

August, 2010

## NEW LIABILITY REGIME FOR ISPs

The IP Law Modification incorporates a whole new chapter III to Title IV of the IP Law, following very closely the IP chapter of the Free Trade Agreement signed between USA and Chile. For the first time the law provides for certain limitations to ISP's liability in case of IP violations committed through their networks and systems. Application of these new rules shall be without prejudice of the application of the general rules on civil liability.

IP Law Modification sets a new rule, upon which the ISPs shall be exempt from having to compensate IP rights owners in case of damages suffered by these owners due to actions committed through the ISP's networks, provided the ISPs fulfill certain conditions. These conditions may vary depending on the service provided.

### *In order to fall into this safe harbor framework, ISPs must:*

- a) Have established public and general terms upon which they may exercise their right to terminate their agreements with content providers that are judicially qualified as repeated offenders against the IP rights protected by law;
- b) Not interfere with the technological measures of protection and rights management of protected works that are widely acknowledged and legally used, and
- c) Not have generated nor have selected the content or its addressees. Additionally, said ISPs must adhere to other conditions, specific for each service they provide. For said purpose, the law distinguishes between:

### *Adicionalmente, dichos proveedores de servicios deben observar otras condiciones concretas para cada servicio específico que prestan, para lo cual la regulación distingue entre:*

- a) Data transmission, routing or connection supply service providers;
- b) Temporary automatic data storage; and
- c) Service providers that, upon user request, store data in their networks or systems, either by themselves or third parties, or provide services that include search, linkage or reference to Web sites by means of search engines, including hyperlinks and directories.



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In order to properly observe the constitutional rights of privacy and safety of communications, a prohibition of surveillance or oversee data is also imposed. Service providers are not required to perform active searches of illicit activities nor supervise the content of data transferred, stored or referenced.

A special, brief and summary proceeding is also set forth in order to safeguard IP rights against violations committed through networks or digital systems. These proceedings include measures destined to withdraw, disqualify or block infringing content in the ISP's network or systems. In this matter, Chilean law opted for the judicial notification system, a process in which the order to withdraw contents from the web is preceded by a judicial analysis of the existence of any infringement. This system is different from the American notification system, upon which the affected party may notify the ISP of the existence of the violating content.

The law also provides for the right of IP owners to judicially request the delivery of necessary information to identify the provider of infringing content.

## 1 *Piracy Countermeasures*

The current regime of civil and criminal offenses of IP rights is considered inadequate by many. The increase of piracy in Chile, which keeps it in the priority watch list in the "2010 Special 301 Report" <sup>1</sup> prepared by the US Trade Representative Office, brought about the need to modernize the tools that would allow a better protection for the IP owners, establishing effective measures against violations commonly referred to as piracy by means of civil and criminal actions.

Specifically, there is the intention of fighting piracy and unauthorized uses by means of more and better legal actions for use in the investigation and harsher punishment for the offenses. This should be a very relevant issue for the international public opinion, since piracy in Chile doubles that of the OCDE country members, according to the Business Software Alliance. <sup>2</sup>

The IP Law Modification sets out a new chapter of civil and criminal sanctions to the infringement of IP rights and derivative works, as well as new mechanisms and procedural tools to be used in case of uses outside the legal framework.

This chapter stands out because of the reunion of several different criminal offenses, which used to be dispersed throughout the regulation. New offenses are incorporated as well, with penalties graduated according to the damage inflicted, therefore introducing objective factors that allow a more fair sanction. The supplementary sanction for not categorized violations is kept, which corresponds to a fine of 5 to 50 UTM.

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<sup>1</sup> This report states that Chilean's IP performance is way below the expectations of a free trade agreement partner.

<sup>2</sup> Diario Financiero, Wednesday February 3rd, 2010, printed Edition.

*The IP Law Modification describes as offenses:*

- Any unauthorized use of IP protected works and interpretations, productions and broadcastings of derivative works.
- Forgery of literary, scientific or artistic works protected by law; of execution charts; of the number of effectively sold copies; of standing to authorize the use of IP rights or licenses regarding performances or interpretations of private domain sound recordings.
- Plagiarism of IP protected works, whenever the author's name is changed or deleted or the title of the work or its text is maliciously altered.
- Omission to make execution charts by those obliged to pay retribution based on the use of IP rights or derivative works, whenever those charts are necessary for the collective management of IP rights; and the forgery or adulteration of said execution charts and certain data in the state of account.

Piracy is a central element in this modification, seeking to substantially improve the legal framework applicable to individuals and criminal organizations dedicated to the illegal manufacture, distribution and marketing of products or creations. Therefore, a specific criminal regulation is established in case of piracy, increasing up to two degrees the maximum penalty applicable. The law distinguishes the marketing of illicit copies or protected works from those who, with intent to make a profit, manufacture, import, have or acquire for commercial distribution or rental purposes said illicit copies. Repeated offenders are strongly penalized.

Procedural means and mechanisms in the law are perfected. The IP owner's right to exercise actions destined to cease the illicit activity, indemnify economic and moral losses and publish the subsequent judgment is recognized. As per request of said owner, the offending goods shall be destroyed or set aside from commerce and illicit copies can only be destined to charitable work with the express authorization of the IP owner.

New preventive measures destined to cease the illicit activity are granted. These may be ordered in any stage of the trial and have to be requested by the party. Under certain conditions, these measures may be requested on a pre-judicial basis.

In order to calculate the compensation, the affected party may choose between the remuneration the offender should have paid to the IP owner in order to acquire a proper license or the profits lost due to the infringement. The legitimate sale value of the infringed goods shall be taken into account in order to determine the pecuniary damage. In regards of the determination of moral damage, the judge shall consider the circumstances of the infringement, the seriousness of the damage and the objective degree of illicit spreading of the work.

## 2 *New Exceptions to IP rights*

The introduction of this chapter was motivated by the interest to balance the IP owner's rights with the rights of the community as a whole to legally access the protected creations. Therefore, a series of limitations and exceptions within the legal framework were included, which grant access to cultural goods and the legitimate exercise of fundamental rights by the community, just as it is recognized in most countries.

These exceptions shall be applicable to IP rights and to derivative works when appropriate.

The right to quote is extended and more thoroughly detailed, being the purpose of the use of the fragment the main criterion. Right to quote may be used for criticizing, illustrating, teaching or investigative purposes.

Neither authorization nor payment shall be required, as long as the source, work's title and author's name are mentioned.

A new exception is set forth regarding the visually and hearing handicapped, as well as other kind of disabilities. Within this exception, the reproduction, adaptation, distribution and public communication of protected works is permitted, as long as there is no commercial interest and is always performed within the scope of people suffering their respective disability.

Some anachronistic expressions are replaced, bringing about technological neutrality, like exceptions for libraries and archives, exceptions for educational purposes, exceptions applicable to satire and comedy, along with exceptions for computer software. Among the latter, two new exceptions are added in compliance with the US free trade agreement. Said exceptions protect reverse engineering activities executed upon legally acquired software, with the sole purpose of achieving operative compatibility between software or for investigative and research purposes. On the other hand, activities executed with the sole purpose of testing, investigating or correcting the operation or security of the computer in which the software is installed, are also protected.

A temporary copy exception is also added. This exception is subject to compliance with certain and specific conditions regarding its use, always within the framework of technological proceedings application.

Finally, the removal of article 45 bis must be emphasized, which established the so called "three step rule", which is included in the Bern Convention and the TRIPS agreement of the World Trade Organization. This rule had been drafted as an imposition of additional conditions for the compliance of the old exceptions. Such removal was made with the intention to provide a more objective nature to the exceptions regime, thus avoiding the uncertainty caused by the need to provide additional explanations of such conditions.