able to take down over 85,000 cyberlinks to illegal files, 335 permalinks to blogs were eliminated and 1,340 virtual auction users were prevented from continuing to sell pirate physical products. The principal actions against Internet pirates were taking down four Direct Connect (DC) Hubs that helped to direct P2P users to illegal files. Also in 2008, the recording industry ran an operation against Internet cafés that covered 21 locations, mainly in Santiago, where law enforcement authorities seized over 50 computers.

Despite these successes, the recording industry sees the lack of concerted attention from the Government to Internet cases like *Chilewarez* as a major obstacle. The most predominant form of Internet piracy is the P2P exchange of illegal music files using the most popular networks available, ARES and Gnutella. The recent actions against Direct Connect Hubs were possible thanks to a well conducted investigation entirely done by the local recording industry group (IFPI Chile). The impact of the actions against these Hubs resulted in a significant decrease in the P2P exchange in the DC network. Unfortunately, those actions are not producing any impact on the most popular networks ARES and Gnutella because of its decentralized structure. The Government needs to start conducting its own internet investigations.

Cooperation with ISP on Internet cases: Chilean law currently does not have any specific provisions regarding the limitations of liability on ISP providers, though as discussed above, this is an issue that is part of Chile's FTA obligations and is

being discussed in the copyright law reform efforts. The local recording industry group is trying to call the attention of Chilean Government in order to set up a roundtable negotiation with ISPs and hopefully reach an agreement that may settle major differences raised during the copyright law reform process. For example, 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. These groups both met on a regular basis throughout 2008 and are expected to continue their work in 2009.

Industry reports that Chilean ISPs do tend to cooperate in those situations that involve hosted content. For example, the music industry specifically notes that they have 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; there, cooperation is very sporadic or none is offered. Much of the infringing content is found on foreign websites. It is believed that the local ISPs are waiting for the outcome of the copyright law reform to see what the scope of the "safe harbors" provisions will be as a result of FTA implementation (the FTA itself is very clear on the specific safe harbors). According to local counsel, it is assumed that ISPs are currently subject to general liability principles in the Civil and Criminal Codes.

Inadequate border enforcement: 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. MPA took five border actions in 2007, seizing approximately 4,500 DVDs, none of which were major actions. The recording industry reports that in one major operation with intelligence provided by the local anti-piracy team, authorities seized over 1 million blank CD-Rs and DVD-Rs. The recording industry notes that some prosecutors, such as in the port city of Iquique, have shown a lack of interest in pursuing border cases.

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 effort in 2008 towards a register of importers, but as noted earlier, MPA reports that this information is easy enough to obtain through existing sources, including the Central Bank, the privately operated database DICOM, and the Chamber of Commerce. MPA is in frequent contact with Customs officials and provides training on intellectual property, with a focus on the importation of blank media.