

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2020.¹

Executive Summary: Chile needs to revamp its legal framework to enable effective copyright enforcement online and, in turn, to foster the development of a healthy digital marketplace. Chile's copyright law contains major gaps, including: absence of clear and comprehensive secondary copyright liability standards; counterproductive court order pre-requisite to online content removal; failure to protect against circumvention of technological protection measures; a lack of deterrent remedies; and overly broad exceptions to copyright. These issues remain unresolved or even made worse by Chile's last copyright law amendment in 2010 (Ley No. 20.425).

Chile continues to have a serious online piracy consumption problem without any effective legal remedies to address it. Chile features significant levels of stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, illegal use of cyberlockers and IPTV. While illicit camcording of films has significantly declined in Chile in recent years, given recent shifts in camcording activity in the region, Chile should nevertheless pursue a law criminalizing this activity. 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 when those devices are bundled with games and services or unfair competition. Making matters more challenging, when cases are successfully brought before a 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. 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 online. 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.

In the aftermath of widespread social and political turmoil in late 2019, the Chilean Government has signaled its intention to pursue major legal reforms, including the announcement of a referendum to rewrite the constitution in April 2020. IIPA urges the Chilean Government to ensure that any reform adequately applies the country's existing international, multilateral and bilateral commitments to strong copyright protection and enforcement, and equitable market access, and to significantly improve its legal regime beyond the treaties' minimum levels of protection, consistent with international norms for the digital marketplace. IIPA respectfully requests USTR to monitor the impact that any legal reform—including any constitutional changes—may have on Chile's IPR landscape.

PRIORITY ACTIONS REQUESTED IN 2020

- Amend the copyright law (Ley No. 17.336) and repeal Ley No. 20.425 of 2010 to: (i) distinguish clearly between neutral and passive intermediary service providers and active services that cannot benefit from limitations on

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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



liability; (ii) enable and meaningfully incentivize intermediary service providers to enter into voluntary cooperation with rights holders against online copyright infringement; (iii) eliminate the court order requirement prior to content removal or take down; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, the establishment of statutory (e.g., pre-established) damages, improved injunctions, including against foreign-based websites, and an effective civil *ex parte* search remedy; (v) provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent; and (vi) adopt technological protection measures (TPMs) legislation with civil and criminal penalties and including sanctions for acts of circumvention and the trafficking in devices or services, and once enacted, to effectively enforce the anti-circumvention prohibitions.

- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property Law.
- 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 value added tax (VAT) on “digital services” does not result in unwarranted discrimination in favor of “free to end consumer” business models over services that offer paid access to copyrighted content.
- Ensure that the eventual overhaul of the country’s constitution and other laws adequately ratifies the country’s international, multilateral and bilateral commitments to strong copyright protection and enforcement, and equitable market access.

THE COPYRIGHT MARKETPLACE IN CHILE

Piracy in Chile remains prevalent and involves various modes of infringement such as Piracy Devices (PDs), also called Internet Service Devices (ISDs), which allow unauthorized access to online streaming content of films and television programs, stream-ripping, file sharing of infringing content over P2P networks, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention devices for use with illegal video game files, illegal mobile downloads, and, increasingly, IPTV services. The most popular piracy sources in Chile are foreign based, e.g. *Y2mate.com*, *ThePirateBay.org* and *1fichier.com*, which highlights the need to strengthen Chile’s national law to protect against foreign infringers. According to SimilarWeb, during the third quarter of 2019, *Y2mate* received over three million visits, while *The Pirate Bay* and *1fichier* received over two million visits.

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 or unlocked consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. Businesses sometimes offer console modifying services for sale through their *Mercado Libre* listings and modified consoles include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. An increasingly popular new online marketplace, *www.linio.cl*, has been unresponsive to requests from the video game industry to take down counterfeit products. 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*, who, in turn refers to hacking groups as “our partners.” 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 *Neotronics.cl*, it still offers “unlocked” consoles and services and is based in Santiago. Traffic to *Neotronics.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 2019, Chile placed 21st (an improvement since last year when it ranked 15th) 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. Chile ranked 9th in the world in P2P infringement of console-based video games (an improvement since last year when it ranked 5th).

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. 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, and incentivize local ISP's to engage in voluntary cooperation with rights holders, as outlined below.

The unauthorized camcording of films in theaters has a significant negative impact on both U.S. and Chilean filmmakers. 90% of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. Chile has improved in this arena. In 2019 there were no illicit camcorded copies of MPA member films traced to Chilean theaters. 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 IN CHILE

Chile made bilateral commitments to the U.S. to significantly improve its levels of copyright protection and enforcement.² Yet, Chile's copyright law regime remains inadequate and lags far behind international best practices and the baseline for member countries of the Organization for Economic Co-operation and Development (OECD). 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. However, Ley No. 20.435 was counterproductive for copyright holders', and even some neutral intermediaries', efforts to enforce copyright online:

Content Removal: Article 85Q requires ISPs to remove or disable access to copyright infringing content only following a court order that rights holders obtain after a lengthy and complicated court process that can take over a year. 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 expeditiously. There is no incentive for ISPs to act—expeditiously—to remove infringing material, and there are no sanctions for non-compliance with takedown notices. Instead, the law provides time consuming and disproportionately burdensome obligations on rights holders such as requiring rights holders to have a legal representative in Chile to send notices of infringement. The law does not provide any fines or other sanctions for an ISP that fails to act after gaining

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

knowledge of infringement through a notification from a rights holder. Instead, Chile has an ineffective notice-and-notice system (Article 85U) where rights holders do not know if an infringer has actually been notified to take down material and no provisions to deter repeat infringers. The cost and ineffectiveness of Chile's 'notice-and-notice' system has prompted the music industry to discontinue using it altogether. Rights holders' only other option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. We urge the Chilean Government to amend its 2010 law to develop a meaningful legal framework for addressing copyright infringement online. As part of this, to avoid abuse of the "safe harbor" provisions, the law should also clarify that these liability privileges are available only to ISPs that are passive and neutral. Finally, so as to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.

Website Blocking: Chile lacks a legal mechanism for website blocking. 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 other non-infringing content. This limitation renders the provision worthless 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. This contrasts with the situation in the EU and a number of Latin American countries where courts have ordered ISPs to block access to websites while considering the totality of the circumstances. The music, sports and TV industries have pursued successful test cases in Argentina, Peru, Mexico, Uruguay, Brazil and, most recently, Ecuador.

Statutory Damages and Civil Remedies: Under the Free Trade Agreement (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 (e.g., pre-established damages), nor does it provide a dedicated procedure for obtaining injunctions or an effective civil *ex parte* search remedy.

Protection of TPMs and Criminalization of Circumvention Devices: Even in light of its 2018 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 and modification services on online marketplaces and through social media is prevalent. Also, music rights holders are left without support to tackle the problem of stream-ripping sites that allow 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.

Exceptions to Protection: The law contains certain exceptions that appear to be incompatible with international norms (as well as the FTA). These include: a reverse engineering exception that is not restricted to achieving 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 international treaties (and the FTA) to ensure that all exceptions and limitations are properly calibrated.

Concerning Proposals for a Reform of the Criminal Code: In early 2019, the Minister of Justice announced a proposal for comprehensive amendment to the Penal Code, aiming to unify and consolidate all criminal provisions scattered in special laws, such as the Intellectual Property Law. The proposal would downgrade copyright infringement to a misdemeanor, dramatically reduce all penalties for copyright infringement and eliminate specific sanctions for the unauthorized reproduction and other illegal uses of phonograms. Such changes would be incompatible with the FTA and the requirements of the TRIPS Agreement. Due to the significant amount of opposing comments received from the private sector, the Minister of Justice delayed the project's submission to Congress pending further analysis. At present, the draft is still under consideration at the Ministry of Justice waiting to be submitted to Congress during the first half of 2020.

CASE LAW DEVELOPMENTS IN CHILE

In 2019, there were two positive rulings in cases involving phonogram producers' rights. On July 24, the Competition Court ("*Tribunal de Defensa de la Libre Competencia*") ruled against the petition filed by the Chilean Broadcasters Association (ANATEL), asking the Court to issue an order to the Executive to seek an amendment to repeal and substitute the collective management organizations' (CMOs) tariffs setting procedure, included in the Intellectual Property Law. According to ANATEL, the procedure was plagued by technical errors that made unfair and unconstitutional the implementation of tariffs by all CMOs. During the procedure, the CMOs and rights holders organizations demonstrated that none of ANATEL members are paying full tariffs and, instead, they enjoy discount programs freely negotiated with CMOs and therefore, there was no necessity for users and CMOs to follow the legal tariffs setting procedure. The Court dismissed the petition and ANATEL appealed.

On October 24, the Appeal Court of Santiago (8th Chamber) dismissed the constitutional protection action filed by a group of business owners against the recording industry, seeking to prevent phonogram producers from collecting dubbing rights from businesses located in the municipality of Providencia. The Court found no constitutional violation committed by the recording industry representatives in Chile by implementing a licensing campaign to defend its members' rights and to collect rights based on the reproduction of phonograms in computers and digital jukeboxes. The ruling ratified the right of members of the Chilean recording industry association to collect dubbing rights from businesses creating music databases as background music.

COPYRIGHT ENFORCEMENT IN CHILE

IIPA members report that copyright enforcement in 2019 was little changed from 2018 and as explained above, the legal system itself is a barrier to more extensive law enforcement, especially online. 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 several different entities, operating under different ministries, and remain poorly coordinated. They are: the *Departamento de Derechos Intelectuales del Ministerio de las Culturas, las Artes y el Patrimonio*; the *DIRECON – Dirección de Economía, Departamento de la Propiedad Industrial*, Ministry of Foreign Affairs; and, the general IP prosecutor. 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, and (4) judges continue to impose the minimum available penalties, which are non-deterrent, even with higher penalties available under the 2010 amendments.

On a positive note, the recording industry highlights the good level of cooperation achieved with public prosecutors around the country, in support of the actions against the unauthorized reproduction of sound recordings by companies offering background music services for businesses. 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) leading to customs seizures of counterfeit consoles with pre-loaded games in 2019. As piracy shifts to the online environment and given the procedural delays in civil actions, IIPA urges Chilean authorities to redirect most enforcement energy to pursue criminal enforcement actions against Internet sites distributing infringing products and content.

MARKET ACCESS IN CHILE

Screen Quota Bill: In October 2019, Chile's Chamber of Deputies approved bills 8620-24 and 11967-24. The first bill modifies Law No. 19.981 on Audiovisual Promotion with a mandatory 20% theatrical quota for Chilean films and obligates theaters to show Chilean films with ticket sales of at least 10% of overall cinema hall capacity in

peak season and 6% in off-peak season. The second bill modifies Law 18.838 on the Creation of the National Television Council by imposing a 40% Chilean content quota in free-to-air television that includes at least 15% of Chilean cinematographic works, such as feature films, series and miniseries, among others, in prime time. The U.S.-Chile FTA does not permit screen quotas on television or 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.

Proposal for VAT Expansion: In August 2019, in a shift from the 2018 Digital Services Tax Bill 1871/5000 that would impose a 10% tax rate on digital services, Chile's Chamber of Deputies approved tax reform bill 12043-05, which would establish a 19% VAT on digital entertainment content delivery services, including videos, games, etc. via download, streaming or other means. The recording industry is deeply concerned by this bill, which still needs to pass the Senate, because 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 a 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.