

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Priority Watch List in 2024.¹

Executive Summary: The digital market for creative content in Chile is teeming with infringing materials, a problem exacerbated by a weak legal framework and inadequate dedication and coordination of government resources for online enforcement. Chile's copyright law, which more than ten years ago established what at the time was an experimental notice-and-notice online piracy response system, has utterly failed to deter infringement online. The law was adopted six years after the 2004 entry into force of the U.S.-Chile Free Trade Agreement (FTA), and yet it left important FTA obligations unmet, such as protections against circumvention of technological protection measures (TPMs) and deterrent remedies against infringement, among other deficiencies.

Chile needs to do more to address the piracy problem, including the reform of its online liability framework, which involves a completely ineffective takedown procedure, and the creation of a centralized authority responsible for all copyright-related matters. Chile should also utilize new enhanced legal powers granted by Law #21,577 and Law #21,595, enacted in June and August 2023 respectively, to prosecute crimes related to organized crime. These laws provide more efficient mechanisms for the prosecution of crimes, such as computer-related crimes and violations against intellectual and industrial property. If used properly, these new laws may assist in prosecuting acts of piracy. The Government of Chile should amend the copyright law to address deficiencies in the U.S.-Chile FTA obligations, as well as other needed amendments. Finally, IIPA urges USTR to monitor the impact that any constitutional changes may have on Chile's intellectual property rights (IPRs) landscape and to closely monitor how any reform will permit Chile to adequately implement its existing international, multilateral, and bilateral commitments to provide strong copyright protection, enforcement, and equitable market access.

PRIORITY ACTIONS REQUESTED IN 2024

Enforcement

- Create a centralized copyright authority responsible for all copyright-related matters, such as registration and enforcement, to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.
- Utilize the enhanced legal powers granted by Law #21,577 and Law #21,595 to prosecute crimes related to organized crime and heighten the criminal liability of legal entities in committing criminal offenses.

Legal Reforms

- Improve and update Chile's legal framework for Internet Service Provider (ISP) liability and online copyright enforcement significantly to foster the development of a healthy digital marketplace.
- Enact amendments to address deficiencies in Chile's copyright law related to the U.S.-Chile FTA.
- Protect the successful Chilean collective management system and discourage or withdraw legislative proposals to amend it.
- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property (IP) Law.
- 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, enforcement, and equitable market access.

¹ 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://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

- Abandon the pending amendment to Article 24-H of the Telecommunications law, which creates an unlimited net-neutrality principle, with no distinction between legal and illegal content.
- Adopt other needed legal reforms to effectively fight piracy in Chile.

Market Access

- Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.

ENFORCEMENT

- **Create a centralized copyright authority responsible for all copyright-related matters, such as registration and enforcement, to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.**

Chile suffers from a piracy problem and needs a coordinated effort to address the issue. Chile remains without a dedicated, centralized authority responsible for copyright and copyright enforcement. Currently, copyright matters are handled by four different entities: (1) *Departamento de Derechos Intellectuales en la Dirección de Bibliotecas, Archivos y Museos* (Department of Intellectual Property Rights and Direction of Libraries, Archives and Museums), Ministry of Education; (2) Minister of Education; (3) DIRECON – *Dirección de Economía, Departamento de la PI* (Direction of Economy, Department of Industrial Property), Ministry of Foreign Affairs; and (4) the IP prosecutor. The implementation of a unified agency would be advantageous to the fight against copyright infringement and help deliver significant results as has been shown in other countries that have such organizations already in place for enforcement coordination and best practices implementation.

The most prominent forms of piracy in Chile remain stream ripping and the use of cyberlockers. The most popular stream-ripping sites in Chile are *y2mate.com*, *savefrom.net*, and *ssyoutube.com*. These sites received 7.1 million, 1.8 million, and 1.5 million visits from Chile respectively in the second quarter of 2023, according to SimilarWeb data. The most popular cyberlocker in Chile is *Mega.nz*. This site received 7.3 million visits from Chile during the second quarter of 2023, based on SimilarWeb data. Another popular cyberlocker, *1fichier.com*, received over 2.4 million visits during this same period. Piracy streaming sites, piracy apps, and ISD piracy are widespread means of film and television piracy in the country. Signal theft is also a major concern to the local pay-tv industry. Generally, IIPA members report a widespread lack of enforcement efforts by the Government of Chile to tackle online piracy.

The video game industry has reported in previous years that Chilean Customs had conducted several border seizures, and IIPA encourages additional such actions in 2024. As many of these seizures involved repeat importers, IIPA urges Chile to implement policies and measures that deter repeat importers of infringing products. Also, without coordination and cooperation of other agencies responsible for IP, enforcement will remain lacking. Specialized Internet crime police units from *Carabineros* and *Policía de Investigaciones* (Military Police and Investigatory Police) are not focused on IP crimes or any disruptive strategies for broader IP enforcement actions at the local level, despite a good level of technical investigative skills present.

In December 2022, the first “National Policy against Organized Crime” was published with the objective of reducing the criminal activity of criminal organizations operating in Chile through planned and coordinated action by state institutions that have a role in the prevention, control, and prosecution of organized crime. One of its lines of action is to implement an inter-institutional training plan with *Carabineros de Chile*, Investigative Police, Public Prosecutor’s Office, *Gendarmery* (Prison Service Military), General Directorate of Maritime Territory and Merchant Marine, National Customs Service, National Intelligence Agency, Financial Analysis Unit, and Internal Revenue Service on organized crime on topics including: asset investigation; investigation techniques and tools according to updated regulations; criminal types of organized crime and terrorism legislation; information gathering on the Deep and Dark Web; handling of digital evidence and other expertise; and intellectual property, counterfeiting, and piracy.

In addition, in August 2023, Decree 7/2023, “Technical Norm for Information Security and Cybersecurity” was published. This decree requires that each organ of the State Administration must develop an Information Security and Cybersecurity Policy that must follow information security standards. Therefore, since all technical standards consider controls related to the prohibition of the use of pirated software, the use of unlicensed software is not authorized in public organizations.

IIPA urges the Government of Chile to create a centralized copyright authority responsible for all copyright-related matters, such as registration and enforcement, to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.

- **Utilize the enhanced legal powers granted by Law #21,577 and Law #21,595 to prosecute crimes related to organized crime and heighten the criminal liability of legal entities in committing criminal offenses.**

In 2023, two legal reforms were enacted that gave private organizations and the Public Prosecutor enhanced legal powers. Law #21,577 strengthens the prosecution of organized crime offenses, establishes special investigative techniques, and bolsters the confiscation of illicit profits. Law #21,595 pertains to economic crimes. These reforms not only bolster the prosecution mechanisms for organized crime but also generate criminal liability for legal entities. Specifically, these laws provide more efficient mechanisms for the prosecution of crimes, among which are computer-related crimes and violations against intellectual and industrial property. These new laws may assist in prosecuting acts of piracy but, due to their recent enactment, it will be necessary to see the results of the cases brought to court to determine their effectiveness.

LEGAL REFORMS

- **Improve and update Chile’s legal framework for Internet Service Provider (ISP) liability and online copyright enforcement significantly to foster the development of a healthy digital marketplace.**

In the U.S.-Chile FTA, Chile made bilateral commitments to the United States to significantly improve its levels of copyright protection and enforcement.² Yet, Chile’s copyright law regime remains inadequate and lags far behind both international best practices and the baseline for member countries of the Organization for Economic Co-operation and Development (OECD). Although Chile adopted amendments to its copyright law in 2010, *Ley No. 20.435* is detrimental to effective online copyright enforcement. For years, IIPA has repeatedly voiced concerns regarding Chile’s deficiencies regarding copyright protection, and the urgency for reform is as strong as ever.

Article 85N of Chile’s copyright law establishes a safe harbor for hosting service providers and search engine, linking, or reference services that do not have “effective knowledge” of IPR infringement, which—by law—can be established only by a court order (issued as per procedure under Article 85Q). This provision significantly limits the circumstances where a hosting, search, or linking service provider can be liable for infringements committed by its users. This article also opens the door to abuse because online services that engage in making copyright-protected transmissions routinely seek to portray themselves as mere “hosting” services to avoid liability under copyright law. Article 85O, which sets out the conditions for liability limitation, also poses problems due to its conflicting criteria. The provision at first appears to narrow the safe harbor by setting out an additional eligibility criterion that “service providers” must meet to avoid liability for IP infringements, namely: “that the service has not generated, nor selected the material or the recipient” (Article 85O (c)). However, the last sentence of Article 85O then sets out that providers of “search, linking or reference services” are exempt from these additional conditions.

Article 85R provides that a court can order access to be blocked to clearly identified infringing content, but only if the blocking does not involve blocking access to other content. This provision creates infinite scope for abuse

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

(as the posting of a single non-infringing work can be relied upon to thwart blocking measures) and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online IP infringement. These limitations on the power of the Chilean judiciary contribute to the low level of online IP enforcement in Chile and the persistent online piracy problem.

Where ISPs are eligible for the above safe harbor privileges, Article 85Q of the copyright law requires ISPs to remove or disable access to copyright-infringing content only following a lengthy, expensive, and complicated court process that can take over a year and is out of step with international norms. This legal requirement can be an excuse for ISPs unwilling to take down content and can even be a legal obstacle for ISPs that 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 fines or sanctions for non-compliance with takedown notices. Instead, the law places 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. Currently, the only method of tackling infringing content online is to follow the burdensome and ineffective notice-and-notice system (Article 85U), which requires ISPs to pass on takedown requests to uploaders. However, rights holders have no way to know whether an infringer has actually been notified to take down material, and there are no provisions to deter repeat infringers or measures demonstrated effective in preventing or restraining infringement. The cost and ineffectiveness of Chile's "notice-and-notice" system has prompted the music industry to discontinue using it altogether. The only remaining option available to rights holders is to initiate a civil case directly against the user, a practical impossibility given the very high numbers of infringing users.

IIPA urges 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: (i) clarify that safe harbors should apply only to passive and neutral intermediaries that do not contribute to infringing activities; (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 takedown; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, establish statutory (e.g., pre-established) damages, improved injunctions, including an express legal basis for injunctions against intermediaries to prevent access in Chile to domestic and foreign-based infringing 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 and enforce TPMs legislation with civil and criminal penalties for acts of circumvention and the trafficking in devices or services. Finally, to be effective, the system should require measures demonstrated effective in preventing or restraining infringement.

- **Enact amendments to address deficiencies in Chile's copyright law related to the U.S.-Chile FTA.**

Chile's latest copyright law was adopted six years after the 2004 entry into force of the U.S.-Chile Free Trade Agreement (FTA), and yet it left important FTA obligations unmet, including:

Statutory Damages and Civil Remedies: Pursuant to 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 (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 pervasive. 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. Draft Bill #14767-0 aims to modify the Chilean IP Law to include TPMs

but has not progressed. Chile should amend its law to provide adequate legal protection for all forms of TPMs and protect against their circumvention.

Exceptions to Protection: The law contains certain exceptions that appear to be incompatible with international norms and 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.

Lack of Secondary Copyright Liability Rules: In the civil liability area, general tort law principles do not help copyright holders in establishing secondary liability in Chile. IIPA urges Chile to incorporate secondary liability principles in its copyright law to incentivize platforms to cooperate in the fight against piracy, among other goals.

- **Protect the successful Chilean collective management system and discourage or withdraw legislative proposals to amend it.**

A proposed legislative package has been filed by the new government to Congress in which significant changes in the collective management legal regime are proposed. One of the most important pillars of the successful collective management system in Chile is the fact that, for many years, existing collecting societies have enjoyed a statutory framework that allows them to enforce performance rights in the market effectively. The proposed legislation is at an early stage of consideration, but IIPA is concerned changes may interfere with Chile's well-functioning performance rights market. Nevertheless, any such proposals should be strongly opposed to avoid a regression in an otherwise successful performance rights market.

- **Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property (IP) Law.**

The 2019 draft proposal to amend the penal code was distributed for consultation and proposed to dramatically reduce all penalties for copyright infringement and eliminate specific sanctions for the unauthorized reproduction of phonograms (Articles 353, 354, and 355). The proposal would effectively treat copyright infringement as a misdemeanor and would delete specific sanctions for piracy crimes against phonogram producers. It is unclear what the current state of the text is or whether the political will exists to move this proposal forward. Due to the significant volume 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 with no specific timeframe.

- **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, enforcement, and equitable market access.**

In an October 4, 2022 referendum, the proposed draft of the new Constitution was overwhelmingly rejected. Negotiations on the modification of the Constitution continue. IIPA urges Chile to ensure all future work on the Constitution preserves, at a minimum, current levels of protection for IPRs. Rights holders seek to achieve the right balance among all fundamental rights. IIPA urges the Convention to ensure that any reform adequately implements the country's existing international, multilateral, and bilateral commitments to strong copyright protection, enforcement, and equitable market access. IIPA urges USTR to monitor the constitutional reform and its implications for copyright protection and enforcement, particularly in view of Chile's FTA obligations.

- **Abandon the pending amendment to Article 24-H of the Telecommunications law, which creates an unlimited net-neutrality principle, with no distinction between legal and illegal content.**

In May 2020, amendments to the Telecommunications Law were passed at the Specialized Commission of Transports and Communications in the Senate. After consideration, the Bill was returned to the aforementioned Commission in July 2021 for further study and consideration. The core of this reform is the proposed modification of Article 24-H (sections “a” and “b”). Under the modification, ISPs are prohibited from implementing any policy measure for the purpose of prioritizing traffic, or any measure that would have the effect of causing delay to Internet access. The Bill also removes from Article 24-H the all-important “legal” requirement that would distinguish between access to “legal” content, websites, and apps on the Internet, and “illegal” content, websites, and apps on the Internet. It would also have the effect of hindering the use of tools or devices on the Internet to inhibit access to such materials online. In sum, the Bill imposes an unlimited and unrestricted net neutrality principle in Chilean legislation with no limitation or distinction regarding the legality of the content, device, website, app, or service accessed by the Internet users. This proposed “unlimited” net neutrality proposal is in stark contrast with the law in both the United States and the EU, where net neutrality principles apply only to legal Internet traffic and content. The Bill also proposes to further enshrine the position that access to illegal content can be blocked “only by judicial order.”

The implications of this proposal are especially relevant to the consolidation of a digital music market in Chile. An unlimited net neutrality principle would make it even more cumbersome for rights holders in Chile to enforce their IPRs online. The idea of resorting to the judiciary for each and every infringement of copyrights or neighboring rights is a *de facto* diminution of the level of protection in Chile, because most of the infringement cases committed online can be addressed by coordinated and voluntary action between rights holders and ISPs. The reform could imply that Internet users in Chile have a *de facto* right to freely access pirated content, and that ISPs and rights holders cannot do anything to prevent or deal with such infringements. Due to a lack of prioritization of this Bill, it is difficult to predict any time frame for a vote on the floor.

- **Adopt other needed legal reforms to effectively fight piracy in Chile.**

Injunctive Relief: The music, sports, and TV industries have pursued successful test cases regarding infringing websites in Argentina, Peru, Mexico, Uruguay, Brazil, and Ecuador, but these industries report that Chile lacks a legal mechanism that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities. Article 85R of Law No. 17,336 of August 1970 on Intellectual Property (modified by Law No. 21,045 of November 3, 2017) provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not block access to other non-infringing content. This limitation hampers enforcement under the provision, as the posting of a single non-infringing work can be relied on to thwart 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 mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities, while considering the totality of the circumstances. The music, sports, and TV industries further report that the Article 85R procedure, in conjunction with the last line of Article 85L, is also seen by some ISPs as preventing them from cooperating with IP rights holders on a voluntary basis.

Theatrical Camcording: IIPA continues to urge the Chilean government to enact legislation that would criminalize illicit camcording in theaters, including deterrent penalties. Such legislation should not include any requirement of proof of the camcorder’s intent to profit.

MARKET ACCESS

- **Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.**

In January 2020, the Chamber of Deputies passed a bill adding a chapter on screen quotas to the Audiovisual Promotion Law, and the initiative awaits further debate. This bill would require exhibitors to show at least one fifth of nationally produced or co-produced audiovisual works as part of their total showings when ticket sales for a Chilean or co-production film, taken as an average from Thursday to Sunday, constitute at least 10% of overall cinema hall capacity in peak season and 6% in off-peak season. In free-to-air television prime time, 40% of content would have to be of Chilean origin and at least 15% would have to correspond to Chilean cinematographic works, such as feature films, series, and miniseries, among others. In July 2021, the proposal was approved by the Senate's Education Commission (*Comisión de Educación*), but the bill has not progressed. U.S. motion picture exporters remain concerned that the screen quota, if signed into law by the president and implemented, would discriminate against non-Chilean works and would contravene Chile's bilateral FTA commitments.