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## CHILE'S NOTICE-AND-TAKEDOWN SYSTEM FOR COPYRIGHT PROTECTION: AN ALTERNATIVE APPROACH

August 2012

For the Internet to flourish, its intermediaries (such as ISPs, content hosts, and search engines) must be protected against liability for the conduct of their users. Until recently, legal models for limiting the liability of intermediaries included the notice-and-takedown provisions of the Digital Millennium Copyright Act in the United States; the broad protection from non-copyright related liability under another US law, “Section 230” of the Communications Act; and the safe harbors provided by Articles 12–15 of the European Union’s E-Commerce Directive. In 2010, another model emerged: Chile adopted a new copyright law under which intermediaries are required to take down content only in response to a court order. In this paper, we summarize the main provisions of the Chilean law. We conclude that the Chilean law generally provides the necessary legal certainty and liability protection for intermediaries. For innovators and other users, it may provide greater safeguards for freedom of expression than other models. However, copyright holders have complained that the law does not allow them to secure fast and large-scale removal of infringing content. Much will depend on how courts implement the law’s processes in practice. A critical issue going forward, therefore, will be to assess how the Chilean law is being applied and whether it does in practice provide reasonable protection for all three categories of stakeholders: rightsholders, intermediaries, and users.

### I. Introduction

In April 2010, Chile passed a major update to its copyright law.<sup>1</sup> Over three years in the making, the law enacted four high-level changes. First, in a section concerning third-party responsibilities with respect to end-user infringement, the new law formally limited the liability of Internet intermediaries, established requirements for intermediaries to notify users of allegations of infringement, and established a procedure for rightsholders to obtain judicial orders to take down or block access to infringing content. Second, the law added a list of limitations and exceptions to copyright – specified activities that do not constitute infringement, many of which are similarly excepted in other jurisdictions, including under the United States’ fair-use doctrine. The law also increased fines and penalties for infringement, including the establishment of statutory damages of up to US\$100,000. Lastly, responding to anti-competition concerns, it established a new fee-setting procedure for copyright collecting societies.<sup>2</sup>

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<sup>1</sup> Chilean Law 20,430 (modifying Law 17,336 on Intellectual Property), Diario Oficial D.O., May 4, 2010 (English translation available at <https://www.cdt.org/files/file/ChileanLaw20430-ModifyingLaw17336.pdf>).

<sup>2</sup> For an overview of the changes, see WIPO, “Chile Breaks New Ground in Regulating IP Liability,” June 2010, [http://www.wipo.int/wipo\\_magazine/en/2010/03/article\\_0009.html](http://www.wipo.int/wipo_magazine/en/2010/03/article_0009.html).

The changes made in the law were designed to implement portions of the US–Chile Free Trade Agreement (FTA), which entered into force on January 1, 2004,<sup>3</sup> and to create a framework that better balanced the rights of authors, rightsholders, and the general public.<sup>4</sup> The liability protections established for Internet intermediaries thus track closely with the language of the FTA and section 512 of the United States’ Digital Millennium Copyright Act (DMCA), on which many of the FTA’s provisions were based. Both Chile’s law and the DMCA protect the same types of Internet intermediaries, if they meet certain conditions, from monetary liability for their users’ infringing activities (known as “safe harbor”). The conditions are largely similar, and each law frees intermediaries from any obligation to monitor their networks and services for infringement.

There is, however, one critical difference between DMCA safe harbor and the Chilean law: A cornerstone of the US legislation is a private notice-and-takedown system, under which the liability protections of service providers are contingent on those providers complying with rightsholders’ formal notices to take down allegedly infringing material. Chile’s law does not include such a private notice-and-takedown system; instead, a court order is required to compel blocking or removal of infringing content.<sup>5</sup> Due to concern over the protection of Internet users’ constitutional rights, the Chilean National Congress rejected several amendments that would have introduced a non-judicial takedown procedure.<sup>6</sup> The law thus strikes a different balance than the DMCA – one that is arguably more favorable to Internet free expression and innovation – with implications for rightsholders, intermediaries, and Internet users. This memo analyzes the law’s approach to intermediary liability and notice-and-takedown, with respect to the balance struck between copyright enforcement and online innovation and free expression.

## **II. Balancing Copyright Enforcement and Online Free Expression and Innovation**

The Internet has presented new challenges for copyright enforcement. On one hand, the widespread availability of cheap copying and fast connectivity allows new avenues for infringement. On the other hand, the Internet has given rise to countless innovative platforms that offer new ways to disseminate content to global audiences. The increase in user-generated content has resulted in many new uses of copyrighted material that are non-infringing and deserve protection and encouragement. More broadly, the Internet has empowered tremendous economic and social progress and is increasingly an essential part of everyday life.

Internet copyright policy must therefore seek to balance strong, effective enforcement of copyright with the critical societal interest in maintaining the Internet as an open, vibrant, competitive platform for communication. Copyright law must provide technology-neutral enforcement tools that deter and punish infringement across a variety of media, while making allowances for new uses of works that do not impinge on rightsholders’ exploitation of their works. To promote continued growth of online services, copyright policy should avoid

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<sup>3</sup> <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta>.

<sup>4</sup> See Daniel Alvarez Valenzuela, “The Quest for Normative Balance: The Recent Reforms to Chile’s Copyright Law,” International Centre for Trade and Sustainable Development, December 2011, <http://ictsd.org/i/publications/120938/>.

<sup>5</sup> The DMCA does envision similar injunctive relief (see 17 USC § 512(j)), but in practice the private notice-and-takedown system is more frequently relied upon.

<sup>6</sup> Daniel Alvarez Valenzuela, “The Quest for Normative Balance,” *supra* n. 4, p. 3.

burdensome obligations on service providers that could restrain the free flow of information and user expression or constrain future innovation.

In the United States, the DMCA's safe harbors were enacted to strike just such a balance. To combat some types of online infringement, the DMCA provides rightsholders with an expedited, non-judicial process to remove infringing content from Internet sites. At the same time, it offers Internet innovators a shield from potentially crippling liability for such content. The Act prescribes a procedure by which rightsholders can demand that online service providers such as web hosts and search engines remove content or links to content that the rightsholders identify as infringing.<sup>7</sup> In exchange for complying with valid takedown notices, service providers receive the limitations on liability necessary to foster growth and investment in online services. Without such a safe harbor, these intermediaries could face uncertain and potentially massive liability risk, since any finding of liability for infringing material could subject them to substantial statutory damages for each work infringed.<sup>8</sup> The statute also includes safeguards that allow the user who posted the content to reinstate it if the user believes the content is not infringing.

The DMCA system strikes a reasonable balance, but it represents just one of several approaches to online intermediaries' liability with respect to third-party content. "Section 230" of the United States' Communications Act takes a different approach, shielding intermediaries from liability in areas other than intellectual property *without* the need to follow a notice-and-takedown system.<sup>9</sup> Section 230 thus provides a high level of protection for a broad range of content and is viewed by many as instrumental in driving innovation and growth in the US's Internet sector. In Europe, the E-Commerce Directive offers liability protections for intermediaries, but conditions the protection on notice-and-takedown compliance for *all* types of content.<sup>10</sup> Nearly all of the most innovative Internet economies in the world have some version of such legal protections for intermediaries.<sup>11</sup>

Chile's law adopts a notice-and-takedown system in which notice must come in the form of a court order. In evaluating any notice-and-takedown requirement for Internet intermediaries, the following questions can be useful for analyzing the balance a law strikes and its potential impact on innovation and free expression. Below we outline these key questions and then apply them to evaluate the Chile law.

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<sup>7</sup> 17 U.S.C. § 512(b)–(d).

<sup>8</sup> 17 U.S.C. § 504(c).

<sup>9</sup> 47 U.S.C. § 230(c)(1).

<sup>10</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. For a fuller discussion of approaches to intermediary liability for third-party content, see CDT, *Intermediary Liability: Protecting Internet Platforms for Expression and Innovation*, April 2010, <http://cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation>.

<sup>11</sup> In June 2012, Canada adopted an approach based on "notice and notice," whereby service providers, upon receipt of a notice of infringement from a rightsholder, must forward the notice to the relevant user and retain information on his/her use of the service for six months. Under the Canadian law, content hosts must only remove content when they become aware of a court order specifically holding it to be infringing. See Bill C-11 (Canada, Assented to June 29, 2012), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697419>.

### **Which intermediaries are included?**

Internet intermediaries include various entities that play distinct roles with respect to third-party content. These range from Internet access providers, which are largely passive conduits for all content, to hosting providers, who offer storage and presentation for third-party content (such as sites for user-generated video). All benefit from protections from liability with respect to third-party content, but different types of entities may require different forms of protection or be better equipped to handle certain obligations. For example, a notice-and-takedown system would make little sense with respect to an access provider, which has no control over stored content.

### **What else must an intermediary do to qualify for protection?**

The principal reason to limit intermediaries' liability is to remove impediments (in the form of legal risks) to providing innovative and beneficial services. To the extent that liability limitations are conditioned on certain actions by the intermediary, any benefit must be weighed against the cost of complying with such conditions. Any conditions imposed on intermediaries as a prerequisite for immunity should be clear and should scale easily with the volume and pace of communication the Internet enables. Thus, conditions that require intermediaries to engage in monitoring or proactive evaluation of all third-party content are not desirable and in some cases may be nearly impossible or prohibitively expensive. Other examples of prerequisites that might be imposed on intermediaries as a condition of immunity protection include obligations to retain user-identifying data, pass-through noticing requirements, accommodation of "technical measures," and the adoption of specific policies and practices with respect to infringing users.

### **What kind of content does the law apply to? Is it easy to tell whether the content is "unlawful"? Is "unlawful" content adequately defined in law?**

Without adequate safeguards, a notice-and-takedown system can result in the removal of lawful content, negatively impacting free expression and the legitimate use of online services. To prevent this, the type of content subject to notice-and-takedown under the law being assessed must be clearly defined, so that all parties know when takedown is and isn't appropriate. In general, intermediaries are not well positioned to assess the legality of content. In the case of copyright, substantive questions of law are also relevant. Limitations and exceptions to copyright, such as the US's fair use doctrine, are important enablers of online innovation and expression. To the extent the copyright law includes such limitations and exceptions, they should inform notice-and-takedown requirements.

In addition, different types of content may be better- or worse-suited to notice-and-takedown rules. Notice-and-takedown systems may be appropriate in the case of easily recognized content that causes significant harm, but should not be adopted in ways that could be abused to take down lawful, albeit objectionable, content. For example, what is defamatory requires complex judgments of law and fact; a system that allowed someone to demand takedown for defamation without a court determination would allow for private suppression of lawful comment and criticism.

### **Under what circumstances must a protected entity remove or take down content?**

Any process by which content can be removed from the Internet must provide hosts with clarity and certainty as to their obligations. Questions to consider when assessing a national law on intermediary liability include: What constitutes sufficient notice? Who can provide notice? What form must the notice take? Are covered intermediaries subject to clear rules defining the content for which a notice must result in removal? Are covered intermediaries ever required to remove content based on knowledge they develop by means other than third-party notice?

### **Are necessary safeguards in place to protect user rights?**

Policies that can result in sanctions against individuals, including the removal of content, must include adequate safeguards against abuse. Sufficient process must be accorded users to ensure that their rights to free expression and privacy are being protected. The right to challenge wrongful takedown is essential. Other protections include clear definitions and requirements, mechanisms to ensure that the content being targeted by a particular notice is rightly subject to takedown, and the availability of legal recourse against parties that abuse the system.

### **Does the system give rightsholders a practical and reasonably efficient tool for mitigating the harms of infringement?**

Notice-and-takedown systems are intended to give rightsholders a significant tool for mitigating the harms of infringement, by enabling them to secure the reasonably prompt removal of infringing material from the Internet. For rightsholders, the practical utility of the system will depend on factors such as how long it takes to remove infringing content; how burdensome the system is for rightsholders; and how well the system can handle large volumes of takedown requests. For example, rightsholders have consistently argued that it is impractical to require full court proceedings prior to taking down infringing content, given the volume of online infringement and the importance of speed in taking down infringing content such as just-released or not-yet-released movies.

## **III. Evaluating the Chilean Approach**

Chile's law establishes a notice-and-takedown system under which a court order is required — instead of a private notice — to have content taken down.<sup>12</sup> Requiring a court order impacts online copyright enforcement in a number of ways. It shifts the task of evaluating notices from intermediaries onto the courts. On one hand, this raises the burden on rightsholders. On the other hand, court oversight may decrease the likelihood that false or abusive notices will result in the takedown of innocent content. It is unclear from the statutory language alone what role courts will play in evaluating takedown petitions and thus unclear how exactly the approaches will differ in practice. This section analyzes Chile's law as written and its implications under the framework described above, comparing and contrasting with other notice-and-takedown regimes where appropriate.

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<sup>12</sup> For a fuller description of the Chilean law and a summary of the process that led to its adoption, see Daniel Alvarez Valenzuela, "The Quest for a Normative Balance," *supra* n. 4.

## A. Covered Entities and Conditions

In articles 85M–Ñ, the Chilean law limits the liability of the same four types of Internet and online service providers as the DMCA, three of which are also covered by the European E-Commerce Directive (ECD).<sup>13</sup> These entities receive safe harbor from liability for infringement when they meet certain conditions. At the same time, intermediaries may be subject to certain types of injunctions laid out in the law. These injunctions, including court-ordered takedown for non-ISPs, are discussed in the next section.

The covered entities are:

- **Article 85M – ISPs:** Providers of data transmission, routing, or connection services cannot be held liable provided they do not modify or select the content of the transmission, do not initiate the communication, and do not select its recipients. Temporary caching necessary to perform the transmission is also covered under this provision.
- **Article 85N – Caches:** Caching providers receive safe harbor provided they abide by rules on the access to and updating of the cached material imposed by the originator, do not interfere with widely accepted, standardized usage-analytics tools, do not modify the content, and comply with valid takedown notices when the content is first removed at the originating site.
- **Article 85Ñ – Hosts and Information Location Tools:** Hosts and information location tools (such as search engines or directories) are protected under a single article of the Chilean law. These entities receive safe harbor provided they have no actual knowledge of infringement, receive no financial benefit from infringement they have the right and ability to control, designate an agent to receive takedown notices from courts, and expeditiously remove or disable access to infringing material upon receipt of such notices.

The law places several conditions on all service providers to be eligible for safe harbor. First, a service provider must have adopted a general policy that it may terminate the accounts of content providers who are repeat infringers. A key difference between this provision and its analog in the DMCA, however, is that under Chile’s law repeat infringers must be so designated by “court resolution.” Under US law, “repeat infringer” is not defined, and the question of when service providers have properly implemented a termination policy continues to be a subject of litigation. To covered service providers, the requirement in Chile’s law is likely an improvement over the DMCA, as it provides greater certainty regarding their obligations. Service providers need not concern themselves with determining when a subscriber is or is not a repeat infringer. Some rightsholders fear, however, that the low rate of copyright lawsuits and prosecutions in Chile may indicate that this condition will not be adequately enforced.<sup>14</sup>

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<sup>13</sup> The DMCA covers providers of transmission services, data caches, data hosts, and information location tools (such as search engines). The ECD omits the lattermost of these, offering protection to “mere conduits,” “caches,” and “hosts.”

<sup>14</sup> See International Intellectual Property Alliance (IIPA), “2012 Special 301 Report on Copyright Enforcement and Protection,” <http://www.iipa.com/rbc/2012/2012SPEC301CHILE.PDF> (“IIPA Special 301 Report”).

Chile's second general condition is that service providers must not interfere with "technological and rights management measures relating to copyrighted material that are widely accepted and lawfully used." The conditions "widely accepted" and "lawfully used" make this a relatively vague standard, which could result in service providers having to meet certain technical filtering obligations in order to qualify for protection from liability. The DMCA contains a narrower definition of "standard technical measures": They must be adopted by broad consensus of both rightsholders and service providers, available on reasonable and nondiscriminatory terms, and not impose substantial costs on rightsholders. Chile's lower standard arguably offers less certainty; there is a greater chance that technical measures could be deemed to meet the standard, leaving service providers uncertain about whether and when particular technical measures would be required.

Finally, in accordance with the FTA, Chile's safe harbors are also conditioned on the service provider not having initiated the transmission or selected the material or its recipients. This final condition does not apply to information location tools (which arguably perform some kind of selection in finding and providing links to content). Such a condition makes sense for a law protecting intermediaries from third-party liability. Content selected or sent by the service provider is rightly considered first-party content and thus outside the scope of *intermediary* protections.

Importantly, as under the DMCA and the ECD, the liability protection afforded by Chile's law is not contingent on service providers monitoring the data they transmit, store, or refer to, nor are service providers required to actively seek out facts or circumstances indicating illegal activities (Art. 85P). As stated in Section I, the reason for adopting shields from liability is to remove impediments to launching new, fast, and high-volume communications tools. Imposing a general obligation to monitor content would introduce just such a barrier and would thus defeat the purpose of enacting liability protections.

## **B. Court-Ordered Notice-and-Takedown and Its Implications**

Chile's law lays out certain formal requirements that notices of infringement from rightsholders must meet in order to obligate a service provider to take action.<sup>15</sup> However, critically, the only action that is required upon receipt of such private notices is that the service provider forward the notice to the user that uploaded or provided the allegedly infringing content.<sup>16</sup> To get content *removed*, rightsholders must file a petition in civil court for a preliminary or permanent injunction (Art. 85Q). Such petitions must:

- designate the appropriate court; identify the petitioner, any representative, and the nature of the representation; and identify the defendant (rules 1, 2, and 3 from Article 254 of the Code of Civil Procedure<sup>17</sup>);
- clearly indicate the rightsholder, the rights infringed, and the kind of infringement;

<sup>15</sup> See Article 85U; see also 17 USC § 512(c)(3).

<sup>16</sup> Similar notice-forwarding occurs in the US regarding infringement on peer-to-peer networks that is not subject to DMCA takedown; in that context, the practice is a result of voluntary agreements between rightsholders and ISPs and is not mandatory. By mandating notice-forwarding but not takedowns in response to private notices, Chile's law covers more types of infringing activity (p2p) but is less restrictive than the DMCA. Canada's copyright reform law of June 2012 also includes formal notice-and-notice requirements. See *supra* n. 11.

<sup>17</sup> <http://www.leychile.cl/Navegar?idNorma=22740> (in Spanish).

- clearly indicate the infringing material; and
- clearly indicate its location on the service provider's systems or network.

The statute specifies that courts must, in response to lawful petitions, issue takedown orders “without delay.” Courts may issue preliminary injunctions without hearing from the provider of the alleged infringing content, provided the rightsholder posts a bond (presumably against potential liability for providing false information pursuant to Article 85T, but the statute does not specify). The affected user may request that the court reconsider a takedown order by filing a petition meeting the same requirements listed above. Courts are instructed to consider such petitions under a “brief and summary” procedure. Appeals of the court's order or reconsideration thereof shall not stay execution of the court's original order, but shall proceed “with priority for being heard by the court of appeals” (Art. 85Q).

What the court order may require varies by the type of service provider (Art. 85R). ISPs (conduits) may only be ordered to take reasonable measures to block access to clearly identified infringing content, and only provided that other legal content is not blocked as a result. Even with these limits, any mandated blocking of Internet content raises serious technical concerns and is likely to result in overblocking of legitimate content. These concerns are mitigated somewhat by the fact that blocking is only permitted with court oversight and when legal content will not be blocked. In addition, the law instructs the court to give due consideration to a number of factors, including the burden on the service provider, the burden on users and subscribers, the significance of harm to rightsholders, the feasibility and effectiveness of the remedy, and the availability of less burdensome enforcement methods. Thus, while it remains to be seen whether and how courts will issue difficult-to-implement or otherwise problematic blocking orders, it seems that this kind of injunction is not intended to be issued lightly.<sup>18</sup>

For providers of caching, hosting, and information location tools, the court may only order the removal or disablement of access to clearly identified infringing material or the termination of the accounts of repeat infringers clearly identified by the petitioner. These two types of injunction are similar to those provided for under the DMCA, although the DMCA does not limit account-terminating orders to repeat infringers. Absent an injunction that orders the removal of particular content, intermediaries are not required to take down content.

### ***Analysis***

Routing takedown notices exclusively through the courts strikes a very different balance of interests than the DMCA, one that provides additional legal clarity to intermediaries and increased protections for freedom of expression. Service providers required to take down content benefit from greater certainty by having only to follow court orders rather than assess the validity of private notices. In addition, the Chilean law avoids an ambiguity that is the subject of ongoing litigation under the DMCA. Under both laws, the safe harbor for hosts and search engines is conditioned on their removing or disabling access to material when they have “actual knowledge” of infringing activity. In the US, rightsholders argue that “actual knowledge” may

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<sup>18</sup> The DMCA makes similar injunctions available for content hosted outside the United States, subject to similar considerations. To date, no such injunctions have issued from US courts.

exist even when no formal notices have issued.<sup>19</sup> Chile avoids this question by linking “actual knowledge” to the judicial process. The law expressly states that an intermediary shall be deemed to have “actual knowledge” when a court has ordered that material be removed (85Ñ).

The procedural hurdles of going to court may affect rightsholders. By having to seek court injunctions, it may be difficult for rightsholders to send the high volume of takedowns that has become the norm in the United States. Indeed, one organization representing rightsholders has expressed concern that the Chilean system will be insufficient to address the volume of online infringement its members encounter.<sup>20</sup> There is likewise a question about how Chile’s process will affect the timeliness of content takedowns; the step of getting court approval may increase the amount of time it takes a copyright holder to get infringing material removed.

From the perspective of Internet users, court involvement may diminish the likelihood that the takedown process will be abused. In the US, there is evidence that the private noticing system results in spurious notices being used to take down non-infringing material.<sup>21</sup> Content hosts have a strong incentive to comply promptly with any facially proper takedown notice they receive, because doing otherwise could jeopardize their crucial safe harbor protection. Therefore, when a takedown notice targets non-infringing content, it is highly likely to result in the removal of that content. Allowing a court to assess the validity of such claims limits the possibility of such abuse. Moreover, the mere fact that a court is involved at all may serve as a significant deterrent against the submission of frivolous or abusive notices in the first place; parties may be more cautious and less casual in submitting notices to a court than they would be when serving notices to other private parties.

Regarding scope, Chile’s law takes some steps that may limit application of the notice-and-takedown system in ways that can safeguard free expression and support innovation. In addition to clarifying the obligations and liability of Internet intermediaries, the law established a number of exceptions to infringement that, if included in a court’s analysis of takedown petitions, would prevent certain uses from falling victim to unnecessary takedowns. The exceptions allow for certain important uses, especially in the context of user-generated content. For example, the exceptions include use for satire and parody and the use of clips for criticism and teaching (with attribution).<sup>22</sup> While fewer activities may fall within the enumerated exceptions than would be considered fair use under the flexible US standard,<sup>23</sup> the clarity provided by the specificity of Chile’s law may make it easier for petitioners and courts to consider these types of uses when evaluating takedown claims.

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<sup>19</sup> What constitutes “actual knowledge” has therefore been the subject of contentious lawsuits alleging that notice-and-takedown compliance alone is not enough to avoid liability; for example, this question has been central to Viacom’s infringement suit against YouTube.

<sup>20</sup> IIPA Special 301 Report.

<sup>21</sup> See, e.g., *Takedown Hall of Shame*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/takedowns>; CHILLING EFFECTS CLEARINGHOUSE, [www.chillingeffects.org](http://www.chillingeffects.org); Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects on the DMCA on the First Amendment*, 24 HARV. J.L. & TECH., author’s draft at [http://wendy.seltzer.org/media/seltzer\\_free\\_speech\\_unmoored.pdf](http://wendy.seltzer.org/media/seltzer_free_speech_unmoored.pdf).

<sup>22</sup> Articles 71B and 71P.

<sup>23</sup> One Chilean fair-use advocacy group used the diminutive “usos justitos,” or “near-fair uses” to describe the exceptions. See Pedro Huichalaf Roa (of Liberación Digital), “Reforma a la Ley de Propiedad Intelectual promulgada Publicado,” April 25, 2010, <http://liberaciondigital.org/blog/2010/04/reforma-a-la-ley-de-propiedad-intelectual-promulgada> (in Spanish).

As Chilean courts begin implement the new law, it will be important to study how they actually assess claims of infringement. The statutory language suggests that the process of seeking injunctions will be expedited and may be perfunctory, with properly formed petitions resulting “without delay” in takedown orders. While one possible reading of the law’s formal requirements (that petitioners clearly identify the infringing material and the type of infringement) would imply that the court should evaluate whether particular content is in fact infringing, it is far from clear that courts are required to do so.

Failure of the process to identify and reject improper takedown claims may expose a downside of Chile’s approach, from the perspective of ensuring safeguards for free expression. The law allows affected users to file counter-notices to request that content taken down be reinstated, but like obtaining a takedown order, reinstating content requires going to court. While the symmetry of this seems logical, the need to go to court may discourage individual users from getting their lawful content reinstated. In the event mistaken or spurious notices are approved through insufficient court scrutiny, the result will be the unnecessary suppression of non-infringing content.

For users who are harmed by a wrongful takedown (and who are not reluctant to go to court), the Chilean law provides some additional recourse. Article 85T allows persons injured by action taken by intermediaries to obtain damages from persons who have knowingly provided false information concerning alleged infringements. This is in accordance with the FTA, and is similar to the DMCA’s section 512(f), which creates liability for knowingly misrepresenting that content is infringing. In the US, one court has held that rightsholders must at least consider fair use’s limitations on copyright for a takedown notice to be in good faith.<sup>24</sup> However, the subjectivity of the fair-use analysis suggests that under US law, it can be difficult to demonstrate that a rightsholder engaged in *knowing* misrepresentation and lacked a good-faith belief that a particular use was infringing.<sup>25</sup> It remains to be seen whether Chile’s law will offer meaningful protection for non-infringing Internet users subject to improper takedowns or whether the “false information” standard will be similarly difficult to prove.

## IV. Conclusion

Online copyright policy must strike a balance between enforcing the law against infringement and allowing Internet intermediaries to operate in support of robust online commerce and free expression. Chile’s notice-and-takedown law arguably places that balance more on the side of legal clarity for intermediaries and potentially offers greater safeguards for user rights to freedom of expression. By formalizing the takedown process through court involvement, Chile provides intermediaries with great certainty as to when they will and will not have to respond to allegedly infringing content. Court oversight will also lessen the likelihood of wrongful takedowns and other system abuses. While this is beneficial for users and service providers, the tradeoff may be that rightsholders will find it more difficult to secure takedown of infringing content in a timely fashion than they are able to under systems that allow private notice.

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<sup>24</sup> See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (ruling that “17 U.S.C. § 512(c)(3)(A)(v) requires a copyright owner to consider the fair use doctrine in formulating a good faith belief that ‘use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.’”).

<sup>25</sup> In the same case, the judge noted that “there are likely to be few [cases] in which a copyright owner’s determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation under 17 U.S.C. § 512(f).”

Rightsholders have consistently argued that court proceedings are impractical considering the volume of online infringement and the necessity for speed in taking down infringing content, such as just-released or not-yet-released movies.

Much will depend on how Chile's courts respond to requests for takedown injunctions. If the process of obtaining a takedown order is cursory – as the law can be read to allow – rightsholders will face a lower barrier to takedown, but mistakes may be more likely. And while the law provides recourse for wronged users and content providers, requiring court involvement also raises the burden on those who seek to reinstate content that has been taken down. We eagerly await the development of evidence that allows an assessment of the Chilean law in practice. For now, it is clear that Chile has shifted to the courts the critical task of striking the balance between meaningful copyright enforcement and the interests of supporting legitimate online commerce, innovation, and free expression.

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