

MARCH 2008 Chile: New Law sparks debate over ISPs' liability

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A bill under Congressional consideration originates in the commitments undertaken by Chile pursuant to the Free Trade Agreement with the United States and intends to increase the penalties for IP crimes, including in new areas such as internet piracy and the associated liability of ISPs.

The first source of contention came from the need to regulate these liabilities in a Copyright Law because Chile does not have a specific norm for internet crimes and they obviously exceed the copyright field (fraud, child pornography, trade mark falsifications, etc). Until today, the basis for ISP liability has been provided by court decisions: a Supreme Court decision of 1999 found access providers liable following the safe haven doctrine that, in general terms, makes ISPs liable for the infractions incurred by their clients when, upon learning about an unlawful activity, ISPs do not remove the data or make its access impossible. This decision was delivered outside the IP field, in the context of the remedy sought by the parents of a minor whose image was shown on the internet by her former boyfriend, offering sexual services.

For the same reason, Congressional discussions have also addressed the mechanisms to serve process and to remove unlawful contents (notice and takedown), so that ISPs themselves implement internal regulations leading to service termination – as is already the case on many websites and virtual communities worldwide – without requiring a court decision, as demanded by some ISPs.

However, from the right owner's viewpoint, taking these mechanisms to court would render illusory any removal of illegal material, in a medium where just a few hours of pirated software, movies or music downloads can generate significant losses. Should this approach be followed, the new Copyright Law would, paradoxically, worsen the standing of authors in respect of internet piracy.

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