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The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law

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Introduction

It should not be news to anyone that the state of the current intellectual property[1] normative framework is in crisis. There are more and more opponents to models that are too focused exclusively on strengthening the protection of intellectual property rights and they are becoming increasingly more vocal at the global and local level.

On several occasions, the general public has manifested its opposition to attempts aimed at further strengthening standards of intellectual property protection, in particular through an extensive use of popular Internet social networks. Recent cases such as the debate in Spain over the "Sinde Law[2]", the signing of the Anti-Counterfeiting Trade Agreement (ACTA) in Mexico,[3] and the legislative proposal of a private copying levy[4] benefiting copyright holders in Argentina exemplify this trend.

For this reason, attempting to modify national and multilateral copyright rules without considering the interests of users and consumers does not seem to be a viable option and Chile is no exception.

This policy brief aims to analyze the recent changes to Chile's copyright law, in particular with regard to their main features, legislative antecedents and legal basis. It also provides an overview of the principal milestones and the concrete results of the legislative debate, now that slightly more than one year has elapsed since the enactment of the new legislation.[5]

1 Here I mention the concept in its generic sense but this paper will deal exclusively with copyright and related rights.

2 The Sinde Law aims to establish an administrative procedure for the removal or blocking of allegedly infringing Internet content, subject to eventual judicial control in the event of controversy over the decisions of the Commission on Intellectual Property, which operates under the protection of the Ministry of Culture of Spain.

3 During ACTA negotiations, there was an intense popular campaign in Mexico to make the contents of the agreement transparent and to clarify the effects that it would have on national legislation and on the rights of users and consumers. After intense debates in the Senate, the Senate resolved to exhort the government of Mexico not to sign the agreement, anticipating its subsequent failure.

4 By parliamentary initiative in the first semester of 2011, a bill was debated in the Senate of Argentina which would have allowed for the establishment of a private copying levy on digital devices used for the storage, reproduction, and distribution of files. This generated a strong rejection on the part of organized citizenry, which led to the subsequent indefinite suspension of the legislative debate.

5 Some of the ideas in this paper have already been presented in the article "Reformas a la ley chilena de propiedad intelectual: el desafío de una regulación equilibrada", co-written with Marcela Paiva Véliz and published in Puentes. Vol. 11. N° 2, July 2010, but in this instance only represent the views of the author.

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To this end, the policy brief will first examine the scope of the main provisions incorporated into the law. In doing so, it will place a special emphasis on the provisions intended to achieve a balance between the various interests in national copyright regulation, in particular by promoting not only the rights of creators and industries but also those of the users and consumers of protected works. Then we will examine in detail the debate regarding the introduction of a *fair use* statute into the Chilean legislation and discuss the reasons behind the limited results achieved in this respect.

We will also consider the political variables that influenced the legislative debate and the difficulties that had to be overcome in order to conclude this process successfully. Special attention will be paid to the problems resulting from the diversity of positions on the matter and to the role played by civil society organizations during the debate.

The History of Chile's Copyright Reform

Since it was enacted in 1970, Chile's Copyright Law (hereafter "the Law")[6] and each of its subsequent amendments has been characterized by almost exclusively catering to the interests of copyright owners. In effect, the Law and its amendments established new rights for copyright holders but almost completely overlooked the interests of users and consumers of protected works.

The legislative reform of 2003 was no exception. In that year, two important pieces of reform were enacted to amend the national legislation in order to meet the requirements of various international obligations. The first incorporated the binding provisions agreed upon in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[7] and the second incorporated the provisions of the Free Trade Agreement between Chile and the United States (U.S.-Chile FTA) with immediate effect,[8] excluding those obligations which were to be implemented within five years.

Following the same trend, in 2004 the Chilean government presented the National Congress with a draft bill[9] which had as its only objective the establishment of new sanctions and procedures for the criminal prosecution of non-authorized uses of protected works; however, the draft bill did not determine when a particular use was for commercial or non-commercial purposes or whether it constituted a legitimate social practice.[10] For this reason, the bill did not advance in the legislative process and actually generated strong criticism not only from organizations representing rights holders but also from NGOs and institutions of higher education representing users and consumers. The draft bill was subsequently withdrawn.

In April 2007, as a result of the aforementioned experience, another draft bill was introduced in the National Congress.[11] The objective of this draft bill was to modernize the then-current regulations, incorporate various international obligations and correct a long-standing deficiency: the lack of a legislative regime that adequately balanced the legitimate interests of authors, rights holders and the general public.

The bill was principally drafted by technical teams from the Ministry of Culture[12] and the Directorate for International Economic Relations from the Ministry of Foreign Affairs (Direcon) with important contributions from the Ministries of Interior, Justice, Education, Economy, Transportation and Telecommunications. Only existing human resources and technical expertise within the Chilean government were used in the drafting of the bill, and no technical assistance was solicited from international organizations and experts.

6 Inappropriately called the Law on Intellectual Property. Law no.17336 on Intellectual Property, published in the *Diario Oficial* on October 10, 1970, reformed by law no. 20435 published in the *Diario Oficial* on May 4, 2010. Available at http://s.bcn.cl/mn9 [Date of access: September 27, 2011]

7 Law No. 19912. *Diario Oficial* November 4, 2003. Available at http://s.bcn.cl/1n7u [Date of access: September 27, 2011]

8 Law No.19914. *Diario Oficial* November 19, 2003. Available at http://s.bcn.cl/1n7t. Among other changes, the term of protection was extended from 50 to 70 years as of the death of the author, a new exclusive right of making available was incorporated in order to cover verified uses through the Internet, and information regarding rights management was regulated, just to mention a few of the most important changes. [Date of access: September 27, 2011]

9 Bulletin No. 3461-03. Available at http://sil.senado.cl/cgi-bin/sil_proyectos.pl?3461-03 [Date of access: September 27, 2011]

10 A revealing example is the situation that existed in libraries for persons with visual disabilities, since the draft defined them as criminal organizations as a result of the high volume of works that had been adapted without authorization from the right holder.

11 Bulletin No. 5012-03. Available at http://sil.senado.cl/cgi-bin/sil_proyectos.pl?5012-03 [Date of access: September 27, 2011]

12 The National Council of Culture and the Arts, whose maximum authority is the Ministry of Culture.

It is important to note that, in contrast to previous legislative reforms in Chile, this process did not include technical or political consultations with interested stakeholders on the premise that the National Congress was the most appropriate forum for debating the content and scope of the bill.

Thus, for the first time in the country's history, along with establishing more powerful tools for the fight against piracy and the enforcement of copyright (both of which were objectives of the U.S.-Chile FTA), Chile also incorporated into its copyright legislation an appropriate list of exceptions and limitations in an attempt to establish the much needed balance that had been lacking in existing copyright legislation.

Contents of the Legislative Reform

Just as it was indicated in the presidential address that introduced the draft bill, the legislative reform was designed with three main objectives: i) to establish effective measures to guarantee an adequate level of enforcement of copyrights and related rights; ii) to limit the liability of Internet service providers for infractions committed by users of their Internet services; and iii) to establish an adequate framework of exceptions and limitations to these rights.

Let us briefly analyze each one of these objectives:

Enforcement of Rights

In order to achieve the first objective, observations[13] previously made by organizations representing copyright holders were used to design a series of measures aimed at making the judicial system for the protection of rights more efficient.

To this end, civil and criminal sanctions for infringement were significantly strengthened, with special emphasis on those that have a high economic impact on rights holders. Penalties, primarily economic in nature, were established for minor infringements or for those valued at less than approximately US$250, except in cases of plagiarism and identity theft, for which the economic factor is not considered.

Furthermore, a series of measures was put forth aimed at simplifying the judicial and investigative proceedings for this type of crimes. A system for pre-established damages to the benefit of rights holders was also introduced, fulfilling a long-standing demand of rights holders and at the same time implementing the provisions of the U.S.-Chile FTA.

Limitation of Internet Service Provider Liability

In order to achieve the second objective, taken directly from the U.S.-Chile FTA[14] and indirectly from the *U.S. Digital Millennium Copyright Act*[15], a regime for limitations on liability for Internet service providers was incorporated into the Law.

A simplified judicial proceeding for the removal and blocking of allegedly infringing Internet content was established. The proceedings authorize an expeditious court order in such cases provided that the specific requirements established for each type of service are met.[16]

In that regard, the National Congress rejected any provision that did not include the intervention of a judge in the proceedings, because it believed that various rights and freedoms guaranteed by the Chilean Constitution could otherwise be seriously affected. The National Congress also refused on numerous occasions to establish an administrative or private proceeding for the removal or blocking of allegedly infringing content, reinforcing its strong opposition against attempts to establish non-judicial mechanisms of content removal promoted by certain rights holders and international copyright groups. As such, the then-government attempted to incorporate in the Law a mechanism of good faith that would allow a service provider to block allegedly infringing content without judicial intervention that required prior notice to the user. The measure was also rejected by the National Congress in the last phase of the legislative debate.

This decision was recently highlighted in a recent report by Frank La Rue, United Nations Special

13 Contained in the cited Bulletin No. 3461-03.

14 U.S.-Chile FTA. Chapter 17.11.23.

15 Subsection 512(c)of the Copyright Act. Available at http://www.copyright.gov/legislation/pl105-304.pdf [Date of access: September 27, 2011]

16 Law No.17336. Ch. III. Title V.

Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression in which he stated:

> 43. The Special Rapporteur believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. (...) The Special Rapporteur welcomes initiatives taken in other countries to protect intermediaries, such as the bill adopted in Chile, which provides that intermediaries are not required to prevent or remove access to user-generated content that infringes copyright laws until they are notified by a court order. A similar regime has also been proposed in Brazil.[17]

Nevertheless, it should be noted that to date - a little more than a year since the Law came into force - the system for removal or blocking of allegedly infringing Internet content has not been used and thus it has not been possible to evaluate its implementation.

Exceptions and Limitations

A set of exceptions and limitations was introduced into the Law to achieve the stated objective of introducing greater balance in the existing legislation and guaranteeing legal public access to protected works in each one of the circumstances listed, for each specific sub-category.

Regarding this third objective of the reform, the above-mentioned presidential address also stated that this new set of exceptions was designed taking into consideration the abundant existing international experience and principles included in various World Intellectual Property Organization (WIPO) treaties and in the flexibilities enshrined in the TRIPS agreement.

However, the lack of international agreement on a set of national exceptions and limitations to copyright and related rights is well known.[18] It led WIPO's Standing Committee on Copyright and Related Rights (SCCR) – following a request from Chile and various other member states - to discuss the matter and to commission ten specific studies on the subject. These studies reflected the existence of a broad spectrum of solutions in each one of the various countries analyzed.[19] Just as we have been harmonizing human rights for more than a century, we now need to do the same with national and international regulations for exceptions and limitations in copyright law.

Chile opted for the elaboration of a new set of exceptions which would capture and improve the few existing regulations and incorporate the most relevant comparative international legislation.

Thus, Chile came to elaborate a list of specific circumstances in which individuals may legitimately make use of protected works without any authorization from or payment to the rights holders.

The circumstances incorporated into the Law can be grouped into the following categories as shown in the subsequent table according to their purpose or intent:

- **Exceptions for freedom of expression and/or creation**
- **Exceptions for persons with disabilities**
- **Exceptions for educational purposes**
- **Exceptions for libraries and archives**
- **Exceptions for public interest or public use**
- **Exceptions for technological purposes**
- **Exceptions for fair or incidental use**

17 United Nations. General Assembly. A/HRC/17/27, p.13.

18 Pierre Sirinelli, *Exceptions And Limits To Copyright And Neighboring Rights* (Geneva: World Intellectual Property Organization, 1999), http://www.wipo.int/edocs/mdocs/copyright/es/wct_wppt_imp/wct_wppt_imp_1.pdf.

19 See, to cite a few: Sam RICKETSON, *Study On Limitations And Exceptions Of Copyright And Related Rights In The Digital Environment* (Geneva: World Intellectual Property Organization, 2003), http://www.wipo.int/edocs/mdocs/copyright/es/sccr_9/sccr_9_7.pdf.; Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired* (Geneva: World Intellectual Property Organization, 2006), http://www.wipo.int/edocs/mdocs/copyright/es/sccr_15/sccr_15_7.pdf.; Juan Carlos Monroy, *Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean* (Geneva: World Intellectual Property Organization, 2009), http://www.wipo.int/edocs/mdocs/copyright/es/sccr_19/sccr_19_4.pdf. [Date of access: September 27, 2011]

Table 1. Copyright Exceptions and Respective Provisions of the Chilean Legislation

Purpose	Respective Provisions of the Chilean Legislation
Freedom of Expression and/or Creation	Art. 71 B. The right of citation Art. 71 P. Satire or parody Art. 71 Q. Fair or incidental use
Private Use	Art. 71 N. Public communication in the home Art. 71 R. Private-use translation
Persons with Disabilities	Art. 71 D. Persons with disabilities
Educational Purposes	Art. 71 M. Illustration of educational activities Art. 71 D. Class notes Art. 71 Q. Incidental or fair use Art. 71 B. Citation rights Art. 71 N. Public communication in the home
Libraries and Archives	Art. 71 I. Out of print works Art. 71 I. Preservation in cases of loss, deterioration, or destruction Art. 71 J. Private use Art. 71 K. Internal online or network use Art. 71 L. Translation for internal use, and Art. 71 M. Public communication in the library
Public interest or public use	Art. 71 S. Administrative use Art. 71 D. Political discourse Art. 71 E. Demonstration purposes Art. 71 F. Public use
Technology	Art. 71 Ñ. Reverse Engineering Art. 71 Ñ. Adaptation or copying of software Art. 71 Ñ. Software testing and security Art. 71 O. Temporary copies
Fair or incidental use	Art. 71 Q. Incidental use or fair use

Source: Daniel Álvarez Valenzuela (2011).

Exceptions for Freedom of Expression and/or Creation

Citation Rights. The scope of the existing exception was broadened. Traditionally limited to the reproduction of fragments in cultural, scientific, or educational works, this exception was broadened to include the publication of short fragments of protected works as a quotation, or for purposes of criticism, illustration, teaching, or research, in conformity with the Berne Convention (Article 10).

Satire or Parody. A specific provision for the authorization and protection of any satire or parody which can be artistically distinguished from the original work, interpretation, or characterization was introduced in the law. This was done in order to guard against any future attempt to hinder freedom of expression through correct use or interpretation of copyright regulations.

Incidental or Fair Use. The inclusion of a broad exception which allows for the incidental use of protected works for purposes of criticism, commentary, caricature, teaching, scholarship, or research constituted a major advance in the Law. In a subsequent section we will analyze the context of this provision.

Exceptions for Private Use

The public communication or performance of a work within a family circle (Art. 71 N) as well as the translation of a work for personal use as long as the original copy is legitimately acquired (Art. 71 R) is expressly permitted.

Nevertheless, it is possible to argue that, according to Article 19 of the Law which states that "No person shall be able to publicly utilize a copyrighted work without having obtained the express authorization of the right holder", and by applying a *contrary* interpretation (*contrario sensu*) to Article 19, the uses which are not public, i.e., private, are beyond the scope of the Law and thus legitimate. However, to date, there have been no known court decisions which support or reject this interpretation.

Exceptions for Persons with Disabilities

Another broad exception was incorporated into the Law, which permits the reproduction, adaptation, distribution, or public communication of a work if it is done for the benefit of persons with visual or hearing disabilities, or for those who have any other disability that impedes normal access to a work (Art. 71 C).

This new exception corrected a long-standing shortcoming in the Law and constituted a significant advance in the exercise of the right to equality for this important segment of the population.

However, insofar as there is no binding international agreement regarding the issue, it will not be possible to import adapted works from other countries. It will also be impossible to efficiently take advantage of the economies of scale that such importation would entail or of the assets held by countries that have more works available in formats accessible to persons with disabilities.[20]

In that sense, the discussion that is currently taking place in WIPO SCCR over an international instrument that would provide access to protected works to persons with disabilities constitutes a significant advance. There was progress in the search for consensus on the topic in the 2011 session of the SCCR as reflected in the proposal presented by Argentina, Australia, Brazil, Chile, Colombia, Ecuador, the European Union and its Member States, Mexico, Norway, Paraguay, the Russian Federation, the United States of America and Uruguay.[21] The proposal was the subject of important observations made by a group of academics and representatives of Latin American civil society.[22]

Exceptions for Educational Purposes

Illustration for Educational Purposes. The reproduction and translation of short fragments of separate works for educational purposes in the illustration of educational activities (Art. 71 M) was authorized, as was the performance and public communication of works in educational establishments (Art. 71 N).

Class Notes. In a provision that had already been included in the previous version of the Law, the reproduction of lessons given in institutions of higher education, colleges, and schools, by the persons to whom the lessons are directed, in the form of written notes or any other form, is expressly permitted (Art. 71 D).

Incidental or Fair Use. The Law authorizes the incidental or exceptional use of protected works for purposes of teaching, scholarship, or research (Art. 71 Q).

Citation Rights. As previously mentioned, the scope of the existing exception was broadened to include the publication of short fragments of protected works for purposes of illustration, teaching, or research (Art. 71 B).

Exceptions for educational purposes must be complemented necessarily by specific provisions which benefit libraries and archives, when practices are undertaken libraries affiliated with educational establishments.

Exceptions for Libraries and Archives

A set of exceptions was added benefiting the work of **libraries and archives** which are so fundamentally important to the transmission and preservation of a country's cultural and scientific heritage. From the list of considered exceptions, the following were authorized:

i) The complete reproduction of works that are no longer available on the market (Art. 71 I);

ii) The reproduction of original works, for purposes of preservation, in cases of loss, deterioration, or destruction (Art. 71 I);

iii) The partial reproduction of works for the private purposes of the users of said institutions (Art. 71 J);

iv) Electronic reproduction for use within the institution's internal network (Art. 71 K);

v) The translation of complete works for use in a library or archive (Art. 71 L);

vi) The public communication or performance of a work on the premises of a library (Art. 71 N).

20 Sullivan, page 47.

21 SCCR/22/15 REV.1 http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=170957 [Date of access: September 27, 2011]

22 Observations made in the process of public consultation organized by the Intellectual Property Office of the United Kingdom, available at http://bit.ly/q5s9mq [Date of access: September 27, 2011]

Although as in other cases, there have not yet been any court decisions on this issue which might allow for an evaluation of the implementation of these provisions, libraries in Chile have already begun making important efforts to adapt their practices to these regulations. Some of these efforts include the organization of various national seminars and training courses for librarians from both public and private institutions, as well as the publication of a Legal Guide for Librarians by the NGO *Derechos Digitales*.[23]

Exceptions for Public Interest or Public Use

Administrative Use. The reproduction and public communication of works for use in judicial, administrative, and legislative proceedings was authorized, thus incorporating into the Law the express and optional provisions of the Berne Convention, (Art. 71 S).

Political Speeches. The use of conferences, political speeches, legal pleadings, and other similar works for informational purposes (Art. 71 D).

Demonstration Purposes. The use of works for public demonstration of equipment in showrooms for commercial purposes (Art. 71 E).

Public Use. The reproduction of artistic works that permanently adorn public spaces and of architectural works was authorized (Art. 71 F).

Exceptions for Technological Purposes

Computer Programs. Having reviewed various international precedents and recognizing the need to establish appropriate incentives and to facilitate technological development in Chile, the government established exceptions regarding computer programs. These exceptions stem directly from specific provisions in the U.S.-Chile FTA[24] and from the flexibilities of the "Three-Step Test" included in the Berne Convention and in the TRIPS Agreement.[25]

The first of the exceptions permits reverse engineering activities for purposes of operational compatibility between programs or for research and development (Art. 71 Ñ, subsection b). The second authorizes the adaptation or copy of a computer program when such action is essential for the use of said program or for backup purposes (Art. 71 Ñ, subsection a). Lastly, any action performed on a computer program exclusively for testing or research purposes, or in order to correct its functioning or its security, is authorized (Art. 71 Ñ, subsection c).

Temporary Copies. Along with recognizing rights holders' freedom to make temporary copies of their works, the Law now includes provisions for all persons to make temporary reproductions of a work as long as said reproductions are necessary for the lawful use or transmission of the work. Thus, the temporary copies of a work that need to be made in order to transmit content by Internet or satellite are covered by this part of the statute, which originated in the U.S.-Chile FTA.[26]

Exception for Fair or Incidental Use

As previously mentioned, one of the stated objectives of this legislative reform had to do with the necessity to establish an adequate framework of exceptions and limitations that guarantee access to culturally important works and citizens' ability to exercise their fundamental rights.

For this purpose, in addition to the specific list of exceptions already described, the presidential address proposed to incorporate into the national legislation a provision which would allow courts to exempt certain legitimate uses of authorized works, provided that they be special cases that do not conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the rights holders. This statutory provision follows the parameters originally established by the Berne Convention and then by the TRIPS Agreement under the "Three-Step Test".

The originally proposed statutory provision[27] also derogated Article 45 bis of the then-current legislation, which had been part of the 2003 legislative reform. Article 45 bis had established an extremely unfair test against the very few exceptions authorized by the Law, as it required

23 Claudio Ruiz, *Guías legales para bibliotecarios (Legal Guide for Librarians)*, 1st ed., Guías Legales (Santiago, Chile: NGO Derechos Digitales, 2010).

24 U.S.-Chile FTA. Article 17.7.3 and footnote No.17.

25 Contained in Article 13 of TRIPS and Article 9.2 of the Berne Convention.

26 U.S.-Chile FTA. Article 17.7.3 and footnote No.17.

27 Originally contained in article 71 R of the bill.

the courts to perform a double test before applying any exception, which far exceeded the scope of international obligations on the matter.[28]

The proposed statutory provision sparked an intense public debate, both in and outside the halls of the National Congress. In this debate both camps gathered forces, each organizing its own Internet campaign in order to advocate the respective approval or rejection of the proposal.[29]

As a result of the debate and the intense lobbying that ensued, the National Congress reached a consensus, resulting in the approved Article 71 Q, which states:

> The incidental and exceptional use of a protected work is hereby deemed lawful, for purposes of criticism, commentary, caricature, teaching, scholarship, or research, provided that said use does not constitute a covert exploitation of the protected work. The exception established by this article is not applicable to audiovisual works of a documentary nature. (unofficial translation)

It is apparent that, although the provision is inspired by the *fair use* doctrine prevailing in the Anglo-Saxon system, its scope is considerably narrower and less precise. For this reason the provision can be considered "a seed" for *fair use* policy.

It is important to point out again, in this case, that there have been no documented cases in the development of the Law that might help to define the meaning and scope of the expression "incidental" used in the wording of the provision. Thus, there is no agreement on the matter and it will be left entirely up to the interpretation of the courts.

As stated in a previous article,[30] providing exceptions to copyright in general is essential to learning, the stimulation of the creative process, and the evolution of humanity's arts and sciences. It also represents an important source for innovation and generation of new wealth, particularly in the digital realm. In the last few years, various studies have called into question the idea that the higher the level of copyright protection, the greater the incentives for creation.[31] On the contrary, initiatives have emerged which tend to empirically demonstrate that more flexible copyright regulations have a positive economic impact on national economies and technological innovation (for example, *fair use* exceptions).[32]

It is in fact feasible and desirable for developing countries to establish *fair use* exceptions. Our normative regimes grant this power to the judiciary, generating a dynamic framework which will be able to evolve along with societal and technological change. Finally, it is important to highlight that those that have established more robust systems of exceptions including *fair use* regimes are in fact the most developed countries. In view of their existing needs and their aspiration to achieve equitable development, developing countries should be inspired by *fair use* regimes to put in place the necessary flexibilitities.[33]

Therefore, we are of the opinion that Chile has wasted a valuable opportunity by not being able to incorporate a broad *fair use* doctrine into its national legislation; it is our hope that the interpretations applied to provision 71 Q will one day lead to the establishment and development of such doctrine.

Political Aspects of the Legislative Reform

As previously stated, the legislative reform was designed keeping in mind the diversity of the relevant stakeholders and their interests, and was debated at length in the National Congress for more than three years.

28 An interesting perspective about the interpretation that should be given to the three-step test can be found at VV:AA, *A Balanced Interpretation of the 'Three-Step Test' In Copyright Law* (Max Planck Institute for Intellectual Property and Competition Law, 2008), http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_/declaration.cfm [Date of access: September 27, 2011]

29 Both campaigns are still available on the websites: http://www.tratojusto.cl and http://www.tratojustoparatodos.cl [Date of access: September 27, 2011]

30 Álvarez and Paiva (2010).

31 Hargreaves, Ian. "Digital Opportunity. A review of Intellectual Property and Growth. An independent report". 2011

32 CCIA. "Fair Use in the U.S. economy. Economic contribution of industries relying on Fair Use". Reports 2007 and 2010; "Economic contribution of EU industries relying on exceptions and limitations to copyright" (June 2010).

33 Álvarez and Paiva (2010).

The draft bill received significant support from organizations representing users and consumers, as well as strong criticism from certain content creators and from national representatives of international creative industries. Although this latter group appreciated the incorporation of improvements to the provisions for copyright enforcement, they were strongly opposed to the expansion of the list of exceptions and limitations.

This situation was unprecedented in the legislative history of the country. Except for the 2004 attempt at legislative reform, in each of the previous amendments to the Law only some –very few in fact– organizations representing certain national authors and international creative industries (audiovisual content, books, and software) appeared before Congress and there was a high level of similarity among the positions of these groups.

On this occasion, however, various representatives from national and international organizations of authors, rights holders, intermediaries, technology and telecommunications companies, as well as other user and consumer groups appeared before Congress. The positions represented were extremely diverse and allowed for a historic debate which exposed a new reality: copyright law was now a matter of public and civic concern.

This concern was manifested not only through traditional action, i.e., before the National Congress and pressure on the government but was also expressed through the organization of numerous forums and seminars. Some of these were academic in nature, while others intended to provide information to the public and other interested parties and raise awareness.

During the most critical months of the debate of the proposal -once approved by the Chamber of Deputies and under discussion in the Senate - and following a public protest[34] in which certain artists participated in cooperation with collecting societies,[35] news of the congressional debate reached TV broadcasts and was extensively reported by newspapers. Media sources published the wide range of perspectives and opinions generated by the bill; not only from a technical perspective, but also reporting on the views held by artists, content creators, agencies, users and consumers at large.

Prior to the final approval by Congress, approximately 30 organizations[36] representing a wide range of interests appeared before Congress. These organizations built alliances with the view of bridging their positions and jointly presenting them on the most critical aspects of the legislative reform.

For example, the Chilean Publishers Association (*Asociación de Editores de Chile*), an organization which represents the independent national publishing industry, held a substantially different position from that of the international book industry, which was organized under the aegis of the Chilean Book Chamber (*Cámara Chilena del Libro*). The Chilean Publishers Association even supported a major part of the position advanced by representatives of libraries and educational institutions, regarding exceptions and limitations to copyright. Although this is due to multiple factors, some of which are related to the strong historical and political differences between the two trade associations, it was possible to perceive that, in this case, the interests of independent publishers were not ideologically opposed to those of the libraries and educational institutions. Both groups believed that copyright law demands an inclusive perspective that did not exclude or criminalize established social practices such as the photocopying of texts for educational purposes, but that did include clear limitations in order to avoid abuse of exceptions. Thus, the independent national publishers - being a trade association that did not share the same agenda as its counterpart

34 http://www.tratojusto.cl/n3/elmercurio.html [Date of access: September 27, 2011]

35 There was even an organization established which met apart from the collecting societies, trade associations, and unions: The National Union of Artists *(Unión Nacional de Artistas)* continues operating to this day.

36 The following organizations appeared before the Chamber of Deputies and the Senate: *Asociación Chilena de Empresas de Tecnologías de Información, Asociación de Derecho e Informática de Chile, Asociación de Distribuidores de Videogramas, Asociación de Documentalistas de Chile, Asociación de Editores Musicales, Asociación de Proveedores de Internet, Asociación de Radiodifusores de Chile, Asociación para la Protección de los Derechos Intelectuales sobre Fonogramas y Videogramas Musicales, Biblioteca Central para Ciegos, Biblioteca del Congreso Nacional, Bibliotecas de la Pontificia Universidad Católica de Valparaíso, Bibliotecas de la Universidad de Chile, Business Software Alliance, Cámara Chilena del Libro, Cámara de Distribuidores Cinematográficos , Cámara de Exhibidores de Cine, Cámara Nacional de Comercio Servicios y Turismo de Chile, Colegio de Bibliotecarios de Chile, Comisión de Bibliotecas del Consejo de Rectores de Universidades Chilenas, Corporación de Actores de Chile, Creative Commons Chile, Editores de Chile, Fundación Jaime Guzmán, Google Inc., IFPI CHILE, NGO Derechos Digitales, Sociedad Chilena del Derecho de Autor, Sociedad Chilena del Intérprete y Sociedad de Derechos Literarios.*

from the international book industry (consisting of publishers, distributors, and booksellers) and that, to the contrary, was inclined to maintain the opposite position - were able to facilitate agreements between other sectors involved in the legislative debate, producing the previously described favorable results.[37]

Similarly, some of the opinions held by organizations representing users and consumers were shared by national and international technology and telecommunications organizations, especially on matters related to provisions for *fair use* and limitation of liability of Internet service providers.

On the other side of the debate, in a much more conservative position, collecting societies- which in Chile have all been created under the protection of Chile's oldest collecting society - maintained a single very similar stance shared by organizations representing international book, music, and audiovisual industries. They were all strongly opposed to the incorporation of any *fair use* provision and many of them advocated a private system for removal or blocking of allegedly infringing Internet content.

It is important to emphasize the impact that the extensive use of social media had on the legislative debate. Both in the Chamber of Deputies and in the Senate, user and consumer groups ran successive campaigns, calling on congressional members to vote in a certain way. Facebook groups were created[38] which in a couple of weeks surpassed 150,000 members and e-mail inboxes of some parliament members were receiving close to 5,000 e-mails per day.

As to the question of partisan politics within Congress, the bill received both support and criticism across the board, from center-right as well as from center-left parties. There were no uniform positions within political parties or parliamentary party groups, which became immediately clear upon examination of the voting records.

Strategy and Leadership

During the preparation of this policy brief, the question arose as to whether or not it would have been possible to begin this process of legislative reform (and to conclude it with relative success) if Chile had not signed a Free Trade Agreement with the United States in 2003. The question is difficult and the answer is complex.

In the author's opinion, Chile urgently needed a process of legislative copyright reform that would take into consideration the diversity of existing perspectives, yet among those who defined public policy at the time as there was no sense of urgency over the matter (nor is there currently). The U.S.-Chile FTA brought this sense of urgency to the table and established a long list of obligations, many of which went beyond international standards.

Thus, with the stated objective of implementing the obligations assumed by Chile, a legislative strategy was planned and designed to take advantage of this circumstance. A substantial proposal was elaborated to include a set of public policy objectives to comply with international obligations while incorporating the element of balance into the Law.

In order for this to take place, clear leadership was needed as to the strategy that would be adopted and the contents that would be considered. Moreover, this leadership had to have a much more important characteristic: the reform process would have to be led by someone who was above strong and traditional interests represented mainly by international industries of copyright protected works and the national collecting societies.

In Chile, this leadership was assumed by the then Minister of Culture. In addition to her political position, she enjoyed public and professional support having had a prominent artistic career. In effect, she had been a well known actress, the Actors' Union President and an active member of the National Council of Culture and the Arts

37 A summary of the presentations of the various organizations that appeared before the National Congress can be found at *"Informe de las Comisiones Unidas de Economía, Fomento y Desarrollo y de Cultura y de las Artes recaído en el proyecto que modifica la Ley N°17.336 sobre propiedad intelectual"*, available at http://sil.senado.cl/docsil/info10944.doc

38 See: http://www.facebook.com/group.php?gid=162357480959, http://www.facebook.com/group.php?gid=59929930709 y http://www.facebook.com/group.php?gid=44318990015 [Date of access: September 27, 2011]

(*CNCA*), a new public institution responsible for the design and implementation of cultural policies in Chile, whose governing body is made up of representatives from both government and civil society.

Under her leadership, it was our responsibility to prepare both the legislative strategy and the subject matters to be considered in the reform, from a position critical of the scope of copyright protection and the desire to incorporate standards which would balance the rights of creators and industry with those of the users and consumers.

This vision was supported by numerous political authorities at the time, which facilitated forging the consensus needed within the government to first introduce the reform bill in Congress, and then to publicly lead the legislative debate and negotiations until the reform bill was finally approved in January of 2010.

The definition of the public policy parameters to guide the reform process were strongly dependent on the obligations assumed by Chile in its FTA with the USA, and was premised on the need of independence from pressure groups. These two important considerations are critical in determining the success or failure of any legislative proposal intended to create a balanced copyright legislation. The most recent case of Brazil is a good example illustrating this assertion.

Since 2003, under the administration of President Lula and with popular singer Gilberto Gil serving as Minister of Culture, the most significant national debate over copyright policy and access to knowledge in Brazilian history took place. As a result of a proposal elaborated by the same Minister of Culture, a National Copyright Forum was established and the largest-ever public consultation about legislative reform in this area was initiated.[39]

Throughout the process, Minister Gil (and his successor, Juca Ferreira) not only showed great awareness about the importance of establishing balanced copyright legislation, but also developed a close relationship with groups critical of the current prevailing normative models such as those promoting the Creative Commons licensing system and the use of free and open source software platforms. In other words, not only were Ministers Gil and Ferreira receptive to traditional advocacy groups representing rights holders but they were also openly critical of the interests that such groups tended to represent.

Unfortunately, the process of preparation and public consultation for the reform promoted by Gil's administration was too long and did not foresee the possible impact of a change in government on the fate of the reform process.

One of the first measures adopted by the new Brazilian administration under a different leadership aimed to revisit the copyright reform process. To date, the legislative reform continues to be debated within the Brazilian government. However, there are still few clear signals as to its future and even fewer as to its contents; this has been widely discussed and criticized in Brazilian society.[40]

Conclusions

The results achieved in Chile are the product of an intense public debate and of direct action in the National Congress undertaken by interested parties and by the government. They also stem from action taken by hundreds of thousands of citizens through the Internet.

The National Congress understood, and in some cases strengthened, the premise held by the then-government of Chile that copyright reform must not be guided only by the rights of the creators and rights holders over their works. The right to citizen access and free utilization of the works must also be considered.

The challenge of any modern copyright legislation is to reach an adequate level of protection for rights holders without affecting the freedom and rights of users and consumers, while remaining adaptable in the face of technological developments and the new social practices that they foment. In the end, the goal that our democracies must seek to achieve is that of establishing balanced legislation.

39 The file of the public consultation record is available at http://www.cultura.gov.br/consultadireitoautoral/ [Date of access: September 27, 2011]

40 I recommend two excellent articles which report on the events in Brazil, both written by Pedro Paranagua, whom I'd like to thank for the information he provided in the course of preparing this policy brief. http://www.ip-watch.org/weblog/2011/05/12/brazil%E2%80%99s-copyright-reform-are-we-all-josef-k/ | http://www.ip-watch.org/weblog/2011/02/08/inside-views-brazils-copyright-reform-schizophrenia/ In addition, the open letter sent to President Dilma Roussef and the Minister of Culture, Ana de Hollanda should be mentioned. http://culturadigital.br/cartaaberta/ [Date of access: September 27, 2011]

This may sound simple, but the facts indicate that it is absolutely not the case. Regulatory capture of government officials, the development of inadequate legislative strategies, the lack of specialized training within relevant civil society organizations, and the apparent absence of political will on the part of policymakers are all important factors that are likely to determine the success or failure of any regulatory initiative that aims to meet the challenge of formulating balanced copyright legislation.

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ICTSD welcomes feedback and comments on this document. These can be sent to Ahmed Abdel Latif (aabdellatif@ictsd.ch).

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