

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2015.¹

Executive Summary: As negotiations for a Trans-Pacific Partnership (TPP) with Chile and many other nations draw to a close in 2015, it is more pressing than ever that Chile should demonstrate its commitment to its existing obligations under the U.S.-Chile Free Trade Agreement (FTA), now eleven years outstanding. Chile's failure to meet its requirements to adopt tools crucial to the creative industries in fighting widespread piracy, such as protections for technological protection measures (TPMs) and statutory damages for copyright infringement, stands in stark contrast to the country's image across Latin America as a model of modernization. Chile's 2010 Copyright Law amendments fail to resolve these and other gaps in copyright protection and enforcement, and set forth an Internet enforcement regime that falls short of the type of online anti-piracy mechanisms contemplated in the FTA. Even where the law is adequate to bring action against certain copyright crimes, police and court personnel are not adequately equipped to bring cases to deterrent remedies.

Chile remains a world leader in the sale of circumvention devices such as video game copier devices made available through online auction sites. The Chilean Government endeavors to promote local filmmakers and musicians, but simple tools to promote voluntary cooperation against Internet piracy and combat illegal camcording are sorely lacking, allowing unauthorized files to proliferate online. As Chile works to build its local creative industries and its international reputation as a strong trading partner, it can no longer ignore the basic needs of a robust digital economy.

PRIORITY ACTIONS REQUESTED IN 2015

- Satisfy FTA and WIPO Internet Treaties obligations to adopt TPMs legislation and enforce anti-circumvention provisions (both criminal and civil).
- 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, the establishment of statutory damages, and an effective civil *ex parte* search remedy.
- Place greater priority on anti-piracy actions among administrative and enforcement authorities and improve the speed of civil copyright infringement litigation through increased resources and coordination.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

COPYRIGHT PIRACY IN CHILE

Piracy in Chile is characterized by significant levels of file sharing of infringing content over peer-to-peer (P2P) networks, hosting of unauthorized material on websites, illegal use of cyberlockers, hyperlinks to infringing materials, blatant online sales of circumvention devices for use with illegal video game files and, increasingly, illegal mobile and smart phone downloads. The most popular piracy sources in Chile are P2P networks such as BitTorrent, and links to cyberlockers containing infringing content posted on social sites such as *portalnet.cl*.

¹For more details on Chile's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Chile's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



The sites *h2zone.cl* and *NeoGames.cl*, which are both hosted and operated in Chile, continue to be leading purveyors of circumvention devices against which there are no means of enforcement. In 2014, Chile placed 18th in the world in terms of 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. Notably, Chile ranked ninth in the world in P2P infringement of console-based video games.

The recording industry saw an increase in its digital sales in 2014, but it continues to be heavily affected by piracy via P2P exchanges and links posted on blogs and social websites. Another problem that is now well-established in Chile stems from the cyberlinks posted on forums and social sites. Today, Chile shows the highest level of Internet piracy across the Latin American region, with about 35% of the total digital market (figures for the rest of the region show an average of 25% for most markets). This situation caused a reduction in the number of people accessing legal music sites in 2014. By contrast, the audience for legal music sites increased in the remainder of the region.

Camcord piracy: 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. While camcording of major studio titles in Chile has declined in recent years, this remains a concern for producers and local distributors. The Academy Award-nominated *NO*, by acclaimed Chilean filmmaker Pablo Llorain, was camcordinated and posted to an illegal website shortly after its 2012 release in Chile, but before it was legitimately available in other territories. Illegal websites, release groups, and brokers maintain a presence in Chile creating a ready-made international online distribution network for any future illicit camcords.

Signal piracy: The pay television industry in Chile also continues to experience problems with signal theft, including via "free to air" boxes, which began to flood into Chile in 2009. As a result, 2013 losses to the industry in Chile alone were 86 million dollars.² Free to air decoders contain a card with modified software able to capture satellite signals from television protected by copyright. Because the sale of devices is separate from the sale of software that allows the satellite signal to be captured, it is impossible to enforce the illegality of the device itself. As a result, Chilean police have not taken action against the sale of equipment. Local industry has proposed a specific criminal offense penalizing the sale of this equipment within the law creating the Superintendent for Telecommunications, as well as efforts to raise public awareness about the negative effects of this and other forms of piracy.

COPYRIGHT LAW ISSUES IN CHILE

The concerns that IIPA has voiced in past years with the deficiencies in Chile's implementation of its copyright obligations under the U.S.-Chile FTA, which went into force on January 1, 2004,³ remain as urgent as ever. Chile adopted amendments to its Copyright law in 2010 to address some, but far from all, of its FTA obligations. As adopted, the amendments contain significant gaps in the following areas⁴:

No protection for TPMs: (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties.) Rights holders remain extremely disappointed that Chile continues to ignore its obligation under 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 online, in specialty markets, and in formal shopping malls, such as *Galeria Las Palmas*, where sales occur alongside legitimate video game products.

²Data from the Business Bureau (<http://businessbureau.com/bb-consulting/?|=en>).

³The U.S.-Chile FTA is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

⁴These legal requirements and the 2010 Copyright Law amendments, including Chile's notice and notice infrastructure, have been examined in greater detail in IIPA's previous filings. See, e.g., <http://www.iipa.com/rbc/2013/2013SPEC301CHILE.PDF>.

No notice and take down mechanism: (See FTA Article 17.11.23.) Chile's Copyright Law as amended creates a "notice plus notice" architecture for Internet Service Providers (ISPs) to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy, and does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement outside of a court order.⁵ 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 cooperation with ISPs continues in regards to notices sent to P2P users who are engaged in the exchange of unauthorized music files. The number of notices sent by the recording industry's local organization, IFPI CHILE, has increased to 600 per week. However, the actual impact of the campaign is extremely difficult to measure in view of the lack of deterrents or sanctions to recidivists. Unfortunately, since the adoption of the 2010 amendments establishing ISP liability and deterrent criminal penalties in Chile, the government has failed to come back to the table to develop an FTA-compliant notice and takedown system. The "notice plus notice" system also sets a non-compliant and low bar precedent for efforts in the rest of the region to deter and contain the Internet piracy problem.

No statutory damages or civil *ex parte* remedy: (See FTA Articles 17.11.9 and Article 17.11.12.) No provisions are included to establish statutory damages or to strengthen the civil *ex parte* search remedy. Chile is also required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products.

Overbroad exceptions to protection: (See FTA Article 17.7.3.) The Law as adopted contains certain exceptions that appear to be incompatible with the FTA, including: 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, ensuring that exceptions and limitations are not overbroad.

Several other FTA obligations also remain outstanding, including to provide: a full right of communication to the public for producers of phonograms (Article 17.6.5); adequate protection for temporary copies (Articles 17.5.1 and 17.6.1); legal remedies for rights management information (Article 17.7.6); and various border measures (Articles 17.11.17 through 17.11.21).

We also urge the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters, with deterrent penalties. Such a measure should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

COPYRIGHT ENFORCEMENT IN CHILE

Much of what IIPA has reported in recent years regarding copyright enforcement in Chile remains unchanged. The copyright industries report good cooperation with Chilean criminal and civil enforcement authorities (within the confines of an inadequate legal regime), and with Chile's intellectual property agency (INAPI). However, additional resources and increased judicial attention are needed to follow through on the positive efforts of the National Police (*Carabineros*) and Civil Police. Police and customs officials take *ex officio* actions on a regular basis and involve rights holders in legal procedures, but 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.

⁵The ISP liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act), which can result in the removal of infringing material, but only after a lengthy court process. This provision falls far short of FTA compliance. Meanwhile, the mechanism for a voluntary notice 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, and thus, standing alone, is simply an inadequate response to widespread Internet piracy.

Criminal enforcement obstacles: 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. Second, the *Carabineros*, the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose the minimum available penalties, which are not deterrent, and 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.

Market access: Proposed screen quota legislation that had been considered in the Chilean Congress in 2013 was not the subject of active debate in 2014, possibly thanks to the "Cooperation Agreement for the Development and Strengthening of the Film Industry," signed in December 2013 among exhibitors and producers to address the desire to boost the local film industry. That agreement, however, will expire and is up for review in early 2015. The screen quota project does remain on the docket in the lower house, and would require exhibitors to show one Chilean or Latin American film for every three "foreign" films shown on all screens nationwide during the previous six months, and to oblige theaters to run these films so long as a certain number of spectators come to see them. Such legislation may run afoul not only of Chile's Constitution but of its international obligations. Chile recently adopted a bill putting in place a 20% quota in favor of local musicians over radio broadcasts.⁶

⁶See <http://santiagotimes.cl/controversial-music-law-sparks-air-wave-debate/>.