

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2017.¹

Executive Summary: For thirteen years, Chile has flouted major obligations it took on in the U.S.-Chile Free Trade Agreement (FTA), and has not achieved the goal of a copyright law and enforcement regime in line with 21st century norms. Not surprisingly, Chile continues to be a locus of online piracy and trafficking in circumvention devices, including free-to-air boxes, which decode encrypted satellite signals of copyrighted programs and broadcasts. Thirteen years after the FTA came into force, several major gaps in Chile's Copyright Law remain unaddressed, including a lack of protections against circumvention devices; obstacles to the removal of infringing content online; inadequate liability standards to give Internet Service Providers (ISPs) incentives to cooperate with right holders in combating online piracy; the lack of deterrent remedies against infringement; and overly broad exceptions to copyright. Even after Chile adopted amendments to its Copyright Law in 2010 to address some of its FTA obligations, it left these issues to languish, glaringly unresolved. Additionally, it lacks any law directed at illicit camcording in theaters, which continues to be a significant problem for the film industries. Even where Chilean law is adequate to bring action against certain copyright crimes, police and court personnel are not adequately equipped to bring cases, and judges continue to impose non-deterrent remedies. As Chile works to build its local creative industries and its international reputation as a reliable trading partner, it can no longer ignore the basic needs of a robust digital economy, including with respect to its obligations under the FTA.

PRIORITY ACTIONS REQUESTED IN 2017

- Adopt technological protection measures (TPMs) legislation and enforce anti-circumvention provisions (both criminal and civil) to satisfy FTA and WIPO Internet Treaties obligations, beginning with revisions to and adoption of the bill regarding sales of free-to-air boxes.
- Further amend the copyright law, including to fully satisfy FTA obligations, to provide meaningful incentives for service provider cooperation with right holders against online infringement (including a notice and takedown system that does not require court orders); deterrent-level civil and criminal sanctions for copyright infringement; the establishment of statutory damages; and an effective civil *ex parte* search remedy.
- 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

Chile has the highest level of Internet use per capita in Latin America;² but it also has a serious Internet piracy problem. Piracy in Chile is characterized by significant levels of stream ripping, 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 foreign based stream ripping sites and illegal streaming services, P2P networks such as BitTorrent, and links to cyberlockers containing infringing content posted on forum sites such as *portalnet.cl* and available on mp3 search sites such as

¹For more details on Chile's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Chile's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See <http://www.internettivestats.com/internet-users-by-country/>, estimating that 77.8% of Chileans were Internet users in July 2016, a higher proportion than any other independent territory in Latin America.



mimp3 and *fullmusicianonline*. The main torrent tracker in Chile is *subtorrents.com*, which receives approximately 2 million visitors per month from Chile. *Todojuegos.cl* is increasingly popular, reaching over 350,000 monthly visits. Chilean users consume significant amounts of pirated content posted on primarily infringing Spanish-language websites, regardless of the location of the hosts and operators of the websites. For example, the 108 top pirate Spanish-language audiovisual content websites received 213 million visits from Chile between December 2015 and June 2016, and an estimated 450 million visits from January-December 2016. 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 made available through online auction sites. 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. The site *NeoGames.cl*, which is hosted and operated in Chile, continues to be a leading purveyor of circumvention devices 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 games. Traffic to *NeoGames.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 2016, 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 *mercadolibre.cl*, Chile is one of the top three countries in South America offering game copying devices in 2016.

The recording industry continues to be heavily affected by Internet piracy, in particular by stream-ripping websites, which circumvent TPMs and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models both of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. Also prevalent are links to pirate files posted on blogs and social websites and the use of cyberlockers to host infringing content. Today, Chile shows the highest level of Internet piracy across the Latin American region, with about 33% of the total digital market. The recording industry, independent of the government, recently conducted an Internet anti-piracy campaign with promising but modest results. In 2016, 130 mobile apps dedicated to music piracy were removed from Google Play mobile and the Apple App Store. 6.1 million pages offering illegal music were delisted from Google, and 5,800 links to local music were removed, based on takedown notices sent by International Federation of the Phonographic Industry (IFPI) Chile to cooperative ISPs. Notably, these were all foreign ISPs, because local ISPs do not remove content as there is no notice and takedown system in Chile. While the recording industry thus has had some success working together with ISPs, the official "notice-plus-notice" system is inadequate to deter bad actors from hosting infringing content, as outlined below.

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 2016, four full camcords and one audio were traced back to Chilean theaters. These copies were found online and distributed by a number of release groups.

The pay-TV 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. Free-to-air decoders contain a card with modified software able to capture encrypted satellite signals for television viewing, including programs and broadcasts protected by copyright. Because the devices are commonly sold separately from the modified software, it is impossible to enforce against sale of the devices alone. As a result, Chilean police have not taken action against the sale of this equipment.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Chile's FTA with the United States entered into force January 1, 2004. Its failure to meet its FTA obligations for the past 13 years takes on a new level of significance, given the demise of the Trans-Pacific Partnership (TPP). The concerns IIPA has voiced in past years regarding the deficiencies in Chile's implementation of its copyright obligations under the FTA are as urgent as ever, and ripe for action in the context of heightened attention to trade agreement enforcement.³

Seven 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:⁴

No protection for TPMs: (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties.) Right 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. In particular, the sale of video game copier devices on online marketplaces is increasingly prevalent, and music right holders are left without support to tackle the problem of stream ripping sites that provide unauthorized access to copyright protected content through circumvention of TPMs. There has been some movement toward amending the Telecommunications Law to address the sale of devices which decode encrypted satellite signals, but no other protection for TPMs exists. Chile should immediately comply with its FTA obligation to provide adequate legal protection for all forms of TPMs.

Significant obstacles to content removal; no notice and takedown mechanism: (See FTA Article 17.11.23.) Chile does not currently have a notice and takedown procedure comparable to the United States or other jurisdictions globally. Under the current law ISPs are only required to remove content if there is a court order.⁵ In addition, the "notice-plus-notice" architecture under Chile's Copyright Law is entirely inadequate. It merely encourages 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 through a notification. The only option for right holders is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users, and wrongly shifts the focus of enforcement away from unlicensed platforms that also play a role in illegal distribution. The recording industry has worked together with ISPs to establish a meaningful notice sending scheme, with thousands of notices sent to P2P users who are engaged in the exchange of unauthorized music files. However, despite the considerable resources devoted to initiating this process, the notices have had no deterrent value whatsoever. More than 12,000 notices were sent, but there were no meaningful legal consequences or sanctions against users or ISPs. Unfortunately, since the adoption of the 2010 amendments attempting to establish 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.

³The U.S.-Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

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.iipawebsite.com/rbc/2013/2013SPEC301CHILE.PDF>.

⁵The Internet Service Provider (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.

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: 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).

Many of these shortcomings also constitute non-compliance with Chile's obligations under the WIPO Internet Treaties, to which it acceded in 2002, as well as (in the case of overbroad exceptions) under the WTO TRIPS Agreement.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Illicit Streaming Devices: In September 2015 a bill was introduced in the Chilean Senate that would criminalize the sale or importation of a device or software that decodes encrypted satellite signals.⁶ This is a welcome step toward combatting the proliferation of these devices, which undermine the legitimate pay-TV market in Chile. However, the proposed bill provides inadequate penalties for sale of such devices or software; by comparison, existing fines for signal theft are five times higher. The fines are stated in "monthly tax units," but range from a minimum fine of 10 monthly tax units (approximately 461,370 Chilean Pesos or US\$714) to a maximum of 1,000 monthly tax units (approximately 46,137,000 Chilean Pesos or US\$71,350). Moreover, individuals who install, configure, or modify devices are subject to a fine of five monthly tax units. The economic benefit obtained in relation to the offense, the economic means of the offender, and the previous behavior of the offender are to be considered in setting the fines. In April 2016, several legislators made proposals for changes to the bill, including raising the minimum fine to 100 monthly tax units. The bill should be revised to provide for deterrent level fines, and then brought into force promptly.

Camcording Legislation: 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, VCD Chile, which had been in operation since 2008. VCD Chile was responsible for the physical and online release of at least 80 identified infringing copies of feature films made by illegal camcording in a theater; operated FTP servers in Chile, the United States, and Europe; and managed at least ten different distribution websites. While the Chilean Police dismantled the organization, Chile's criminal laws provide for such low penalties that the operator of the group is likely to see no jail time whatsoever.

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

⁶The bill is to modify the general telecommunications law. See Boletín No 10294/15. Proyecto de Ley que Modifica la Ley General de Telecomunicaciones para establecer sanciones a la decodificación ilegal de los servicios limitados de televisión, available at <http://www.senado.cl/appsenado/templates/tramitacion/index.php#> (search for 10294/15).

the National Police (*Carabineros*) and Civil Police. Police and Customs officials involve right holders in legal procedures, but the copyright industries report a reduction in *ex officio* actions against physical format pirated products, which may be as a result of the shift towards online piracy. Authorities should redirect enforcement energies and pursue 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.

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 substitute inadequate punishments such as community service and probation for criminal penalties.