

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Priority Watch List in 2022.<sup>1</sup>

**Executive Summary:** The digital market for creative content in Chile is teeming with illegal materials, a problem exacerbated by a weak legal framework and inadequate dedication or coordination of government resources for online enforcement.

Chile's copyright law, which more than ten years ago established what at the time was an experimental notice-and-notice online piracy response system, has utterly failed to deter infringement online. The law was adopted six years after the 2004 entry into force of the U.S.-Chile Free Trade Agreement (FTA), and yet it left important FTA obligations unmet, such as protections against circumvention of technological protection measures (TPMs) and deterrent remedies against infringement. Other major gaps in Chile's legal framework include: the absence of clear and comprehensive secondary copyright liability standards to encourage voluntary cooperation from intermediaries; a counterproductive court order requirement for online content removal; and broad exceptions to copyright. The country lacks many of the standard copyright enforcement measures and procedures available in other similar markets. We urge Chile to improve and update significantly its legal framework for Internet service provider (ISP) liability and online copyright enforcement to foster the development of a healthy digital marketplace.

Recently, a number of legal developments in Chile threaten to hinder, rather than advance, enforcement efforts. The pending amendment to Article 24-H of the Telecommunications law would create an unlimited net-neutrality principle, with no distinction between legal and illegal content, and would prevent ISPs and copyright holders in Chile from addressing mass online infringement. The Digital Platforms Bill is another misguided proposal that could make online enforcement more difficult. Proposed Criminal Code reform would downgrade copyright infringement to a misdemeanor, among other problematic changes. 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 FTA commitments. The Chilean government should abandon these proposals in favor of reforms that would promote a vibrant, legal environment for creative content.

In the aftermath of widespread social and political turmoil in late 2019, the Chilean government held a referendum on October 25, 2020 in which the vast majority of voters favored rewriting the country's constitution. IIPA urges USTR to monitor the impact that any constitutional changes may have on Chile's intellectual property rights (IPRs) landscape and, in particular, to closely monitor how any reform will permit Chile to adequately implement its existing international, multilateral and bilateral commitments to strong copyright protection, enforcement, and equitable market access.

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<sup>1</sup>For 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>.



## **PRIORITY ACTIONS REQUESTED IN 2022**

- 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 TPMs legislation with civil and criminal penalties for acts of circumvention and the trafficking in devices or services.
- Create a centralized copyright authority, responsible for all copyright-related matters such as registration and enforcement, in order to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.
- 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.
- Ensure that proposed amendments to the Telecommunications Law (Law #18.168) and the Digital Platforms Bill (Law #14.561-19) do not interfere with the enforcement of IPRs online, including through voluntary initiatives agreed between rights holders and ISPs.

## **THE COPYRIGHT MARKETPLACE IN CHILE**

The overall level of piracy in Chile remains high in 2021, after worsening in 2020 in the early months of the COVID-19 pandemic. Digital piracy takes a variety of forms, such as: Piracy Devices (PDs) including, for example, infringing streaming devices (ISDs); piracy apps; 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; signal theft; and, increasingly, Internet protocol television (IPTV) services.

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, where modified console offerings include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. *Mercado Libre* continued to have a steady audience in 2021 with 8.7 million unique monthly users in Chile, ranking as the 10th most popular site in the country by Alexa. Data indicates that around 15.7% of all game titles offered at *Mercado Libre Chile* are illegal and are predominantly unauthorized digital goods (UDGs), primarily digital unauthorized account resales.<sup>2</sup> An increasingly popular online marketplace, *www.linio.cl* (owned by the popular

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<sup>2</sup>Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

commercial entity, *Falabella*), has been relatively unresponsive to requests from the video game industry to take down counterfeit products despite having a rudimentary online notification system. 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 2021, Chile placed 22<sup>nd</sup> (an improvement from 20<sup>th</sup> last year) 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 11<sup>th</sup> in the world in P2P infringement of console-based video games (also an improvement since last year when it ranked 10<sup>th</sup>).

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*, *savefrom.net*, and *mp3-youtube.download*. These sites received 6.5 million, 1.8 million, and 1.6 million visits from Chile respectively in the third quarter of 2021, according to SimilarWeb data. The most popular cyberlocker in Chile is *Mega.nz*, which received 8.6 million visits from Chile during the third quarter of 2021. *1fichier.com* and *Zippyshare.com*, other popular cyberlockers, received over 2.4 million and 1.1 million visits respectively 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.

In 2021, the motion picture industry continued 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 devices opens the door to infringing material. PDs are freely offered in markets in Santiago without proper response from law enforcement. Similarly, 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 a widespread lack of enforcement efforts to tackle content piracy by the Government of Chile. Chile remains the only country in Latin America without a dedicated, centralized authority responsible for copyright protection and enforcement. Currently, copyright matters are handled by four different entities: (1) *Departamento de Derechos Intellectuales en la Dirección de Bibliotecas, Archivos y Museos*, Ministry of Education; (2) Minister of Education; (3) *DIRECON – Dirección de Economía, Departamento de la PI*, Ministry of Foreign Affairs; and (4) the IPR prosecutor. The implementation of a unified department would advance the fight against copyright infringement and help deliver the kinds of significant results that have been made possible in other countries that have set up such organizations. The Chilean government should create a copyright national authority, in charge of all copyright matters and duties, in order to better coordinate all policies for the promotion, protection, and enforcement of rights. This central copyright office would also assume all currently dispersed duties such as registration. The fact that no central and dedicated authority exists in the copyright sector speaks volumes about the lack of political will on the Chilean government to prioritize copyright in the national agenda.

Additionally, specialized Internet/online crime police units from *Carabineros* and *Policía de Investigaciones* are not focused on pursuing intellectual property (IP) crimes or any disruptive strategy for broader IPR enforcement actions, despite a good level of technical investigative skills.

The video game industry reported in 2020 that Chilean Customs conducted several border seizures. 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

A number of recent proposals of law in Chile threaten copyright protection and enforcement efforts. These arise on a backdrop of an imperfect copyright regime. In the U.S.-Chile Free Trade Agreement (FTA), Chile made bilateral commitments to the U.S. to significantly improve its levels of copyright protection and enforcement.<sup>3</sup> Yet, Chile's copyright law regime remains inadequate and lags far behind both 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.

### Chile's FTA Obligations

**Broad ISP safe harbor:** Article 85N of Chile's copyright law 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 Article 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. Article 85O, which sets out the conditions for liability limitation, also poses problems due to its conflicting criteria. The provision at first appears to narrow down the safe harbor by setting out an additional eligibility criterion that "service providers" must meet to avoid liability for IP infringements, namely: "that the service has not generated, nor selected the material or the recipient" (Article 85O (c)). However, the last sentence of Article 85O then sets out that providers of "search, linking or reference services" are exempt from these additional conditions. This carve-out from the safe harbor eligibility criteria also creates a scope of abuse of the copyright liability limitations.

**Content Removal:** Where ISPs are eligible for the above safe harbor privileges, Article 85Q of the copyright law 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 fines or 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. Currently, the only method of tackling infringing content online is to follow the burdensome and ineffective notice-and-notice system (Article 85U), which requires ISPs to pass on takedown requests to uploaders. However, rights holders have no way to know whether an infringer has actually been notified to take down material, and there are no provisions to deter repeat infringers or to ensure that the notified content stays down. The cost and ineffectiveness of Chile's "notice- and-notice" system has prompted the music industry to discontinue using it altogether. The only remaining option available to rights holders is to initiate a civil case directly against the user, a practical impossibility 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 passive and neutral intermediaries that do not contribute to infringing activities. Finally, so as to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including removing infringing content on sites that have been identified by the rights holder.

**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,

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

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.

**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. Following the establishment of a "Constitutional Convention" on July 4, 2021, sessions focused on passing internal rules and preparatory work, as opposed to substantive work. However, IFPI Chile and other civil society organizations contacted Convention members to make sure all future work of the Convention preserves, at least, current levels of protection for IP rights in the Political Constitution. There is a concern that future work for a new Constitution may aim to further reduce protections for IPRs. Rights holders seek to achieve the right balance among all fundamental rights. IIPA urges the Convention 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 constitutional reform and its implications for copyright protection and enforcement, particularly in view of Chile's FTA obligations.

**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. At present, the draft is still under consideration at the Ministry of Justice with no specific timeframe for submission to Congress. Like many other projects and initiatives in Chile, the future of the proposal awaits the final outcome of the ongoing Constitutional process. 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.

**Digital Platforms Bill (Law #14.561-19).** Chile's Senate is considering a bill to regulate digital platforms. The initiative aims to address harmful activity mainly on social media networks, but with broad references to "digital services platforms" and "providers for digital platforms," the bill could have a spillover effect for all Internet applications operating in the region, including curated video on demand services. Moreover, as currently drafted, the bill contains language that could negatively impact the way IP rights are currently enforced online in Chile, as Internet applications might delay or be prevented from applying their own policies and procedures in response to notices from rights holders.

**Amendments to Telecommunications Law (Law #18.168).** In May 2020, amendments to the Telecommunications Law were passed at the Specialized Commission of Transports and Communications in the Senate. After consideration, the Bill was returned to the aforementioned Commission in July 2021 for further study and consideration. The core of this reform is the proposed modification of Article 24-H (sections “a” and “b”). Under the modification, ISPs are prohibited from implementing any policy measure for the purpose of prioritizing traffic, or any measure that would have the effect of causing delay to Internet access. The Bill also removes from Article 24-H the all-important “legal” requirement that would distinguish between access to ‘legal’ content, websites, and apps on the Internet, and ‘illegal’ content, websites, and apps on the Internet. It would also have the effect of hindering the use of tools or devices on the Internet to inhibit access to such materials online. In sum, the Bill imposes an unlimited and unrestricted net neutrality principle in Chilean legislation with no limitation or distinction regarding the legality of the content, device, or website accessed by the Internet users. This proposed “unlimited” net neutrality proposal is in stark contrast with the law in both the US and the EU, where net neutrality principles apply only to legal Internet traffic and content. The Bill also proposes to further enshrine the position that access to illegal content can be blocked “only by judicial order.”

The implications of this proposal are especially relevant to the consolidation of a digital music market in Chile. An unlimited net neutrality principle would make it even more cumbersome for right holders in Chile to enforce their IPRs online. The idea of resorting to the judiciary for all and every infringement of copyrights or neighboring rights is a *de facto* diminution of the level of protection in Chile because most of the infringement cases committed online can be addressed by coordinated and voluntary action between right holders and ISPs. The reform could imply that Internet users in Chile have a *de facto* right to freely access pirated music content, and that ISPs and rights holders cannot do anything to prevent or deal with such infringements. Due to the lack of priority of this Bill, it is difficult to predict any time frame for a vote on the floor.

**Website Blocking.** The music, sports, and TV industries have pursued successful test cases regarding infringing websites in Argentina, Peru, Mexico, Uruguay, Brazil, and Ecuador, but these industries report that 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 block access to other non-infringing content. This limitation hampers enforcement under the provision, as the posting of a single non-infringing work 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 further report that the Article 85R procedure, in conjunction with the last line of Article 85L, is also seen by some ISPs as *preventing* them from cooperating with IP right holders on a voluntary basis.

**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.

## **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. In July 2021, the proposal was approved by the Senate’s Education Commission (*Comisión de Educación*). U.S. motion picture exporters remain concerned that the screen quota, if signed into law by the president and implemented, would discriminate against non-Chilean works and would contravene Chile’s bilateral FTA commitments.