

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2021.¹

Executive Summary: The urgency for legal reform in Chile is as strong as ever. Chile's copyright law contains major gaps, including: absence of clear and comprehensive secondary copyright liability standards; a counterproductive court order requirement for online content removal; failure to protect against circumvention of technological protection measures; lack of deterrent remedies; and broad exceptions to copyright. These issues remain unresolved or were made worse by Chile's 2010 copyright law amendment (Ley No. 20.435). We urge Chile to revamp its legal framework to enable effective copyright enforcement online and, in turn, to foster the development of a healthy digital marketplace.

In the aftermath of widespread social and political turmoil in late 2019, the Chilean government held a referendum on October 25, 2020 where the vast majority of voters favored the rewriting of the country's constitution. IIPA urges the Chilean government 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 impact that any constitutional changes may have on Chile's IPR landscape.

IIPA members are also concerned about legislation imposing national content quota requirements that, if implemented, would discriminate against non-Chilean audiovisual works and would contravene Chile's bilateral Free Trade Agreement (FTA) commitments.

PRIORITY ACTIONS REQUESTED IN 2021

- Amend the copyright law (Ley No. 17.336) and repeal Ley No. 20.435 of 2010 to: (i) distinguish clearly between neutral and passive intermediary service providers, and active services that cannot benefit from limitations on liability; (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, the establishment of 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 technological protection measures (TPMs) legislation with civil and criminal penalties for acts of circumvention and the trafficking in devices or services.
- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property 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.
- Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.

¹For 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://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Ensure that any amendments to the Telecommunications Law (Law #18.168) do not interfere with the enforcement of intellectual property rights online, including through voluntary initiatives agreed between rights holders and ISPs.

THE COPYRIGHT MARKETPLACE IN CHILE

Piracy in Chile involves various modes of infringement such as Piracy Devices (PDs), stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention software, devices and modification services for use with illegal video game files, illegal mobile downloads, and, increasingly, Internet protocol television (IPTV) services. Due to the pandemic, online piracy increased in Chile in 2020.

Chile remains active in the sale of circumvention devices such as video game copier devices and modified or unlocked consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. Businesses sometimes offer console modifying services for sale through their *Mercado Libre* listings and modified consoles include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. An increasingly popular online marketplace, *www.linio.cl*, has been unresponsive to requests from the video game industry to take down counterfeit products. 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. Known hackers have identified their “official reseller” in Chile for the sale of Nintendo SX Pro/SX OS as *chile-server.cl*, which, in turn refers to hacking groups as “our partners.” In 2020, Chile placed 20th (worsening since last year when it ranked 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. Chile ranked 10th in the world in P2P infringement of console-based video games (an improvement since last year when it ranked 9th).

The most prominent forms of music piracy in Chile are stream-ripping and use of cyberlockers. The most popular stream-ripping sites in Chile are *y2mate.com* and *flvto.biz*, with each site receiving over 6.7 million and over 3.1 million visits, respectively, during the third quarter of 2020. The most popular cyberlocker in Chile is *1fichier.com*, which received over 2.1 million visits from Chile during the third quarter of 2020. *Zippyshare.com*, another popular cyberlocker, received over 1.4 million visits during this same period. BitTorrent indexing sites are also popular in Chile, most notably *thepiratebay.org*, with over one million visits in the same quarter. An unauthorized streaming site, *elgenero.com*, received over 13 million visits from Chile in the last 12 months and is currently the second most visited pirate site in Chile.

The motion picture industry continues to see an upward trend in audiovisual consumption through streaming, but unfortunately, much of it is on unauthorized platforms, PDs, and piracy mobile apps. PDs, in particular, are extremely problematic because the sale of the devices can be legal if used with legitimate services and programming, but the simple download of software or piracy apps on the device opens the door to infringing material. PDs are freely offered in markets in Santiago without proper response from law enforcement. Similar to PDs, law enforcement against free-to-air boxes is lacking because of the dual legal and illegal uses of the device. The pay-TV industry in Chile also continues to experience problems with signal and content theft.

COPYRIGHT ENFORCEMENT IN CHILE

IIPA members report that there were no changes to Chile’s copyright enforcement in 2020. Part of the enforcement challenge is that Chile lacks a dedicated, centralized authority responsible for copyright matters, including copyright enforcement. Rather, entities from different ministries oversee copyright matters with little coordination, including the *Departamento de Derechos Intelectuales del Ministerio de las Culturas, las Artes y el Patrimonio*; the *DIRECON – Dirección de Economía, Departamento de la Propiedad Industrial*, Ministry of Foreign

Affairs; and, the general IPR prosecutor. The implementation of a unified department would advance the fight against copyright infringement.

Additionally, specialized Internet/online crime police units from *Carabineros* and *Policía de Investigaciones* are not focused on pursuing IP crimes or any disruptive strategy for broader IPR enforcement actions despite a good level of technical investigative skills. The video game industry reports that Chilean Customs conducted several border seizures in 2020. As many of these seizures involved repeat importers, IIPA urges Chile to implement policies and measures that deter repeat importers of infringing products.

LEGAL REFORM IN CHILE

Chile made bilateral commitments to the U.S. to significantly improve its levels of copyright protection and enforcement.² Yet, Chile's copyright law regime remains inadequate and lags far behind 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.

Broad ISP safe harbor: Article 85Ñ 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 only be established by a court order (issued as per procedure under Art.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.

Content Removal: Where ISPs are eligible for the above safe harbor privileges, Article 85Q Ley No. 20.435 requires ISPs to remove or disable access to copyright infringing content only following a court order that rights holders obtain after a lengthy and complicated court process that can take over a year. This legal requirement can be an excuse for ISPs unwilling to take down content and can even be a legal obstacle for ISPs who would otherwise react to rights holders' takedown requests expeditiously. There is no incentive for ISPs to act expeditiously to remove infringing material, and there are no sanctions for non-compliance with takedown notices. Instead, the law provides 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. The law does not provide any fines or other sanctions for an ISP that fails to act after gaining knowledge of infringement through a notification from a rights holder. Instead, Chile has an ineffective notice-and-notice system (Article 85U) where rights holders do not know if an infringer has actually been notified to take down material and there are no provisions to deter repeat infringers. The cost and ineffectiveness of Chile's “notice-and-notice” system has prompted the music industry to discontinue using it altogether. Rights holders' only other option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. We urge 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 also clarify that liability privileges are available only to ISPs that are passive and neutral, meaning they do not play any active role in relation to the content on or passing through their services. Finally, so as to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of infringing content that has been identified by the rights holder.

Website Blocking: Chile lacks a legal mechanism for website blocking. Article 85R provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not involve other non-infringing content. This limitation renders the provision worthless as the posting of a single non-infringing work

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

can be relied on to oppose 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 ordered ISPs to block access to websites while considering the totality of the circumstances. The music, sports and TV industries have pursued successful test cases in Argentina, Peru, Mexico, Uruguay, Brazil and Ecuador.

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 prevalent. 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. Chile should amend its law to provide adequate legal protection for all forms of TPMs.

Exceptions to Protection: The law contains certain exceptions that appear to be incompatible with international norms (as well as 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. We urge Chile to incorporate secondary liability principles in its copyright law to incentivize platforms to cooperate in the fight against piracy, among other goals.

Concerning Proposals for a Reform of the Criminal Code: In early 2019, the Minister of Justice announced a proposal for comprehensive amendment to the Penal Code, aiming to unify and consolidate all criminal provisions scattered in special laws, such as the Intellectual Property Law. The proposal would downgrade copyright infringement to a misdemeanor, dramatically reduce all penalties for copyright infringement and eliminate specific sanctions for the unauthorized reproduction of phonograms while reducing sanctions for other illegal uses. Such changes would be incompatible with the FTA and the requirements of the TRIPS Agreement. Due to the significant amount 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 waiting to be submitted to Congress.

Camcording: IIPA continues to urge the Chilean government to enact specific 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.

Constitutional Reform: Chile held a public consultation on October 25, 2020 on whether to redraft the country's constitution. With a favorable vote of about 80%, the country decided that a new constitution should be prepared and voted on in 2021. IIPA urges Chile 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 Chile's constitutional reform and its implications for copyright protection and enforcement.

CASE LAW DEVELOPMENTS IN CHILE

In September 2020, the Supreme Court affirmed the 2019 decision of the Competition Court (*Tribunal de Defensa de la Libre Competencia*) which ruled against the Chilean Broadcasters Association (ANATEL) request for an order to the Executive to repeal and substitute the collective management organizations' (CMOs) tariffs setting procedure, established in the Intellectual Property Law. According to ANATEL, the procedure was plagued by technical errors that made the implementation of tariffs by all CMOs unfair and unconstitutional. During the procedure, the CMOs and rights holders organizations demonstrated that none of ANATEL's members are actually paying full tariffs and, instead, enjoy discount programs freely negotiated with CMOs and therefore, there was no requirement for users and CMOs to follow the legal tariffs setting procedure. The Court ruled to dismiss ANATEL's lawsuit.

MARKET ACCESS IN CHILE

Screen Quota Bill: In January 2020, the Chamber of Deputies passed a bill adding a chapter on screen quotas to the Audiovisual Promotion Law. The initiative awaits further debate and 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. U.S. motion picture exporters remain concerned that the screen quota, if enacted and implemented, would discriminate against non-Chilean works and would contravene Chile's bilateral FTA commitments.