

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### CHILE

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** IIPA recommends that Chile be elevated to Priority Watch List in 2006.

**Actions Which the Chilean Government Should Take in 2006:** The intellectual property rights chapter of the U.S.-Chile Free Trade Agreement (FTA) provides a high level of copyright and enforcement obligations. Although the FTA entered into force on January 1, 2004,<sup>1</sup> some of the copyright and enforcement obligations were subject to transition periods and have not yet entered into force. With respect to piracy and enforcement on-the-ground, the copyright industries remain very concerned by the lack of any tangible improvement in Chile during 2005. The Chilean government should engage in several simultaneous measures to improve copyright protection, including a public declaration expressing the political will to fight piracy on a national level and announcing specific actions in that regard.

#### **Legislative**

- Revise the pending anti-piracy bill (introduced in January 2004), which contains several provisions which do not meet the high levels of effective enforcement in either the FTA or TRIPS. Legislative consideration of this bill stalled during 2005, due to elections, and it is expected to move by March/April 2006..
- Develop legislation to implement the remaining elements (including enforcement) for which Chile was granted transition periods in the U.S.-Chile FTA. This would include addressing the industries' longstanding calls for:
  - Increasing the level of criminal sanctions for copyright infringement;
  - Providing an effective civil *ex parte* search remedy;
  - Establishing statutory damages;
  - Affording express protection of temporary copies;
  - Establish ISP liability; and
  - Adopting provisions on technological protection measures and the enforcement against their circumvention.
- Adopt appropriate provisions (as agreed to in the U.S.-Chile FTA) to regulate the acquisition and management of software by government agencies.
- Implement exclusive importation rights for local copyright holders and provide protection to encrypted program-carrying satellite signals.

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<sup>1</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).

## Enforcement

Concerted and organized enforcement efforts should include the following:

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaíso;
- The police should place more emphasis on investigating pirate manufacturing and distribution centers and operations;
- The civil police and administrative authorities should also act to prohibit the sale of pirated materials in the streets;
- The police should coordinate their investigations and actions with customs officials at international airports and border areas, as well as with finance ministry officials;
- Pursue prosecutions and impose deterrent-level criminal sentences;
- Initiate more raids and actions using organized crime legislation;
- Improve the speed of civil copyright infringement litigation;
- Have customs establish a system to track blank optical media imports and coordinate with rightholders to ensure accurate invoicing;
- Initiate actions against illegal downloaders of music, movies, and software.

<b>CHILE</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2001-2005 <sup>2</sup></b>										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music</b> <sup>3</sup>	22.7	51%	24.8	50%	21.1	40%	14.0	35%	12.2	35%
<b>Business Software</b> <sup>4</sup>	47.4	64%	49.0	64%	42.0	63%	34.0	51%	46.3	51%
<b>Motion Pictures</b> <sup>5</sup>	NA	NA	2.0	40%	2.0	40%	2.0	40%	2.0	40%
<b>Entertainment Software</b> <sup>6</sup>	NA	NA	37.9	70%	NA	NA	NA	NA	NA	NA
<b>Books</b>	1.0	NA	1.0	NA	1.1	NA	1.1	NA	1.1	NA
<b>TOTALS</b>	<b>71.1+</b>		<b>114.7</b>		<b>66.2</b>		<b>51.1</b>		<b>61.6</b>	

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf). For more details on Chile's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Chile are posted at <http://www.iipa.com/countryreports.html>.

<sup>3</sup> Estimates for the recording industry are based on a third-party survey in order to improve the accuracy of the statistics.

<sup>4</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Chile, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>5</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>6</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

## **COPYRIGHT LAW REFORM IN CHILE**

**The U.S.-Chile FTA and 2003 reforms:** The U.S.-Chile FTA incorporates the obligations set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The Chile FTA IPR chapter does contain extended transition periods (ranging from 2 to 5 years) which delay the significant benefits that immediate implementation of these treaties' obligations would bring to the copyright industry and to both the U.S. and Chilean economies.<sup>7</sup> 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.

During 2003, Chile adopted two sets of amendments to its 1970 copyright law (Law No. 17.336), the first to better implement its long-overdue TRIPS obligations and the second to implement those provisions of the U.S.-Chile FTA which would enter into force on January 1, 2004. These amendments addressed many of the longstanding deficiencies and/or ambiguities in this law which IIPA and its members had identified as not satisfying the thresholds of obligations found in U.S. bilateral programs, the WTO TRIPS Agreement and the two WIPO Internet treaties.<sup>8</sup>

According to the FTA terms, Chile has a transition period to provide protection to temporary copies, establish effective technological protection measures, grant comprehensive public performance rights and non-interactive digital transmission rights, and adopt ISP liability and notice and takedown provisions. We encourage Chile to amend its laws to fully comply with the WCT/WPPT and U.S.-Chile FTA obligations. Moreover, Chilean law should be amended to establish an exclusive importation right for local copyright holders; and provide protection to encrypted program-carrying satellite signals.

**2004 anti-piracy bill is pending before Congress and needs further reform:** President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, the bill is not satisfactory and has not received the full support of the copyright-based industries. While the goal of such reform is laudable, it is not a comprehensive attempt to fully implement the rest of the Chile FTA enforcement obligations. The bill was approved by the Economic Committee in the House of Representatives. It is now pending review by the Committee on the Constitution, Legislation and Justice. After being voted out of that committee and passed by the Chamber of Deputies, it will move to Senate committees, and, eventually, to the Senate as a whole. The bill did not make any legislative progress in 2005, due in large part to the elections, and is not expected to move until March/April 2006, the beginning of the congressional session. The copyright industries are concerned that the government will pressure Congress to approve the current text of the bill, which contains many deficiencies (see below).

This anti-piracy bill (Boletín N° 3461-03) purports to accomplish two major amendments to current law: (1) replacing the section in the current copyright law on infringements and penalties with a new chapter; (2) adding modifications to enforcement procedures, including precautionary measures and empowering certain courts. The copyright industries have highlighted the following features of this legislation:

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<sup>7</sup> For IIPA's more detailed analysis of the strengths (and weaknesses) in the U.S.-Chile FTA IPR Chapter, see IIPA's Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at [http://www.iipa.com/rbi/2003\\_May8\\_ChileFTA\\_ITC.pdf](http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf).

<sup>8</sup> For a historical sense of Chilean copyright efforts over the past decade, please refer to IIPA's prior Special 301 country reports at <http://www.iipa.com/countryreports.html>.

- Although the bill does incorporate some of the FTA enforcement obligations on criminal penalties, it does not significantly or effectively increase criminal penalties from current levels. For example, levels for minor offenses remain the same but only slight increases in fines are proposed (no increases in jail terms) for the revamped articles on copyright infringement. Several problems are clear. First, the level of proposed fines remains far too low to offer any deterrence. For example, infringers do not even pay the issued fines, and prefer to wait out their cases (some software cases have taken up to six years to be resolved). Second, the drafting formulation remains “fines or jail” for most offenses. In present practice, Chilean judges rarely issue any jail sentences. For example, minimum sentencing (that is, house arrest) has been applied in the few audiovisual piracy cases, despite good cooperation with police on raids. Industry officials have suggested that jail times should be increased to up to three years in order to constitute a deterrent (this higher level would halt automatic suspensions of sentences).
- The bill does not address two important issues—technological protection measures and statutory damages.
- Reproduction, absent financial gain, is punished only if the amount of the damages exceeds 150 UTM (approximately U.S. \$7,500).
- On a positive note, the bill does include a fair number of FTA-related civil procedure and provisional measures.
- The anti-piracy bill fails to address other enforcement-related FTA issues, including:
  - Criminal and civil remedies for encrypted program-carrying satellite signals (Chile FTA Article 17.8).
  - Limitations on ISP liability (such provisions do have a four-year transition), including notice and take down provisions.
  - Judicial authority to impose fines or jail terms on infringers who do not comply with court orders in criminal cases to supply information (Chile FTA Article 17.13 — the bill does appear to afford some civil remedies only).
  - The availability of civil *ex parte* search remedies (Chile FTA Article 17.15)—a historic problem, especially for the software industry.

During 2005, several Chilean government agencies reportedly were trying to amend the bill to incorporate very broad “fair use”-like exceptions which would allow copyrighted materials to be used without the rightsholders’ authorizations. It is likely that these provisions, if included, would also meet with the objections of the copyright industries.

The copyright industries have informed the Chilean government of the inadequacies embodied in this bill and the need to reform it. The industries have been pressing for additional amendments to this bill, especially to increase criminal penalties.

## **COPYRIGHT PIRACY IN CHILE**

The copyright industries report no improvement in the piracy situation in Chile in 2005, with many industries reporting major concern over the growth in digital piracy. Copyright piracy involving hard goods continues to be a serious problem. For example, street piracy is notorious, with sellers on the sidewalks covering their pirated 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.

The Business Software Alliance (BSA) reports that piracy accomplished mostly by burning machines (and not via Internet distribution) has become its most pressing problem in Chile. Commercial piracy conducted by integrators (such as OEMs) and by the hardware and software retailers is serious, and anti-piracy campaigns by BSA and its Chilean colleagues (ADS) have not reduced these problems. The unauthorized use and copying of software by small to medium-sized businesses (multiple installations of a single-product license and other under-licensing or license misuse) remains the most economically harmful form of piracy for the business software industry in Chile.<sup>9</sup> The impending challenge will be Internet piracy, because Chile has the highest Internet penetration among South American countries.<sup>10</sup> Furthermore, with growing broadband penetration, Internet piracy will, in the next few years if not sooner, become a major problem in Chile.

Piracy of music and sound recordings, primarily in the form of pirate CD-Rs, continues to wreak havoc. The pirate market today is approaching 5.6 million units in annual sales. The recording industry reports that pirate music CD-Rs can be found all around the major cities and in *ferias* around the country. The police (*carabineros*) have made efforts to remove many street vendors in Santiago, Concepcion and Valparaiso but require more resources specifically allocated to fight piracy in order to intensify the campaign. Most of the pirate product found in Chile is produced domestically. For example, blank CD-Rs enter Chile (as contraband, undervalued items or even legally), but the unauthorized reproduction of music takes place locally with CD-R burners. In 2005, the recording industry anti-piracy group (APDIF Chile) assisted police in identifying pirate locations, resulting in the seizures of approximately 300,000 recorded CD-Rs and DVD-Rs as well as 459 burners. Although these numbers reflect the goodwill of the police force, this is not sufficient to deter the sale of over 5 million pirate products. In addition, the industry has reached out to many local and state authorities during 2005 by conducting training seminars on piracy for police, prosecutors and tax auditors.

Chile continues to experience a significant problem involving the massive importation of blank CDs from South East Asia. Most of these blank CDs end up being used in the black market. The recording industry reports that this importation problem is especially serious in the Iquique region, where there is free trade zone. To address this problem, the government should establish a customs policy whereby all blank CD shipments must pass through “red light” proceedings. This procedure would require that every shipment of optical media be inspected for price and classification accuracy as well as legitimacy of exporters and importers. To simplify such an operation, Chilean Customs may want to consider limiting the number of ports of entry for blank optical media, as have programs already implemented in Mexico and Paraguay. In addition, the creation of an importers’ register will also improve disclosure; such a system should also involve rightsholders.

The Motion Picture Association (MPA) reports that optical disc piracy remains a major problem in Chile. Chile also has the highest level of Internet penetration, on a percentage basis, in all of Latin America— especially in the broadband segment—and there is an increasing incidence of both hard goods sales and downloading via broadband, especially for later

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<sup>9</sup> BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Chile.pdf), using 2004 data, found the following: “Cutting Chile’s piracy rate from 64 percent to 54 percent could add a half a billion dollars to its economy, increase local industry revenues by more than \$418 million, generate an additional \$55 million in tax revenues, and create 1,600 new jobs.” See <http://www.bsa.org/idcstudy/pdfs/Chile.pdf>.

<sup>10</sup> BSA cites of [Nielsen/Net Ratings](#), updated on November 21, 2005, which reports Chile having an internet penetration of 45.9%, compared to 13.3% average among the region.

conversion to CD-R or DVD-R product for further distribution. Back-to-back duplication of VHS in video stores continues to be common. The country's black market, and the increasing number of street vendors, are of continuing concern. These unregulated distribution points, which are nearly 100% pirate, represent direct competition to the potential legitimate video market, making it even harder for otherwise legitimate retailers to compete. Furthermore, signal piracy remains a significant problem in Chile,<sup>11</sup> especially involving the creation of mini-head ends that receive pirate programs that are then provided to particular buildings, condominium associations and small towns. The Chilean Government and municipalities accept registrations from and grant licenses to pirate companies without investigation so long as these companies pay taxes. Regarding enforcement, the government does not pursue investigations or enforcement actions; legal actions by the private sector have resulted in the closure of pirate services, but enforcement by the government of the sentences issued by courts is weak.

Photocopies of medical texts and reference books (usually translations of U.S. titles produced by subsidiaries in Mexico and Chile) continue to plague the book publishing industry, primarily at the university level. Private copy shops are conveniently located near universities, and university-run photocopy facilities on campuses also produce pirate product. The publishing industry estimates that 30% of the potential market is being lost through illegal copying. Commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs, and multimedia entertainment products) continues to be a problem, with most pirate products imported from Asia and Paraguay.

## **COPYRIGHT ENFORCEMENT IN CHILE**

The Chilean enforcement system fails in practice to meet Chile's existing bilateral and multilateral obligations, and the industries report no noticeable improvement in 2005. The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. The FTA also contains a two-year transition period to expressly protect temporary copies; a four-year transition period to implement the enforcement obligations (including statutory damages); and a five-year transition period to implement Chile's already existing WCT/WPPT obligation regarding protection against circumvention of technological protection measures. Effective implementation of these provisions should begin now, not later.

IIPA and its members outline below illustrative examples of specific enforcement problems encountered in Chile:

- Chile fails to grant *inaudita altera parte* (*ex parte*) proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register and are available to the public. Target companies may check the register to find out whether an *ex parte* search request has been filed against them before the inspection takes place. This notice violates TRIPS Article 50. It also undercuts the effectiveness of the remedy, because it affords a defendant the opportunity to remove/erase all traces of piracy or to

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<sup>11</sup> Market research has identified 842,342 subscribers of legitimate pay TV platforms, while the national census reported that 1,050,913 homes have access to pay TV products and services, constituting a 20% piracy rate.

take other steps to protect him/herself from the inspection. This remedy is particularly important because the BSA conducts only civil (no criminal) actions in Chile.

- The police run raids, but prosecutions are rare. Raids carried out by the Federal Civil Police and the Public Ministry can be relatively effective. The recording and audiovisual industries report generally good cooperation with police units. However, only a small number of prosecutions are brought. It is very rare indeed for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated.
- For cybercrimes, including intellectual property violations, Chile's Civil Police created a specialized, dedicated force to investigate Internet crimes, which has generally performed well. The few intellectual property cases that they have investigated have been related to individuals engaged in hard goods sales.
- Criminal sentences are not deterrent. Although distribution of pirated material is theoretically punishable by incarceration of up to 540 days (one and one-half years, a low term compared to the rest of the region), it is difficult to secure prosecutions, convictions or adequate sentencing. In the few cases that do reach judgment, sentences are suspended for an undetermined period of time without ever being effectively applied. Consequently, defendants are never incarcerated for copyright infringement. The recording industry reports ten sentences issued in 2005 but none carried any type of incarceration. The MPA reports 34 sentences issued in 2005, ranging from 41 to 200 days; however, only one convicted defendant was incarcerated. The vast majority of these sentences were suspended.
- The industries report that a new criminal procedure code entered into effect in 2005 which established an oral hearing which renders the whole procedure more transparent, and imposes a maximum duration of 2 years for the entire criminal legal action. Before, the duration of a criminal case was on average 6 years. Currently the average is one year for new cases. However, the procedures remain ineffective if, at the end of the day, penalties are not increased and if mechanisms to more easily prove organized crime activities are not created. The new procedure did not clean up the backlog of old cases. For example, an entertainment software company notes that some of its criminal cases have been pending since 2002. Though some of the much older cases have been resolved (cases that were pending as far back as 1998), many simply ended with a "temporary stay," without the imposition of penalties (deterrent or otherwise).
- Chile's civil courts are relatively slow in issuing relief to copyright holders, with civil copyright infringement cases taking two or more years until judgment in cases of first instance.
- Border enforcement measures are ineffective. Imports of optical discs remain a serious concern. Iquique continues to be a hub of blank cassettes and pirated compact discs, business software applications, and entertainment software products. Estimates show that over 130 million blank CD-Rs were imported in 2004, which would appear to be far out of proportion to legitimate demand. An encouraging sign of the potential for border enforcement was a raid conducted by Chilean Customs in December 2005 that netted 540 thousand units of blank CDRs being smuggled through the free port of Iquique.

- The Chilean government must fully implement government software asset management. 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 Chilean government still has not fulfilled this FTA commitment.