

Country :	CHILE	2008	Country code : CL
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NOTE : A summary of the replies to the 2006 enforcement survey relating to Chile can be found at http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130387.pdf

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The Commission makes the results of this survey public in order to enhance transparency about its initiatives and European Union policies in general. For more information about access and use of information available in this web site please refer to http://ec.europa.eu/geninfo/legal_notices_en.htm.

Please note that this document only intends to summarise the views expressed by survey respondents, and that the accuracy of information is not necessarily endorsed by the Commission nor by the authorities of the country concerned. Therefore, this document may not in any circumstances be regarded as stating an official position of the European Commission.

This information is one of the sources of input which will be taken into account by the Commission in the perspective of updating the list of "priority countries" on which EU efforts should focus regarding IPR protection and enforcement. However, other sources of input and factors will also be taken into account in updating the list.

EXECUTIVE SUMMARY

The results of the survey show signs of a positive development with regard of the IPR situation in Chile. Relationship with the Chilean government on this issue has also improved. According to the respondents to the survey, the creation of INAPI and of BRIDEPI (a specific IPR police division), have been positively acknowledged. However, respondents indicate that they consider it important that Chile pursues its positive efforts in order to fulfil its WTO commitments in the area of IPR legislation and in terms of IPR enforcement.

1a. Profile of the respondents: operations in the country, including type of presence

Professional associations, NGOs, European embassies, the EU Delegation in Santiago, several private companies with or without local agents or representatives

1b. Sectors / activities of the respondents in the country

Pharmaceuticals; lighting systems; agro-chemicals and pesticides; collective management of author's rights; production, distribution of films, television programmes and home entertainment material; editing and distribution of books; perfumes, cosmetics and luxury items.

2. In the case of associations (or other grouping of companies or individual right holders), number or proportion of their members affected by IPR infringements in the country

A professional association representing traders in the area of perfumes, cosmetics and luxury items declared that 100% of its members are affected. In the area of production, distribution of audiovisual works, 90% of the companies declared that they have been affected. In the area of agro-chemicals and pesticides 100% of the companies declared that they have been affected. Few cases of infringement have been reported by an NGO representing users of open source licenses for online distribution of films, music, photographs etc.

3. Type(s) of infringement(s) suffered

All types of infringement mentioned below have been reported by the respondents:

Piracy of *copyrights*

Counterfeiting of *trademarks*

Infringement of *patents*

Infringement of *geographical indications*

Infringement of *designs*

Unauthorised use of exclusive data in the area of pharmaceuticals, agrochemicals and pesticides used to obtain market authorisation

4. Nature of the infringement(s) suffered

Respondents report that in the sector of cosmetics and luxury items, infringing goods not only are produced, used or commercialised locally but also they are imported from the EU or third countries "legally" in the sense that Chile's legislation does not protect official distributors against parallel imports of genuine products.

In the sector of pharmaceuticals, agrochemicals and pesticides, respondents report that infringing substances are locally produced, distributed and used, despite the existence of adequate IPR protection.

As far as copyright-protected literary and artistic works are concerned, respondents report that infringing books, films, music, home video materials and television programmes, are locally produced, used and sold. In addition the country is used as an entry point for blank optical disk media coming from Southeast Asia with a final destination to other South-American countries.

5. Were the rights infringed registered in the country, or ex officio or otherwise protected?

Right holders replied that their rights are adequately registered in Chile. Copyrights are protected in conformity with the Berne Convention through their creation without need of registration.

6. Use of other methods to increase protection against IPR violations

In certain sectors of activity additional methods are used in order to increase protection such as use of holograms, SID coding, watermarks and scrambling. Pharmaceutical companies mention the patent number on the packaging, while cosmetics distributors use scanning systems to constantly monitor original products on their way until they reach the consumer.

7. Possibility to identify infringers

A large majority of respondents reports that it is easy to identify the infringers and the place where they operate.

8. Type of measures undertaken with the country's authorities in order to react against infringements of IP rights

Respondents reported that a variety of measures have been undertaken with the country's authorities in order to react against IPR infringements, ranging from administrative and judicial measures to political demarches and contacts with local trade and industrial associations. One respondent even mentioned direct contacts with a company infringing a famous EU geographical indication; the infringer stopped for a time to use the geographical indication but later on started again. Another respondent reports that in some piracy cases pending before the civil jurisdictions, the Consejo de Defensa del Estado, the

organism representing the state in judicial proceedings, intervenes and requests additional penalties and fines considering infringement as a crime against the state.

9. Response of the competent authorities to the initiatives undertaken in reaction against violations of IP rights

Respondents report that although it is relatively easy to identify the authorities that are competent to act against infringements, the main problem appears to be the weak enforcement of IPR laws due to their lack of availability and the length of their reaction to the requests. As far as the costs of the proceedings are concerned, respondents judge them generally as expensive given the fact that at the same time proceedings last for years.

However, one of the respondents points out that judicial and administrative proceedings are costless except for lawyers and attorneys fees. When Intellectual property laws foresee penal sanctions, judicial authorities may act ex officio considering that the infringement is also a crime against the state and the society.

No differences in treatment between national and foreigners were reported.

10. Representation procedures used to pursue the above listed proceedings (see question 8) in this country

The majority of the respondents use local specialised lawyers or attorneys qualified generally as competent and available.

11. Quantification of the adverse commercial impact caused to your company by the infringement of IP rights in the country

One of the editing companies mentions that its yearly losses correspond to 5% of their total income. A pharmaceutical company reports losses of 1M€ while a different one reports losses of 30MUSD per year. An industrial company estimates its losses at 300.000€per year.

12. Quantification of the adverse commercial impact caused to your sector of activity by the infringement of IP rights in the country

One professional association representing international producers and distributors of audiovisual works estimates the total losses in the sector at 25MUSD with a subsequent loss of 35% of the potential market. An industrial company estimates the losses in the sector at 500.000€

13. Implementation of different enforcement mechanisms

- 13.1 **CIVIL JUDICIAL PROCEDURES AND REMEDIES**, including injunctions for a party to desist from an infringement, the attribution of adequate damages and expenses, destruction or removal from the channels of commerce of infringing goods, materials or machinery used in the production of such goods and the closure of facilities where production or trade of infringing goods take place.

The respondents answer that civil judicial procedures and remedies are either deficient or not properly implemented. One of the respondents reports that even in the case of successful ruling, damages allocated were disproportionally low and no order was issued to remove from the channels of commerce the infringing goods. Companies operating in the area of producing and distributing audiovisual works underline that rulings with civil remedies are difficult to implement especially towards small criminal organisations. Other companies stress the fact that civil proceedings are too slow and that a case may last for 5 years before a decision is issued. Finally the judge's knowledge of IPR is also mentioned as a reason for the inefficiency of these procedures and remedies.

- 13.2 **PROVISIONAL OR TEMPORARY PROTECTIVE MEASURES** to prevent, in a prompt and effective manner, the infringement of an IPR from occurring and/or to preserve relevant evidence in regard to an infringement (such as raids, seizures, suspensions of release into trade channels, provisional closing of facilities, etc.), including, in urgent cases, measures issued *ex parte* (at the request of one party and without previous notification of the other party).

Most respondents judge these measures as deficient or not implemented by the courts. Others think that they are not available in the law.

Some of the respondents report that, very often, courts officials and judges have no specific training in these matters. Injunctions are very difficult to obtain, even if the evidence is compelling. One professional association indicates that new law is under discussion that facilitates provisional or temporary protective measures in the field of copyright infringement.

- 13.3 **ADMINISTRATIVE MEASURES**, adopted by police or other entities, of a nature similar to those described in 13.1 and 13.2 above.

Half of the respondents were unable to respond to this question; some others judge the administrative measures deficient. However some respondents provide that administrative measures, especially those adopted by the police, may be efficient. In fact, with the criminal law reform of 2005, a specialised police force was created for fighting against IPR infringement. According to one professional association, this new police force works efficiently.

- 13.4 **CRIMINAL PROCEDURES**, leading to the imposition of deterrent penalties such as fines or imprisonment terms, seizure, forfeiture and destruction of the infringing goods and machinery or materials used in the production of such goods, closing of retails or outlets, etc.

The majority of the respondents qualify the criminal procedures as deficient; only one professional association considers them as effective since the criminal law reform of 2005. Another professional association indicates that both judges and courts are not prepared to undertake drastic criminal sanctions against infringers. It explains that judges are far from really understanding the economic and social consequences of IPR infringements and do not consider them as affecting the state and the citizens as a whole.

Another professional association reports that as far as copyrights are concerned only a small number of criminal prosecutions are instituted in Chile and it is difficult to secure prosecutions, convictions or adequate sentencing. Prosecutors' offices are understaffed and overwhelmed by the scope of the piracy problem. Because of low penalties in the current law, judges do not impose deterrent sentences in those few cases that reach sentencing. Chilean copyright law – whether in its current form or as it would be amended by the legislative package under discussion in Congress – 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.

- 13.5 **CUSTOMS PROCEDURES** destined to prevent imports, exports and/or transit of IP infringing goods, including the availability of a mechanism to lodge preliminary applications by right-holders and the practice of *ex officio* seizures by customs authorities, as well as the granting to right-holders of the right

of information and inspection and of the possibility to obtain from the competent judicial authorities the definitive elimination of the infringing goods seized.

The majority of the respondents qualify the customs procedures as deficient or not available in law. One pharmaceutical company reports that customs procedures are efficient but limited to counterfeiting of trademarks.

As far as the importation of blank optical media is concerned, one of the respondents underlines that Chile continues to play a major role as an entry point for blank optical disc media that is coming from Southeast Asia with a final destination Paraguay and/or Bolivia. However the Chilean Government has not organized any type of border program to track the importation of blank optical discs.

A professional association that manages collectively the rights of authors and audiovisual producers in Chile indicates that by the end of 2003 Chile adopted specific laws for border measures in conformity with TRIPS. Customs authorities apply this law in a satisfactory way; they receive and treat now an important number of complaints per year. According to information delivered by the customs authorities, in 2004 they seized 2.243.000 infringing items. Those seizures related mostly to counterfeited trademarks and pirated software.

14. Main weaknesses / problems of the current system in place

Various respondents underscored the deficient enforcement of the domestic IPR laws and regulations; according to them this is due to a lack of knowledge on the part of judges and a lack of political will. The length and the costs of proceedings, the lack of resources and the lack of trained officials have also been mentioned as weaknesses of the current system.

As far as data exclusivity for agrochemical products market authorisation is concerned, many respondents point out that the agricultural authorities continue granting market authorisations to new applicants by partially relying on data provided by the original right holders. Agricultural authorities consider that summaries attached to registration dossiers are not protectable. In addition, competent authorities consider that if any data has been disclosed by any means and in any geography, all the components of the data package have been placed in the public domain and therefore there is no subject matter for protection.

Respondents point out that Chile continues to grant sanitary registrations for pharmaceutical products to local pharmaceutical companies despite that they are patent protected in the country. In practice the Ministry of health does not take into account patent status in granting sanitary registration to pharmaceutical products (the so-called patent linkage)

15. Overall evolution of the local IPR enforcement situation in the last 3 years

Half of the respondents replied that the IP enforcement situation has improved in the last 3 years and half of the respondents judge it as unchanged or deteriorated.

16. Main positive points/improvements

The main and most positive action that was reported is the creation of the National Industrial Property Institute (INAPI). The creation of this institute, with its own budget and more independence, is perceived as a way to ensure more transparency and rapidness in registering IPRs.

Various respondents underline Chile's efforts to meet commitments laid down in several FTAs the country has signed in the frame of WTO with the EU and the USA. This has helped a lot the adoption of new legislation in conformity with the said trade agreements.

The creation of an IPR police division (BRIDEPI) in April 2008 is another positive element reported by the respondents. This police division is dedicated exclusively to prosecute IPR-related crimes. The BRIDEPI, consisting of 16 officers, will keep track of the criminal organisations behind piracy and counterfeiting.

Respondents also reported that Chile authorities have carried out a public consultation on a draft bill to modify the protection of undisclosed information and the granting of sanitary registration.

After approval in the Senate of the ratification of PCT, the Treaty is now waiting for promulgation by the President. With the ratification of PCT, Chile fulfils a commitment under the EU-Chile Association Agreement.

The bill on copyright is still under discussion in Congress.

In recent times Chile has given more political importance to IPR issues. Nevertheless, according to the respondents, there seems to be a lack of political will at the highest levels to address enforcement issues and fulfil international commitments and obligations commensurate with the clear priority given to innovation and competitiveness.

17. Provision of / participation in enforcement-related technical assistance and/or awareness raising initiatives in the country during the period of reference (1.4.2005-31.3.2008)

Almost all respondents have taken part in awareness raising initiatives in the past.

Several respondents have provided training sessions to law enforcement personnel such as the Police Crime Lab of the uniformed Police of Santiago, Valparaiso and Inquique as well as the Police Crime Lab of the Civil Police in Santiago. Courses of combating digital piracy have also been offered to the Cyber Crime Unit of the Chilean Civil Police.

Other respondents have participated in Congress hearings on IPR and have given their point of view and expert comments. Respondents from the pharmaceutical sector have organised seminars and working sessions with local pharmaceutical and veterinary industry representatives, the local association of manufacturers and importers of agrochemical products

Respondents from the cosmetic industry have participated in awareness actions via the local media informing the consumer on the risks from acquisition of non-original products.

18. Readiness to work together with the competent authorities in the country in order to assist them in combating IPR infringements

All respondents reply positively to this question. Companies from the agro-chemical and pharmaceutical industry are ready to work with the local authorities for the establishment of a solid product regulatory data protection.

**19. Participation in the previous European Commission Enforcement Survey
(1.1.2003 – 31.3.2005)**

None of the respondents participated in the previous survey