

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2019.<sup>1</sup>

**Executive Summary:** The U.S.-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004, but Chile has yet to establish, implement, and maintain a copyright law and enforcement regime in line with 21<sup>st</sup> century norms and fit to combat the rampant piracy in the country. Chile's copyright law contains major gaps, including: failure to protect against circumvention of technological protection measures; failure to implement clear and comprehensive secondary copyright liability standards; meaningless notice-and-takedown obligations that require a court order for an ISP to take down content, thereby posing a legal obstacle to standard takedown practices accepted elsewhere in the world; a lack of deterrent remedies; and overly broad exceptions to copyright. These issues remain unresolved, even after Chile adopted amendments to its copyright law in 2010, and prevent a fruitful collaboration with ISPs to combat online piracy because of the lack of necessary mechanisms to encourage participation. Moreover, a new legislative initiative at the Ministry of Justice contemplates a "reform" of the Penal Code whereby all copyright infringement penalties would be reduced and all infringement would become misdemeanors.

Chile continues to have a serious online piracy problem, including significant levels of stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, and illegal use of cyberlockers. Additionally, although there has been a slight improvement in illicit camcording, it remains an issue, and Chile does not have a law directed at illicit camcording in theaters. Moreover, Chile continues to be a hub for trafficking in circumvention devices and services. Unfortunately, Chile's enforcement regime is ill-equipped to handle such piracy, 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. Video game companies, in particular, are limited in enforcement options with respect to circumvention devices and can only pursue such enforcement actions through other avenues, such as unfair competition. Furthermore, Chile remains the only country in Latin America that does not have a dedicated and centralized national copyright authority. This has profound effects on the ability to achieve progress on copyright matters and fight piracy, especially as piracy moves to the digital environment. Making matters more challenging, when cases are successfully brought before the court, judges continue to impose insufficient and non-deterrent remedies, and procedural requirements are often ill-suited to the realities of online infringement and digital evidence gathering. As Chile continues to work to build its local creative industries, a vibrant legitimate online market for creative content, and an international reputation as a reliable trading partner, it must address the issues in its copyright enforcement regime.

### PRIORITY ACTIONS REQUESTED IN 2019

- Adopt technological protection measures (TPMs) legislation and enforce anti-circumvention provisions (both criminal and civil).
- Further amend the copyright law to (i) distinguish clearly between neutral and passive service providers, who might be eligible for the (amended) ISP safe harbors, and services that cannot benefit from the ISP safe harbors; (ii) enable and meaningfully incentivize service providers to enter into voluntary cooperation with rights holders against online copyright infringement; (iii) overhaul the current meaningless notice-and-takedown system to ensure that the removal of copyright infringing content, or the disabling of access to it, does not require court

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<sup>1</sup>For 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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



orders; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, the establishment of statutory damages, improved injunctions, including against foreign-based websites, and an effective civil *ex parte* search remedy; and (v) provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

- Refrain from reducing copyright infringement penalties currently provided in the Criminal Code.
- Implement and maintain a copyright enforcement regime that is appropriately staffed and trained and is equipped with adequate resources to effectively combat online piracy.
- Ensure that any contemplated “digital services” tax does not create a sales tax on subscriptions to, or purchases of, digital copyrighted content and does not result in unwarranted discrimination in favor of “free to end consumer” business models (as used by certain, already dominant online distribution services) over services that offer paid access to copyrighted content. Care should be taken that any regulatory measure of this sort does not entrench current market failures, which affect the legitimate market for online copyright content.

## COPYRIGHT PIRACY IN CHILE

The piracy in Chile remains consistently prevalent as in past years and involves various modes of infringement such as Piracy Devices (PDs), 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 downloads. The most popular piracy sources in Chile are foreign based stream-ripping sites, linking sites, and P2P networks. 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. In 2018, *thepiratebay.org*, fully operational in Chile, received approximately 25 million visits from Internet users within Chile, and the top 180 Spanish-language audiovisual piracy websites received 300 million visits from Internet users within 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 Switch, 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. Known hackers have identified their “official reseller” in Chile for the sale of Nintendo SX Pro/SX OS as *chile-server.cl*. 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. Although this website now redirects to *Neutronics.cl*, it still offers “unlocked” consoles and services and is based in Santiago. Traffic to *Neutronics.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 2018, Chile placed 15<sup>th</sup> in the world in terms of the number of peers participating in the unauthorized file-sharing of select video game titles through personal computers on public P2P networks. Notably, Chile ranked 5<sup>th</sup> in the world in P2P infringement of console-based video games.

The recording industry continues to be heavily affected by Internet piracy, including significant levels of stream-ripping, file sharing of infringing content over P2P networks such as *BitTorrent*, and illegal use of cyberlockers such as *Mega*, *Mediafire* and *4shared*. As stated above, the pirate sites affecting the Chilean music market are largely foreign-based. Stream-ripping websites, which are the major piracy issue facing the music industry in Chile, circumvent TPMs used on popular and legal music streaming services such as YouTube and enable the illegal conversion of streams into permanent downloads. Such activity undermines the revenue models of licensed streaming services, especially those with premium, paid service tiers that offer users the option to cache streams for offline listening. The recording industry, independently of the government, recently conducted an Internet anti-piracy

enforcement campaign with promising, but modest, results. While the recording industry has had some success working together with foreign ISPs, the official system in Chile 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. As in 2017, there were no illicit camcords of MPAA member films traced to Chilean theaters in 2018. 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 motion picture industry continues to see an upward trend in audiovisual consumption through streaming, but unfortunately, much of it is on unauthorized platforms, PDs, and piracy mobile apps. PDs, in particular, 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 or piracy apps on the device opens the door to countless infringing material. PDs are freely offered in markets in Santiago without proper response from law enforcement. The pay-TV industry in Chile also continues to experience problems with signal and content theft. Similar to PDs, law enforcement against free-to-air boxes is lacking because of the dual legal and illegal use of the device.

## **LEGAL REFORM**

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;<sup>2</sup> yet, Chile's copyright law regime remains inadequate. IIPA has repeatedly voiced concerns regarding its deficiencies, and the urgency for reform is as strong as ever. Chile adopted amendments to its copyright law in 2010 to attempt to modernize its copyright law.<sup>3</sup> However, in comparison with the modern best practices in the protection and enforcement of copyright online, significant gaps still remain in the following areas:

**Protection of TPMs and Criminalization of Circumvention Devices:** In October 2018, Chile enacted a new law attempting to crack down on and criminalize the sale and/or importation of devices or software that decode encrypted satellite signals. The law provides for fines of up to \$70,000 for those caught importing, selling, or installing the illegal devices, but spares users from any sanctions. While the law is a welcomed step toward combatting the proliferation of these devices, which undermine the legitimate pay-TV market in Chile, a question remains as to whether the law is fully FTA compliant because the sanctions do not apply to users who willfully receive or distribute the pirated signals. Additionally, more information is necessary to understand whether fines of up to \$70,000 are sufficient to deter future infringement.

Even in light of its new legislation criminalizing satellite signal decoders, Chile still falls short of its FTA obligation to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work. 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. Chile should amend its law to provide adequate legal protection for all forms of TPMs. Moreover, Chilean authorities should take action against the provision of music stream-ripping services.

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<sup>2</sup>The U.S.-Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

<sup>3</sup>These 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>.

**Content Removal:** Current law in Chile is inadequate for the 21<sup>st</sup> century online economy because service providers are only required to remove copyright infringing content or disable access to it following a court order.<sup>4</sup> This legal requirement can be an excuse for ISPs unwilling to take down content and can even be a legal obstacle for ISPs who would otherwise react to rights holders' take down requests. The law also does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement through a notification. Moreover, 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 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. In the past, the recording industry worked together with ISPs to test a large-scale notice sending scheme. More than 12,000 notices were sent to P2P users engaged in the exchange of unauthorized music files, but this experiment confirmed that the legal framework is unworkable in practice, as there were no meaningful legal consequences or sanctions against users or ISPs and rights holders were not in a position to bring court cases against each individual uploader. 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.

Additionally, there is no definitive legal mechanism for website blocking under current law. Article 85R provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not involve blocking access to other content. This provision creates infinite scope for abuse (as the posting of a single non-infringing work can be relied on to oppose blocking measures) and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online infringement.

**Safe Harbors:** 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. The law should be amended to ensure that safe harbors are only available to technical, automatic, passive ISPs. Currently, Article 85Ñ of the Copyright Act sets out broad safe harbor protection for hosting service providers and search engine, linking or reference services who do not have "*effective knowledge*" of IP infringement, which can only be established by a court order. This provision significantly limits the circumstances where a hosting, search or linking service provider can be liable for infringements committed by its users.

IIPA members are concerned about proposals granting total immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include in these proposals exceptions for IP enforcement, which must then be properly implemented. Additionally, there are concerns with overly broad copyright immunity, for example, provisions that immunize parties who induce or facilitate infringement. Such troubling proposals are also occurring in Brazil and Argentina. Legal incentives that ensure cooperation of ISPs and other online intermediaries with rights holders, are important for online enforcement.

**Statutory Damages and Civil Remedies:** 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 provide injunctions against intermediaries and an effective civil *ex parte* search remedy.

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<sup>4</sup>The 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. 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, it is simply an inadequate response to widespread Internet piracy.

**Concerning proposals for a reform of the Criminal Code:** The Ministry of Justice is currently working on a legislative proposal to reform the Criminal Code of Chile, and the substance of the proposal is concerning. The Ministry is contemplating a reduction in the level of penalties for copyright infringement and converting all forms of copyright infringement into misdemeanors. Such a change would be incompatible with the FTA and the requirements of the TRIPS Agreement. Thus, the government should refrain from carrying out these unhelpful amendments to the existing criminal law.

**Exceptions to Protection:** The law 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.

**Collective Management Organizations:** In 2008, Chilean law introduced unwaivable and unassignable remuneration rights for various acts of exploitation of audiovisual works in favor of audiovisual performers, which threatens the freedom to contract. 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. Collective rights management legislation (Artists Copyright Bill/11927-4) recently approved in Chile's Congress would shift the burden to pay from the distributors to the exhibitors, but does not make collection mandatory for U.S. works.

## **COPYRIGHT ENFORCEMENT IN CHILE**

IIPA's commentary on Chile's copyright enforcement remains the same. Chile remains the only country in Latin America without a dedicated, centralized authority responsible for copyright matters, including copyright enforcement. Copyright matters are handled by four entities, operating under different ministries, and remain poorly coordinated.<sup>5</sup> Several specific and significant impediments to effective criminal enforcement in Chile are: (1) the IPR Prosecutor's Office does not dedicate the time and resources to understand and build online 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.

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<sup>5</sup>1) *Departamento de Derechos Intelectuales en la Dirección de Bibliotecas, Archivos y Museos*, Ministry of Education; 2) Minister of Education; 3) *DIRECON – Dirección de Economía, Departamento de la PI*, Ministry of Foreign Affairs; and 4) general IP prosecutor.

On a positive note, 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 most enforcement energy to pursue enforcement actions against Internet sites distributing infringing products and content. Civil actions are often delayed by procedural obstacles, so increased criminal enforcement is 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.

## MARKET ACCESS

**Screen Quota Bill:** Bill 8620-24, modifying Law No. 19.981 on Audiovisual Promotion, would impose a 20% theatrical quota for Chilean films. The U.S.-Chile FTA does not permit screen quotas on theatrical exhibition of films. Moreover, this quota legislation appears to potentially violate fundamental rights afforded by the Chilean Constitution such as economic freedom and freedom of expression.

**Digital Services Tax Bill:** Bill 1871/5000 would impose a 10% tax rate on digital services. This bill, which is being reviewed by the Chamber of Deputies (the first stage in Congress), would encompass entertainment services for digital content such as images, movies, series, videos, music, and games accessed through downloading, streaming, and/or other technology. While nobody is seriously opposing the idea that digital services should be subject to tax laws, the recording industry is following this bill with great attention because if the proposal goes too far (some are proposing up to 20%), it may bring an unreasonable added cost to legal access to music content in Chile and/or further distort the online marketplace for content that is already struggling with the market failures represented by piracy and lack of enforcement. Care should be taken to ensure any tax would not favor "free-to-end consumer" business models over paid access business models.