

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2016.¹

Executive Summary: Online piracy and trafficking in circumvention devices in Chile continues unabated, owing to several major gaps in Chile's Copyright Law, including a lack of protections against circumvention devices, insufficient mechanisms for the removal of infringing content online, the lack of deterrent remedies against infringement, and overly broad exceptions to copyright. All of these deficiencies correspond to unmet obligations that Chile assumed under the U.S.-Chile Free Trade Agreement (FTA), which went into force January 1, 2004. In 2010, Chile adopted amendments to its Copyright Law addressing some of its FTA obligations, but left these issues to languish, glaringly unresolved. Ratification of the Trans-Pacific Partnership (TPP) will, like the FTA did in 2004, confer new benefits for the Chilean economy just as it introduces new benchmarks for Chile to meet the modern era's standards of protection and enforcement. One such standard that has been sorely lacking in Chile's laws is the criminalization of illicit camcording in theaters. 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. As Chile works to build its local creative industries² and its international reputation as a reliable trading partner, it can no longer ignore the basic needs of a robust digital economy.

PRIORITY ACTIONS REQUESTED IN 2016

- Satisfy FTA and WIPO Internet Treaties obligations to adopt technological protection measures (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*.

Chile remains active in the sale of circumvention devices such as video game copier devices made available through online auction sites. The site *NeoGames.cl*, which is hosted and operated in Chile, continues to be

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/2016SPEC301HISTORICALCHART.pdf>.

²Chile's Film Commissioner has indicated plans to introduce new incentives for local film production. See Anna Marie de la Fuente, "Cannes: Chile Hosts Diverse Productions, Incentives or No", *Variety* (May 18, 2015), available at <http://variety.com/2015/film/festivals/cannes-chile-hosts-diverse-productions-incentives-or-no-1201499441/>.



a leading purveyor of circumvention devices against which there are no means of enforcement. *NeoGames.cl* bills itself as an “authorized reseller” in Chile for handheld video game consoles and offers bundle packs, which are consoles pre-loaded with games. In 2015, Chile placed 21st in the world in terms of the number of peers participating in the unauthorized file sharing of select video game titles through personal computers on public P2P networks. Notably, Chile ranked tenth in the world in P2P infringement of console-based video games. When it comes to online marketplaces like *Mercado Libre*, Chile is identified as one of the top ten countries offering game copying devices in 2015.

The recording industry continues to be heavily affected by piracy via P2P exchanges, and links posted on blogs and social websites. Today, Chile shows the highest level of Internet piracy across the Latin American region, with about 33% of the total digital market.

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. In the second half of 2015, two full camcords and two audios were traced back to Chilean theaters. These copies were found online and distributed by a number of release groups. More support from local authorities is critical to addressing this problem.

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.³ 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 satellite signals to be captured, it is impossible to enforce the illegality of the devices alone. 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, and has undertaken efforts to raise public awareness about the negative effects of this and other forms of piracy.

COPYRIGHT LAW ISSUES IN CHILE

With the negotiations for a Trans-Pacific Partnership (TPP) with Chile and many other nations complete, Chile’s failure to meet its existing obligations under its FTA with the United States, now twelve years outstanding, have taken on a new level of significance among Chile’s trading partners. The concerns that IIPA has voiced in past years with the deficiencies in Chile’s implementation of its copyright obligations under the FTA are as urgent as ever.⁴ Six years after Chile adopted amendments to its Copyright law to implement a portion of its FTA obligations, significant gaps still remain in the following areas:⁵

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 and in specialty markets.

No notice and takedown mechanism: (See FTA Article 17.11.23.) The “notice-plus-notice” architecture under Chile’s Copyright Law, encouraging ISPs to engage with users regarding instances of infringement, lacks the threat of any real consequences for typical online piracy, and does not provide any consequences for an ISP that

³Data from the Business Bureau (<http://businessbureau.com/bb-consulting/?l=en>).

⁴The U.S.-Chile FTA is available on USTR’s website, at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

⁵These 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>.

fails to act after gaining knowledge of infringement outside of a court order.⁶ The recording industry reports that its work with ISPs to send notices to P2P users who are engaged in the exchange of unauthorized music files continues, but the considerable resources that are devoted to initiating those notices have had no deterrent value whatsoever, and result in no sanctions against recidivists regardless of the number of notices sent. 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 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 Article 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. These include: a reverse engineering exception that is not restricted to achieve interoperability; exceptions that could allow libraries to reproduce entire works in digital form without restriction; and the lack of overarching language consistent with the three-step test set forth in the FTA, 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 to protect rights management information (Article 17.7.6); and various border measures (Articles 17.11.17 through 17.11.21).

IIPA urges the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters and include 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

In early January 2016, Chilean Police took action against one of the world’s largest release groups that had been in operation since 2008. The “VCD” group was responsible for the release of at least 80 identified infringing copies of feature films made by camcording in a theater. They operated FTP servers in Chile, the United States, and Europe, and managed at least ten different distribution websites.

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 National Institute of Industrial Property (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 and involve right 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.

⁶The ISP liability provisions of the 2010 legislation provide a means by which right 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 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 impediments to effective criminal enforcement in Chile. First, the IPR Prosecutor's Office does not dedicate 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 inadequate punishments such as community service and probation for criminal penalties.