

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2013.¹

Executive Summary: Due to several shortcomings, Chilean law fails to provide a robust environment for the enforcement of copyright, and Chile is not in compliance with its FTA obligations. Chile adopted important amendments to the Copyright Law that went into effect in May 2010, but provisions for the protection of Technological Protection Measures (TPMs) were not included. Government software legalization has not been adopted. While maximum criminal penalties for repeat offenders were increased to deterrent levels, minimal levels are still available and continue to be favored by Chilean judges. The Law establishes a number of exceptions and limitations to copyright that could undermine important copyright protections, and fails to resolve gaps in copyright protection and enforcement in areas including *ex parte* searches and statutory damages. Significantly, the 2010 amendments set forth first steps toward a robust Internet enforcement regime, but they fall short of the type of online anti-piracy mechanisms that are contemplated in the FTA.

Nearly two years ago, Chilean President Piñera met with President Obama and promised to make “significant progress” in 2011 toward full implementation of the U.S.-Chile FTA. Unfortunately, major elements of FTA compliance still remain outstanding, including several that would improve the fight against widespread piracy in Chile. Hard goods piracy remains at steady levels especially for the entertainment software industry, while Internet piracy continues to grow, a major obstacle for the development of a new digital economy. Industry cooperation with Chilean copyright enforcement authorities generally is good; however, additional resources are still needed to address the low number of street actions, and increased attention on the part of the judiciary is needed to follow through on the positive efforts of the Carabineros and Civil Police. Few copyright prosecutions are undertaken and even fewer result in deterrent sentencing, due largely to inadequate minimum penalties in the law.

PRIORITY RECOMMENDED ACTIONS FOR CHILE IN 2013

- Further amend the copyright law to fully satisfy FTA obligations with respect to: effective Internet Service Provider (ISP) liability provisions, deterrent-level civil and criminal sanctions for copyright infringement, an effective civil *ex parte* search remedy, and the establishment of statutory damages.
- Satisfy FTA and WIPO Internet Treaties obligations to adopt TPMs legislation and enforce anti-circumvention provisions (both criminal and civil).
- Empower the Department of Intellectual Property Rights to enforce the obligation of ISPs to forward notices received from rights holders regarding copyright violations.
- Complete and fully implement the 2001 Government Software Legalization Decree, and adopt provisions to regulate the acquisition and management of software by government agencies.
- Through increased resources and coordination, place greater priority among administrative and enforcement authorities on anti-piracy actions, particularly on the Internet and in the streets of Santiago.
- Improve the speed of civil copyright infringement litigation and afford an effective and TRIPS-compliant civil *ex parte* search remedy, both in the law and in practice.

¹For more details on Chile’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



- Launch a national Internet anti-piracy campaign, with goals for specific enforcement efforts, improved interagency cooperation, reporting on administrative and judicial Internet actions, and public awareness.
- Strengthen border enforcement with better tracking mechanisms and coordination with rights holders.

COPYRIGHT PIRACY IN CHILE

The copyright industries report no decline in Chile's widespread "street piracy," and illegal downloading continues to be pervasive and largely unchecked. Although the country is emerging as a sophisticated digital market (the Internet is now available to 58.6% of the population, according to www.internetworldstats.com), without effective anti-piracy mechanisms to keep pace with the increase in Internet users and available bandwidth, legitimate online distributors of copyrighted materials face enormous challenges. Internet piracy occurs most significantly via peer-to-peer (P2P) file sharing of infringing content, but also occurs through hosted sites, illegal use of cyberlockers, hyperlinks to infringing materials and, increasingly, illegal mobile and smart phone downloads.

Optical disc piracy: As most of the pirate music consumers in Chile have migrated to the Internet, today street vendors ("*ambulantes*") primarily sell DVDs containing movies and music videos. The recording industry, however, reports that optical discs still face a 50% piracy rate of the total market in Chile. Finally, Chile is a major port of entry for blank optical disc media coming from Asia. The illegal importation and smuggling of pirate goods from Peru seriously affects the northern cities of Arica, Iquique, and Antofagasta. Some products are imported through the Port of Iquique, falsely identified, and re-exported to other countries.

End-user software piracy: BSA | The Software Alliance (BSA) reports that the general public as well as government officials in Chile continue to gain a better understanding of the risks involved in using pirated software and the importance of IP to the economy, and the overall rate of software piracy fell in Chile from 62% to 61% in 2011 (the most recent year studied).² The software industry remains highly concerned about widespread enterprise end-user piracy (the unauthorized use and copying of software by businesses and other enterprises). Other significant forms of software theft include unauthorized pre-installation of software by hardware retailers, in-house and external IT advisors who often load unauthorized copies of software onto computers or networks, and Internet piracy.

Enterprise end-user piracy of software occurs in a variety of professional businesses, including media, architecture, design, engineering, and publicity, to name a few. Perhaps of most immediate concern is the piracy that occurs within public agencies, which are in a position to set a national example. While there has been progress with government software legalization, more needs to be done. Adopting appropriate provisions to regulate the acquisition and management of software by the government is a critical solution, and one required by the FTA. Internet piracy of software is also a major concern in Chile, making the need for deterrent measures against online infringement an immediate one.

Piracy of music and sound recordings: The recording industry, led by its national group (IFPI Chile), reports that the level of piracy of optical discs remains stable at 50% of the market, while online music piracy is

²BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Chile was 61%, representing a commercial value of unlicensed software of US\$382 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

growing. Physical piracy, primarily in the form of pirate CD-Rs and DVD-Rs, is highest in the cities of Santiago, Concepción, Iquique, and Valparaiso. Internet piracy continues to grow, now exceeding the hard goods problem significantly. Internet piracy is estimated at 90% of all music consumption in the country. IFPI Chile reports that the recording market in Chile suffered a decrease of 7%. Digital sales to computers and mobile devices continue to be heavily affected by piracy, especially via P2P exchanges and links posted on blogs and social websites. Monthly P2P unique users reached 4.7 million in 2012. The most important site in the BitTorrent network is The Pirate Bay with 317,000 unique monthly users, followed by Torrentz with 221,000 unique monthly users. In the cyberlocker arena, Mediafire and 4share dominate with 1 million and 666,000 unique users respectively.

The most common form of Internet piracy is the exchange of illegal files through P2P networks (the most popular being ARES and BitTorrent) and links to cyberlockers containing infringing content posted on social sites such as Chilecomparte. Pirated copies on the Internet are readily available for download and are used as source materials to burn CDs/DVDs for distribution in the streets. In 2012, Chile placed 11th in the world in the number of connections by peers participating in the unauthorized file sharing of select members of the Entertainment Software Association (ESA) member titles on public P2P networks, a startling leap up from its 18th place ranking in 2011 and 24th place ranking in 2010.

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

Camcorder piracy: In the past several years, the Motion Picture Association (MPA) has seen pirated videos enter the market originating from illegal filming in Chilean movie theaters. Known as camcorder piracy, this activity was the subject of trainings subsequently conducted for cinema employees on how to spot illegal camcording among moviegoers.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

COPYRIGHT LAW ISSUES IN CHILE

The U.S.-Chile FTA:³ Chile adopted important amendments to the copyright law that went into effect in May 2010. These amendments moved Chile toward compliance with an important obligation under the U.S.-Chile FTA, to increase maximum criminal penalties for repeat infringers. They also brought Chile closer to compliance with its FTA obligation to establish effective notice and takedown measures for online infringement, but the procedures adopted fall short of the types of mechanisms contemplated in Article 17.11.23 of the FTA, and that can efficiently reduce online piracy in the country. Overall, since the U.S.-Chile FTA went into force on January 1, 2004, Chile has

³The U.S.-Chile Free Trade Agreement is posted on USTR’s website at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. For an earlier review by IIPA of the U.S.-Chile FTA IPR Chapter, see IIPA’s Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.

failed to meet the bulk of its obligations that were due under a series of transition period deadlines, all of which have passed. Each of the following obligations remains outstanding:

- Provide for the protection of TPMs and enforce anti-circumvention provisions against circumvention, including preparatory acts (Required by FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties).
- Adopt provisions to regulate the acquisition and management of software by government agencies to ensure legal software use by federal or central government agencies (Article 17.7.4)
- Adopt effective provisions on limitations of liability for ISPs and efficient notice and takedown measures (Article 17.11.23).
- Provide for a right of communication to the public and non-interactive digital transmissions (Article 17.6.5).
- Provide adequate protection to temporary copies (Articles 17.5.1 and 17.6.1).
- Provide for legal remedies for rights management information (Article 17.7.6).
- Provide for pre-established damages (statutory damages) in civil judicial proceedings (Article 17.11.9).
- Provide for civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (Article 17.11.12).
- Provide for various border measures (Articles 17.11.17 through 17.11.21).

IIPA and its members strongly support the FTA and for many years have urged Chile to fully and promptly comply with its FTA and international obligations.⁴ Since the time of the 2010 amendments establishing ISP liability and deterrent criminal penalties in Chile, rights holders have been optimistic that this demonstration of governmental support for anti-piracy cooperation in the online space would result in a significant decrease in illicit activity over the Internet among Chilean users. Unfortunately, however, the government has become content to rest on its laurels for this partial advancement in voluntary cooperation among rights holders and ISPs, and has failed to come back to the table to develop an FTA-compliant notice and takedown system.

The 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) and a mechanism for a voluntary notice system by which ISPs are to forward notices of infringement to users within five working days of their receipt (Article 85U). The judicial order takedown procedure in Article 85Q results in concrete results to remove infringing material, though it is the lengthier of the two processes. Meanwhile, the notice-forwarding requirement of Article 85U has the potential for quicker responses to known instances of infringement. However, under the latter procedure, failure to comply on the part of the ISP or failure to remove content on the part of the user results in no negative consequences. As a result, speedy compliance cannot be guaranteed.

While the new ISP liability provisions fall short of establishing an effective notice and takedown procedure as required by the U.S.-Chile FTA, they do take an important first step in developing voluntary notice systems between rights holders, ISPs, and users.

The recording industry reports that more than 1,300 notices have been sent to five major ISPs in the Santiago area since 2011. According to IFPI Chile, reports from ISPs on the responses received from subscribers and potential recidivists are now pending. However, since the Chilean law does not include any administrative procedure with sanctions, rights holders must now initiate judicial actions, making enforcement of their rights cumbersome.

Copyright law reform adopted in 2010: Chile has been working on legislation to amend its copyright law since 2007 to address some (but far from all) of the FTA issues cited above. Local copyright industry representatives repeatedly raised concerns with Chilean officials and members of Congress over the years that followed, yet the text originally drafted by the Ministry of Culture moved through the Senate and the House largely unimproved. The

⁴Past IIPA Special 301 submissions have detailed the history of Chile's FTA implementation, and are available at <http://www.iipa.com/countryreports.html#C>.

Constitutional Court approved amendments to the Chilean Copyright Law on March 31, 2010. The amendments entered into force as Law No. 20.435 upon publication in the Official Journal, dated May 4, 2010. As adopted, the amendments contain significant gaps in the following areas:

ISP liability: Chile's Copyright Law as amended creates a "notice plus notice" architecture for ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy and fails to impute liability upon an ISP that gains knowledge of infringement outside of a court order. Due to these shortcomings, the new procedure falls short of Chile's FTA obligations. It also is inadequate to deal with piracy over P2P networks, a prevalent form of piracy in Chile. Specifically:

- Chapter III on "Internet Service Providers Limited Liability Provisions" generally tracks the safe harbors in the FTA (articles 85-L to 85-Ñ). However, the new Law requires that ISPs have "effective knowledge" before voluntarily removing infringing content – and under Article 85-Ñ such knowledge must be based on notification from a court of law rather than from a right holder. This structure severely limits the possibility of the voluntary cooperation between ISPs and rights holders that is needed for an effective response to online piracy.
- Article 85-O requires ISPs to have a contractual policy to cancel the subscriptions of infringers that have been subject to due process, but only when those subscribers have been convicted twice for copyright infringement. Considering the infrequency of prosecutions in Chile, this condition will likely never be met in reality, and is unlikely to have any deterrent effect.
- Article 85-U requires ISPs to inform subscribers of notifications from rights holders within five days of receipt, but the Law fails to ensure compliance with this notification requirement through any incentives or penalties.

No civil *ex parte* remedy or statutory damages: No provisions are included to strengthen the civil *ex parte* search remedy, nor are there any provisions establishing statutory damages.

Overbroad exceptions to protection: The Law as adopted contains certain exceptions that appear to be incompatible with the FTA. For example, provisions on reverse engineering are too broad: the exception is not restricted to achieve interoperability (which is the FTA standard). Exceptions involving libraries could allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Finally, all enumerated exceptions and limitations to Chile's copyright provisions must be consistent with the three-step test set forth in the FTA, ensuring that exceptions and limitations are not overbroad.⁵

Low minimum criminal sentences: As adopted, the amendments achieve new maximum prison sentences and fines, which can reach US\$140,000 (2,000 *Unidades Tributarias Mensuales* (UTMs)) for repeat offenders. The law does not, however, increase the minimum sanctions for infringements. As a result, the copyright industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions. Efforts in separate legislation (discussed below) may go part of the way toward implementing more deterrent criminal sanctions for piracy. Sanctions should clearly apply in cases involving Internet piracy, especially involving those who upload protected copyrighted materials.

No protection for Technological Protection Measures: Rights holders remain extremely disappointed that Chile continues to ignore its obligation under Article 17.5 of the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work. Due to the lack of protection under current law, the sale of circumvention devices continues unabated in markets and online. In fact,

⁵Specifically, Article 17.7(3) of the U.S.-Chile FTA provides that "Each Party shall confine limitations or exceptions to rights to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder."

one ESA member reports that Chile is among the top-10 countries in terms of the number of game copier devices made available through online auction sites.

Trans-Pacific Partnership FTA: Chile is an initial TPP negotiating partner. IIPA continues to view the TPP negotiations as an opportunity to make progress on Chile's outstanding IPR obligations under the U.S.-Chile FTA.

COPYRIGHT ENFORCEMENT IN CHILE

The copyright industries report good cooperation with Chilean criminal and civil enforcement authorities, and with Chile's intellectual property agency (INAPI) and the Director of the Tax Agency. However, additional resources are needed to raise street actions to an effective level, and increased attention on the part of the judiciary is needed to follow through on the positive efforts of the Carabineros and Civil Police. Police and customs officials take *ex officio* actions on a regular basis and involve rights holders in legal procedures. However, authorities need to take enforcement actions with greater frequency against Internet sites distributing infringing products. Prosecutions for copyright crimes are too infrequent and rarely result in deterrent sentencing, and civil actions face procedural obstacles and delays.

Inadequate civil *ex parte* actions and slow civil cases: Inadequate preparation and training on intellectual property issues for many judges and their staff remains a major problem, along with weak civil provisions. Although the problem has diminished slightly over the years, there is much room for improvement to raise the capacity of the judiciary to understand the nature of copyright cases.

BSA continued to bring only civil actions in Chile last year, conducting raids in Santiago and four other regions, with plans to expand to a fifth region in 2013. Civil *ex parte* actions are still a critical remedy for the business software industry. BSA reports that in 2012, Chilean judges continued to improve their response to civil complaints and accepted more BSA requests for *ex parte* raids, which is a commendable achievement. However, despite this progress, BSA is still struggling with a very difficult provision of Chilean law regarding *ex parte* proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register, where target companies may learn about a search request before the inspection takes place. This notice violates TRIPS Article 50, and it undercuts the effectiveness of the remedy. BSA continues to move forward on this issue and is hopeful that with the new Copyright Law, the judges (including the judicial police's IPR branch, BRIDEPI) are improving their understanding of IP issues and software piracy specifically.

There are three overwhelming problems in getting effective criminal enforcement in Chile. First, the IPR Prosecutor's Office is not dedicating the time and resources to understand and build Internet piracy cases, while the National Prosecution Office lacks a special branch to investigate intellectual property cases. In general, all enforcement authorities lack adequate training and expertise to investigate and prosecute Internet piracy cases. This is the biggest factor behind law enforcement's inability to achieve significant results. Despite all efforts developed by the private sector in organizing seminars and informative materials for enforcement officers, the government is not taking the issue seriously or assuming the duty of training its own personnel. Second, the National Police (Carabineros), the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. The Carabineros, particularly the organized crime investigations department, continue to provide major support for anti-piracy actions in Chile. However, raids are limited to requests from rights holders. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose the minimum available penalties, which are not deterrent. Under the new Chilean Criminal Procedure System, judges continue to follow the principle of *in dubio pro reo* ("when in doubt, for the accused"), typically preferring the lower of the range of penalties. Compounding the problem, the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to effectively substitute community services and a probationary period for criminal penalties. The General Attorney's Office needs to prioritize copyright cases and instruct prosecutors to file criminal charges in important infringement cases.

The recording industry has an active criminal anti-piracy campaign in Chile, but reports disappointing results in 2012. The recording industry's anti-piracy group (IFPI Chile) assisted the police last year and reports that hard goods raids continue to be focused in Santiago and Valparaiso. Most of these raids are requested by the industry rather than being initiated by the local authorities. Flea markets such as Bio-Bio in the outskirts of Santiago are still plagued with pirate product. The police are taking a small number of *ex officio* actions in cases of street piracy and some laboratories. Customs also works on its own but eventually requests a complaint from the right holders. However, police operations rarely result in the arrest of responsible individuals and almost never in effective prosecutions. This pattern reflects a combination of factors, including the weak attention of Chilean authorities to cases of piracy and the massive migration of music pirate activities to the Internet. Therefore, less and less burned music CD-Rs are found on streets, replaced by more and more DVD-Rs containing movies and games.

Internet piracy and cybercrime cases: Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes. The Cyber Crime Brigade has been active and helpful on many Internet anti-piracy actions, but obtaining follow-through by prosecutors remains difficult. As with physical piracy, the industry hopes to continue fighting piracy through local teams. The Specialized Prosecutor's Office continues to show very little interest in prosecuting the social site Chilecomparte for its dedicated pirate music and video components, despite the fact that Chilecomparte is the biggest local online source for unauthorized distribution of pirate music.

The entertainment software industry indicates that www.h2zone.cl, which is hosted and operated in Chile, continues in 2012 to be a leading purveyor of circumvention devices, such as game copiers and mod chips. Because Chile lacks adequate legal protection for TPMs, remedies against such distributors are unavailable. Unfortunately, the easy availability of circumvention devices serves as a catalyst for further online piracy, as such devices are needed for games illegally downloaded from the Internet to play on a game console.

ISP cooperation: With respect to online hosted infringing content, the recording industry reports that the voluntary notice procedures implemented in the 2010 copyright law amendments help to foster cooperation between rights holders and ISPs in cases where content is hosted on the ISP's server. However, ISPs are not cooperating in forwarding notices to their subscribers, as mandated by the new Intellectual Property Law. IFPI Chile is conducting consultations with major ISPs in the country and official authorities to explore a solution to the lack of action from ISP's. In the meantime, rampant Internet piracy goes unaddressed, especially among users of P2P networks.

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