

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2014.¹

Executive Summary: Since the U.S.-Chile Free Trade Agreement (FTA) went into force in 2004 allowing Chile to gain heightened access to the U.S. market, the country has failed to meet the bulk of its copyright-related obligations under the agreement. With no FTA-compliant legal protections in place for the technological protection measures (TPMs) that copyright owners use to prevent piracy, Chile remains a world leader in the sale of circumvention devices such as game copier devices made available through online auction sites. While maximum criminal penalties for repeat offenders were increased to deterrent levels, minimal levels are still available and continue to be favored by Chilean judges. Chile's 2010 Copyright Law amendments established a number of exceptions and limitations to copyright that could undermine important copyright protections, and failed to resolve gaps in copyright protection and enforcement in areas including *ex parte* searches and statutory damages. The 2010 amendments set forth significant first steps toward a robust Internet enforcement regime, but they fall short of the type of online anti-piracy mechanisms that are contemplated in the FTA. Meanwhile, stubbornly high levels of enterprise end-user piracy of business software applications persist.

As talks for a Trans-Pacific Partnership (TPP) with Chile and many other nations near completion, it is crucial that the United States press Chile to demonstrate that it is a trustworthy negotiating partner, by honoring the commitments it made in our bilateral agreement more than ten years ago.

PRIORITY ACTIONS REQUESTED IN 2014

- Satisfy FTA and WIPO Internet Treaties obligations to adopt TPMs legislation and enforce anti-circumvention provisions (both criminal and civil).
- Further amend the copyright law to fully satisfy FTA obligations with respect to: effective Internet Service Provider (ISP) liability provisions, deterrent-level civil and criminal sanctions for copyright infringement, an effective civil *ex parte* search remedy, and the establishment of statutory damages.
- Fulfill obligations included in the FTA regarding Government Software Legalization, and issue appropriate regulations and administrative decrees to normalize the acquisition and management of software by all government agencies.
- Place greater priority on anti-piracy actions among administrative and enforcement authorities and improve the speed of civil copyright infringement litigation through increased resources and coordination.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

¹For more details on Chile's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Chile's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN CHILE

The copyright industries report that what was once an epidemic of widespread “street piracy” in Chile largely has now migrated online. Legitimate online distributors of copyrighted materials continue to face enormous challenges through Internet piracy that occurs most significantly via peer-to-peer (P2P) file sharing of infringing content, but also occurs through hosted sites, illegal use of cyberlockers, hyperlinks to infringing materials and, increasingly, illegal mobile and smart phone downloads. The sites h2zone.cl and NeoGames.cl, which are both hosted and operated in Chile, continue to be leading purveyors of circumvention devices against which there are no means of enforcement.

The most popular piracy sources in Chile are P2P networks such as ARES and BitTorrent, and links to cyberlockers containing infringing content posted on social sites such as Chilecomparte. In 2013, Chile placed 12th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select members of the Entertainment Software Association (ESA) member titles on public P2P networks. Notably, Chile ranked seventh in the world in P2P infringement of console-based games. The recording industry saw an increase in its digital sales in 2013, but it continues to be heavily affected by piracy via P2P exchanges and links posted on blogs and social websites. In 2012, the recording industry reported detecting 4.7 million unique P2P users in Chile.

Another problem that is now well-established in Chile stems from the cyberlinks posted on forums and social sites. A clear example of this is the site *Chilecomparte*, one of the most popular social communities on the Internet in Latin America, which allows registered users to post and exchange thousands of unauthorized copies of music files. The Prosecutor’s Office has issued an action plan to address the issue, apparently addressing the lack of training on IPR Internet related cases. As of today, however, the Chilean authorities have taken no action to address the massive piracy taking place through *Chilecomparte*.

Camcord piracy: The unauthorized camcording of films in theaters has a significant negative impact on both the U.S. and Chilean filmmakers. Ninety percent of all pirated movies available during a film’s theatrical release originate as unauthorized in-theater camcords. While camcording of MPAA member titles in Chile has declined in recent years, this remains a concern for local industry and for the region. The Academy Award-nominated NO, by acclaimed Chilean filmmaker Pablo Llorain, was camcordinated and posted to an illegal website shortly after its 2012 release in Chile, but before it was legitimately available in other territories. Illegal websites, release groups, and brokers maintain a presence in Chile, creating a ready-made international online distribution network for any future camcords.

Signal piracy: The pay television industry in Chile also continues to experience problems with signal theft, including via “free to air” boxes.

Enterprise end-user software piracy: BSA | The Software Alliance (BSA) reports that the general public and government officials in Chile continue to gain a better understanding of the risks involved in using pirated software and the importance of IP to the economy. However, BSA observes that there has been very little change in the overall rate of software piracy in recent years. In 2011, the software piracy rate in Chile was 61%, representing a commercial value of unlicensed software of US\$382 million.² Widespread enterprise end-user piracy of software (the unauthorized use and copying of software by businesses and other enterprises) occurs in a variety of professional businesses, including media, architecture, design, engineering, and publicity, to name a few, and remains a high concern of the software industry. Other significant forms of software theft include unauthorized pre-installation of

²Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

software by hardware retailers, in-house and external IT advisors who often load unauthorized copies of software onto computers or networks, and Internet piracy.

The piracy that occurs within public agencies remains a significant concern. While there has been progress with government software legalization, more needs to be done. Adopting appropriate provisions to regulate the acquisition and management of software by the government is a critical solution that is required by the FTA and the adoption of effective, transparent and verifiable software asset management procedures could provide a powerful positive example to private enterprises.

COPYRIGHT LAW ISSUES IN CHILE

Overall, since the U.S.-Chile FTA went into force on January 1, 2004,³ Chile has failed to meet the bulk of its copyright obligations, all of which are now past due. Chile adopted amendments to its Copyright law in 2010 to address some, but far from all, of its FTA obligations. As adopted, the amendments contain significant gaps in the following areas⁴:

No protection for Technological Protection Measures: (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties.) Rights holders remain extremely disappointed that Chile continues to ignore its obligation under the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work. Due to the lack of protection under current law, the sale of circumvention devices continues unabated online, in specialty markets, and in formal shopping malls, such as Galeria Las Palmas, where sales occur alongside legitimate video game products.

No notice and take down mechanism: (See FTA Article 17.11.23.) Chile's Copyright Law as amended creates a "notice plus notice" architecture for ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy, and fails to provide any consequences for an ISP that fails to act after gaining knowledge of infringement outside of a court order.⁵ While the new ISP liability provisions fall short of establishing an effective notice and takedown procedure as required by the U.S.-Chile FTA, they do take an important first step in developing voluntary notice systems between rights holders, ISPs, and users. The recording industry reports good cooperation in 2013 with the major ISPs in Chile with the voluntary system of notifications of infringing behavior, and that digital market revenues in 2013 improved over 2012. Unfortunately, since the time of the 2010 amendments establishing ISP liability and deterrent criminal penalties in Chile, the government has failed to come back to the table to develop an FTA-compliant notice and takedown system.

No civil *ex parte* remedy or statutory damages: (See FTA Articles 17.11.12 and Article 17.11.9.) No provisions are included to strengthen the civil *ex parte* search remedy, nor are there any provisions establishing statutory damages. Chile is also required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products.

Overbroad exceptions to protection: (See FTA Article 17.7(3).) The Law as adopted contains certain exceptions that appear to be incompatible with the FTA, including: a reverse engineering exception that is not restricted to achieve interoperability, exceptions that could allow libraries to reproduce entire works in digital form

³The U.S.-Chile FTA is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

⁴These legal requirements and the 2010 Copyright Law amendments, including Chile's notice and notice infrastructure, have been examined in greater detail in IIPA's previous filings. See, e.g., <http://www.iipa.com/rbc/2013/2013SPEC301CHILE.PDF>.

⁵The ISP liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act), which can result in the removal of infringing material, but only after a lengthy court process. This provision falls far short of FTA compliance. Meanwhile, the mechanism for a voluntary notice system by which ISPs are to forward notices of infringement to users within five working days of their receipt (Article 85U) has had some positive impacts, as discussed in the text, but lacks incentives for compliance, and thus, standing alone, is simply an inadequate response to widespread Internet piracy.

without restriction, and the lack of overarching language consistent with the three-step test set forth in the FTA, ensuring that exceptions and limitations are not overbroad.

Several other FTA obligations also remain outstanding, including: To provide for a full right of communication to the public for producers of phonograms (Article 17.6.5); to provide adequate protection for temporary copies (Articles 17.5.1 and 17.6.1); to provide for legal remedies for rights management information (Article 17.7.6); and to provide for various border measures (Articles 17.11.17 through 17.11.21).

We also urge Chile to enact specific legislation that would criminalize illicit camcording, with penalties sufficient to deter this activity. Such a measure should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

COPYRIGHT ENFORCEMENT IN CHILE

Much of what IIPA has reported in recent years regarding copyright enforcement in Chile remains unchanged. The copyright industries report good cooperation with Chilean criminal and civil enforcement authorities (within the confines of an inadequate legal regime), and with Chile's intellectual property agency (INAPI) and the Director of the Tax Agency. However, additional resources and increased judicial attention are needed to follow through on the positive efforts of the Carabineros and Civil Police. Police and customs officials take *ex officio* actions on a regular basis and involve rights holders in legal procedures, but authorities need to take enforcement actions with greater frequency against Internet sites distributing infringing products. Prosecutions for copyright crimes are too infrequent and rarely result in deterrent sentencing, and civil actions face procedural obstacles and delays. Rights holders repeatedly must educate civil court officials regarding intellectual property law, including in enterprise end user piracy cases regarding the unauthorized use of software.

Inadequate civil *ex parte* actions and slow civil cases: Civil *ex parte* actions remain a critical remedy for the software industry; however, BSA is still struggling with a very difficult provision of Chilean law regarding *ex parte* proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register, where target companies may learn about a search request before the inspection takes place. This notice is inconsistent with TRIPS Article 50, and it undercuts the effectiveness of the remedy.

Criminal enforcement obstacles: There are three overwhelming problems in getting effective criminal enforcement in Chile. First, the IPR Prosecutor's Office is not dedicating the time and resources to understand and build Internet piracy cases, while the National Prosecution Office lacks a special branch to investigate intellectual property cases. Second, the National Police (Carabineros), the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose the minimum available penalties, which are not deterrent, and the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to effectively substitute community services and a probationary period for criminal penalties.

Market access: The Chilean Congress is currently considering screen quota legislation that would require exhibitors to show one Chilean or Latin American film for every three "foreign" films shown on all screens nationwide during the previous six months, and to oblige theaters to run these films so long as a certain number of spectators come to see them. Such legislation may run afoul not only of Chile's Constitution but of its international obligations.

Chile is currently considering digital television legislation that includes an amendment that would ban all advertising from Pay TV channels. This legislation is currently being considered by the Transportation and Telecommunications, and Education and Culture joint committee. In addition to this straight ad ban, there are multiple other amendments that would limit advertising and restrict the content of advertisements.