

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2018.¹

Executive Summary: Since the U.S.-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004, trade between the U.S. and Chile has increased by more than 350%, with two-way trade in goods and services totaling close to \$30 billion. However, Chile has yet to establish, implement, and maintain a copyright law and enforcement regime in line with 21st century norms and continues to disregard the major obligations it assumed under the FTA with respect to improving the level of copyright protection and enforcement online.

As a result of the inaction of the government, Chile continues to have a serious Internet piracy problem. Chile also remains the only country in Latin America that does not have a dedicated and centralized national copyright authority. This structural gap has profound effects on the ability to achieve progress on copyright matters and fight against piracy. Copyright matters are handled by four entities, operating under different ministries, and remain poorly coordinated. Some examples of piracy in Chile are significant levels of stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, and illegal use of cyberlockers. Cooperation with *Carabineros* (the national police service) remains positive, but as piracy moves to the digital environment, actions on the streets are scarce. Although there has been a slight improvement in illicit camcording, Chile continues to be a hub for online piracy and trafficking in circumvention devices, including free-to-air boxes, which decode encrypted satellite signals of copyrighted programs and broadcasts.

Chile's copyright law contains major gaps, which include a lack of protections against circumvention devices; inadequate secondary liability standards to give Internet Service Providers (ISPs) incentives to cooperate with rights holders in combating online piracy; meaningless notice-and-takedown obligations, with ISPs only being required to takedown content following a court order; the lack of deterrent remedies against infringement, including injunctions against intermediaries; and overly broad exceptions to copyright. Even after Chile adopted amendments to its copyright law in 2010, these issues remained glaringly unresolved. Chile's copyright law deficiencies prevent a fruitful collaboration with ISPs to combat online piracy because the law lacks the necessary mechanisms to encourage participation. Additionally, Chile does not have a law directed at illicit camcording in theaters, which would provide a useful deterrent for this type of activity. Chile's enforcement regime is ill-equipped, causing its police and court personnel to ineffectively bring cases even in the areas where Chilean law is adequate to bring action against certain copyright crimes. Training is required to assist the national police service to prepare digital piracy cases.

Making matters more challenging, when cases are successfully brought before the court, judges continue to impose insufficient and non-deterrent remedies. It is undeniable that a robust digital economy is essential to compete in today's global marketplace; yet, Chile repeatedly ignores the basic needs necessary to achieve such a goal. As Chile continues to work to build its local creative industries and its international reputation as a reliable trading partner, it can no longer carry on in this manner and must address the issues in its copyright enforcement regime, including with respect to its obligations under the FTA.

¹For more details on Chile's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Chile's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2018

- Adopt technological protection measures (TPMs) legislation and enforce anti-circumvention provisions (both criminal and civil) to satisfy the FTA and WIPO Internet Treaties obligations, beginning with revisions to and adoption of the bill regarding sales of free-to-air boxes.
- Further amend the copyright law to enable and meaningfully incentivize service providers to enter into voluntary cooperation with rights holders against online infringement, including through the implementation of filtering technologies and similar effective measures. The current meaningless notice-and-takedown system should be overhauled, too, to ensure that the removal of copyright infringing content, or the disabling of access to it, does not require court orders. Other necessary improvements to Chile's copyright law include the introduction of deterrent civil and criminal sanctions for copyright infringement; the establishment of statutory damages; improved injunctions, including injunctions against intermediaries; and an effective civil *ex parte* search remedy.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

COPYRIGHT PIRACY IN CHILE

Chile is the first member of the OECD from Latin America and has a developed economy. Internet use per capita is one of the highest amongst Central and South American countries.² These high numbers in Internet usage coupled with Chile's serious Internet piracy problem is a dangerous combination that does not befit a country at this level of economic development. The piracy in Chile remains consistently prevalent as in past years and involves various modes of infringement such as Illicit Streaming Devices (ISDs), high levels of stream ripping, file sharing of infringing content over P2P networks, hosting of unauthorized material on websites, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention devices for use with illegal video game files, and, increasingly, illegal mobile and smart phone downloads. Chile is among the top ten countries for video game copier listings on online marketplaces, such as *Mercado Libre*. The most popular piracy sources in Chile are foreign based stream ripping sites, linking sites using the most popular cyberlocker platforms such as *Mega*, *Mediafire* and *4shared*, and P2P networks such as BitTorrent. In other words, piracy sites affecting the Chilean market are largely foreign, which highlights the need to strengthen Chile's national law to protect against outside infringers. The main torrent tracker in Chile is *subtorrents.com*, which receives approximately 2 million visitors per month from Chile. *Todojuegos.cl* is increasingly popular, reaching over 350,000 monthly visits. Chilean users consume significant amounts of pirated content primarily posted on infringing, Spanish-language websites, regardless of the location of the hosts and operators of the websites. In 2017, *thepiratebay.org*, fully operational in Chile, received approximately 30 million visits from Internet users within Chile, and the top 180 Spanish-language audiovisual piracy websites received 379 million visits from Chile. Such consumption of pirated content harms the legitimate market in Chile.

Chile remains active in the sale of circumvention devices such as video game copier devices and modified consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. The modified consoles include the Nintendo 3DS, Sony PSP and PS3, and Xbox 360. The commercial area of Providencia in Santiago, *Paseo Las Palmas*, is well known for the sale of video games and related products. Stores offer handheld consoles for sale at different prices, depending on whether the consoles have been modified or not. The site *NeoGames.cl*, which is hosted and operated in Chile by a local, Santiago ISP, *Magnetizarte Ltd.*, continues to be a leading purveyor of circumvention devices and "unlocked" or modified consoles, against which there are no means of enforcement. *NeoGames.cl* deceptively bills itself as an "authorized reseller" in Chile for handheld video game consoles and offers bundle packs, which are consoles pre-loaded with video games. Traffic to *NeoGames.cl* increased by 20% over the last six months, totaling over 25,000 monthly visits. Withdrawal of legitimate payment services for this site has been difficult as credit card companies have faced challenges verifying payment methods. In 2017, Chile placed 22nd in the world in terms of the number of peers participating in the unauthorized file-sharing of

²See <http://www.internetworldstats.com/stats15.htm#south> and <http://www.internetworldstats.com/stats12.htm#central>, estimating that 77% of Chileans were Internet users as of June 30, 2017, the fifth highest proportion in Central and South America.

select video game titles through personal computers on public P2P networks. Notably, Chile ranked 11th in the world in P2P infringement of console-based video games.

The recording industry continues to be heavily affected by Internet piracy, in particular by stream ripping websites, which circumvent TPMs and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube. Such activity undermines the revenue models both of licensed streaming services and of legitimate pay-for download sites such as iTunes and Google Play. Also prevalent are links to pirate files posted on blogs and social websites and the use of cyberlockers to host infringing content. The recording industry, independent of the government, recently conducted an Internet anti-piracy campaign with promising, but modest, results. In 2017, 68 illegal music sites dedicated to piracy were removed and 80 are under monitoring. Also, 8.4 million pages offering illegal music were delisted from Google, and 3,400 links to local music were removed as a result of takedown notices sent by International Federation of the Phonographic Industry (IFPI) Chile to cooperative ISPs. Notably, these were all foreign ISPs because local ISPs do not remove content, as there is no meaningful notice-and-takedown system in Chile. While the recording industry has had some success working together with foreign ISPs, the official system is inadequate to deter bad actors from hosting infringing content, as outlined below.

The unauthorized camcording of films in theaters has a significant negative impact on both U.S. and Chilean filmmakers. Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. Chile has improved in this arena. In 2017, there were no illicit camcords of MPAA member films traced to Chilean theaters, down from five in 2016. Even with this positive turn around, IIPA continues to urge the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters, including deterrent penalties, and to strengthen its enforcement regimes so that these positive gains can be sustainable in the face of ever-changing criminal behaviors. Such measures should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

The pay-TV industry in Chile also continues to experience problems with signal and content theft. One prolific method is via free-to-air boxes, which began to flood into Chile in 2009. Free-to-air decoders contain a card with modified software able to capture encrypted satellite signals for television viewing, including programs and broadcasts protected by copyright. Because the devices are commonly sold separately from the modified software, it is impossible to enforce against sale of the devices alone. As a result, Chilean police have not taken action against the sale of this equipment. Additionally, ISDs have been introduced into the market. Such devices are extremely problematic because the sale of the devices can be legal if used with legitimate services and programming, but the simple download of software on the device opens the door to countless infringing material. Similar to free-to-air boxes, law enforcement against ISDs is lacking because of the dual legal and illegal use of the device.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Chile's FTA with the United States entered into force January 1, 2004, and it was intended to achieve a higher level of copyright protection and enforcement in Chile; yet, for the past 14 years, Chile has failed to meet its FTA obligations in this respect. With the demise of the Trans-Pacific Partnership (TPP), Chile's failure to meet the objectives and obligations of the FTA with respect to online copyright has reached a new level of significance and importance. The concerns IIPA has repeatedly voiced regarding the deficiencies in Chile's implementation of its copyright obligations under the FTA are as urgent as ever and ripe for action in the context of heightened attention to trade agreement enforcement.³ Chile adopted amendments to its Copyright law eight years ago to implement some of its FTA obligations. However, significant gaps still remain in the following areas:⁴

³The U.S.-Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

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., <https://iipa.org/files/uploads/2017/12/2013SPEC301CHILE.pdf>.

No protection for TPMs: (This obligation is provided in FTA Articles 17.7.5 (a) and (c), as well as the WIPO Internet Treaties.) Chile's continuous disregard for its obligation under the FTA to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work is still disappointing to rights holders across various creative sectors. The lack of protection under the current law allows for the continued, unrestricted sale of circumvention devices online and in specialty markets. In particular, the sale of video game copier devices on online marketplaces is increasingly prevalent. Also, music rights holders are left without support to tackle the problem of stream ripping sites that allow for users to download content, without authorization, through circumvention of TPMs. There has been some movement toward amending the Telecommunications Law to address the sale of devices that decode encrypted satellite signals, but no other protection for TPMs exists. Chile should immediately comply with its FTA obligation to provide adequate legal protection for all forms of TPMs.

Significant obstacles to content removal: (See FTA Article 17.11.23.) Current law in Chile is inadequate for the 21st century online economy because service providers are only required to remove copyright infringing content or disable access to it following a court order.⁵ In addition, the notice-plus-notice architecture under Chile's copyright law is entirely inadequate because it merely encourages ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences with respect to repeat infringements for typical online piracy. The law also does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement through a notification. The system is simply too costly and time consuming with very ineffective results. Rights holders' only option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. Such a remedy also improperly directs the focus of enforcement on the user and away from unlicensed platforms that play a critical role in illegal distribution. The recording industry has worked together with ISPs to establish a meaningful notice sending scheme, with thousands of notices sent to P2P users who are engaged in the exchange of unauthorized music files. However, despite the considerable resources devoted to initiating this process, the notices have had no deterrent value whatsoever. More than 12,000 notices were sent, but there were no meaningful legal consequences or sanctions against users or ISPs because rights holders were not in a position to bring court cases against each individual uploader. Therefore, music rights holders decided to stop sending such notices. The notice-plus-notice system is not compliant with the FTA and is not the kind of precedent that should be set in the region to combat Internet piracy. The experience in Chile shows that such a system does not produce results. Unfortunately, since Chile's adoption of the 2010 amendments attempting to establish ISP liability and deterrent criminal penalties, the government has failed to come back to the table to develop a meaningful strategy for tackling copyright infringement online, including, but not limited to, an FTA-compliant notice-and-takedown system.

No statutory damages or civil *ex parte* remedy: (See FTA Article 17.11.9 and Article 17.11.12.) Under the FTA, Chile is required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products. Yet, Chilean Copyright Law does not establish adequate statutory damages nor does it strengthen the civil *ex parte* search remedy, which are major missteps in Chile's attempt to act in compliance with the FTA.

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. These include: a reverse engineering exception that is not restricted to achieve interoperability; exceptions that could allow libraries to reproduce entire works in digital form without restriction; and the lack of overarching language consistent with the three-step test set forth in the FTA to ensure that exceptions and limitations are not overbroad.

⁵The Internet Service Provider (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 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; thus, standing alone, is simply an inadequate response to widespread Internet piracy.

Additional gaps in Chile's obligations: Several other FTA obligations remain outstanding, including to provide: adequate protection for temporary copies (Articles 17.5.1 and 17.6.1); legal remedies to protect rights management information (Article 17.7.6); and various border measures (Articles 17.11.17 through 17.11.21). Many of these shortcomings also constitute non-compliance with Chile's obligations under the WIPO Internet Treaties, to which it acceded in 2002, as well as (in the case of overbroad exceptions) under the WTO TRIPS Agreement.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Illicit Streaming Devices: In September 2015 a bill was introduced in the Chilean Senate that would criminalize the sale or importation of a device or software that decodes encrypted satellite signals.⁶ This is a welcomed step toward combatting the proliferation of these devices, which undermine the legitimate pay-TV market in Chile. However, the proposed bill provides inadequate penalties for sale of such devices or software; by comparison, existing fines for signal theft are five times higher. The fines are stated in "monthly tax units," but range from a minimum fine of 10 monthly tax units (approximately 461,370 Chilean Pesos or US\$714) to a maximum of 1,000 monthly tax units (approximately 46,137,000 Chilean Pesos or US\$71,350). Moreover, individuals who install, configure, or modify devices are subject to a fine of five monthly tax units. The economic benefit obtained in relation to the offense, the economic means of the offender, and the previous behavior of the offender are to be considered in setting the fines. In April 2016, several legislators made proposals for changes to the bill, including raising the minimum fine to 100 monthly tax units. The bill should be revised to provide for deterrent level fines, and then brought into force promptly.

Cooperation with Intermediaries: One key component to defeating online piracy is the collaboration with and cooperation of intermediaries, ranging from traditional passive ISPs, to search engines, advertisers and domain registrars. In Chile, the struggle with ISPs is not their lack of cooperation, as they are quite willing to work with rights holders to fight against piracy, but rather it is the Chilean law that hinders the effectiveness of this working relationship.

Implementation of the Larrain Bill: In 2008, Chilean law introduced unwaivable and unassignable remuneration rights for various acts of exploitation of audiovisual works in favor of audiovisual performers. In 2016, Chile implemented the Larrain Bill, which extended the reach of the 2008 law to include audiovisual authors (directors and script writers). The remuneration rights introduced by this legislation apply to audiovisual works communicated to the public by TV broadcasters, cinemas and possibly ISPs through on demand services, as well as performances in public venues and public lending. In 2017, following implementation of the Larrain Bill, a national collective management organization (CMO), ChileActores, began contacting local distributors of U.S. audiovisual works to demand remuneration in the form of a 2% tariff on box office revenues. This is done with respect to the remuneration rights of performers only. IIPA has no knowledge as to whether any author remuneration demands have been asserted thus far. While ChileActores may validly represent remuneration rights of Chilean performers and performers of other nationalities, ChileActores does not represent any members of U.S. performer guilds or unions. Moreover, the Chilean law, as implemented, does not require mandatory collective management of these remuneration rights. This means CMOs such as ChileActores are not automatically deemed to represent performers, but rather they must have a specific mandate to do so. Thus, attempts by ChileActores to claim remuneration on behalf of U.S. performers are not supported by any valid representation or other authorizations. MPAA is collaborating with the U.S. Government's regional IP Attaché to challenge any invalid or unsubstantiated claims and to educate the Chilean Government about the contractual frameworks U.S. producers of audiovisual works employ to provide ongoing, equitable and contractually agreed upon remuneration to performers, authors and directors.

⁶The bill is to modify the general telecommunications law. See Boletín No 10294/15. Proyecto de Ley que Modifica la Ley General de Telecomunicaciones para establecer sanciones a la decodificación ilegal de los servicios limitados de televisión, available at <http://www.senado.cl/appsenado/templates/tramitacion/index.php#> (search for 10294/15).

COPYRIGHT ENFORCEMENT IN CHILE

Much of what IIPA has reported in recent years regarding copyright enforcement in Chile remains unchanged. Police and customs officials continue to involve rights holders in legal procedures. The copyright industries maintain good cooperation with Chilean criminal and civil enforcement authorities (within the confines of an inadequate legal regime) and with Chile's National Institute of Industrial Property (INAPI). While the copyright industries report a reduction in *ex officio* actions against physical format pirated products, which may be as a result of the shift towards online piracy, in 2017, one video game company had three sizeable seizures totaling 8,300 products. The products included fake Wii U tablets and infringing hardware consoles with built-in video games. This is a positive result and such actions should continue; however, because of the shift to online piracy, authorities should redirect some enforcement energy to pursue more enforcement actions against Internet sites distributing infringing products and content (including by streaming, stream ripping, and download). Civil actions are often delayed by procedural obstacles, so increased criminal enforcement would be welcomed.

In early January 2016, Chilean Police took action against one of the world's largest release groups, which had been in operation since 2008. This group was responsible for the physical and online release of at least 80 identified infringing copies of feature films made by illegal camcording in a theater; operated FTP servers in Chile, the United States, and Europe; and managed at least ten different distribution websites. The operator of group was convicted in April 2017 and sentenced to 71 days in prison. This sentence was replaced with a one-year obligation to pay a monthly fine to the state, attend weekly meetings at the reformation unit in his home city, and keep the local police informed of his whereabouts. Failure to fulfill any of these obligations would result in an immediate reinstatement of his initial imprisonment sentence.

Criminal Enforcement Obstacles: There are several specific and significant impediments to effective criminal enforcement in Chile, including: (1) the IPR Prosecutor's Office does not dedicate the time and resources to understand and build Internet piracy cases, (2) the National Prosecution Office lacks a special branch to investigate intellectual property cases, (3) the *Carabineros*, the prosecutor's office and the judicial police suffer from a lack of sufficient human resources, (4) judges continue to impose the minimum available penalties, which are non-deterrent, even with higher penalties available under the 2010 amendments, and (5) the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to substitute inadequate punishments such as community service and probation for criminal penalties.

Some rights holders have found that the most cost-effective course to bring a border enforcement proceeding is to file a criminal complaint. Unfortunately, though, the criminal process is plagued with long delays. Additionally, in some cities, the storage of seized products is the responsibility of the brand owner, which increases the expense tied to customs enforcement and seizures.