GLOBAL INFORMATION SOCIETY WATCH 2009

Focus on access to online information and knowledge – advancing human rights and democracy

Global Information Society Watch 2009

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www.derechosdigitales.org and www.mujeresenconexion.org

Introduction

Emerging from a period of strong censorship under military dictatorship, it is only in the last decade that access to information as a right (in its different forms) has become a serious concern for the Chilean government and society in general. Access to public information and the consequences of intellectual property rights are now the topics of ongoing debates.

New legislation regarding access to public information has recently been adopted, creating challenges in its implementation for government, citizens, the media, civil society and the different actors in this arena. With very concentrated and monopolised traditional media, the internet and other new information and communications technologies (ICTs) have provoked an important break with the past, opening up new possibilities to amplify the diversity and pluralism of voices. A very strong debate over intellectual property rights and data protection in new media platforms has emerged in the last two years, raising the need to update old legislation relevant to the issues. As in other countries, positions are divided between those sectors wanting to reinforce copyright and those that defend the "fair use" and "public domain" approaches.

Policy and legislative environment

Chile lacks a public policy on access to information. From 1973 to 1990, the country was governed by a military dictatorship with severe constraints on human rights, including communication rights and access to information. When the Constitution of 1980 was adopted, it emphasised economic liberties and a free market, instead of social, economic and cultural rights. Public transparency and access to information were not mentioned in the new constitution.

There have been some successes in dealing with censorship. However, there have been fewer successes in dealing with data privacy and intellectual property, and ongoing work on public transparency, off and online.

Since 1999, Chile has had a personal data protection act that regulates the processing of personal information by both the public and private sector. However, the European Union (EU) has categorised Chile as a non-secure country, because the data protection act does not contain restrictions for cross-border flow of personal data to other countries, and the country does not have a data protection authority. This year (2009), the Chilean government introduced a draft data protection act that follows EU and Organisation for Economic Co-operation and Development (OECD) standards.

The copyright act, adopted in the early 1970s, does not guarantee access to or use of public works, because their copyright is owned by the respective public service. There is no adequate copyright exception that authorises access by citizens, even for non-profit purposes. There is also no law that guarantees access to and use of copyrighted works for educational purposes, including e-learning. In May 2007 the government introduced draft legislation that modified the current act by setting norms regarding the responsibility of internet service providers (ISPs) for copyright infringement, new copyright exceptions and limitations, and norms related to piracy and judicial procedures.

In August 2006, the government had established standards that state administration websites must follow. The standards require that the websites ensure the availability and accessibility of information and the proper protection of personal data. In January 2008, the government adopted the Digital Development Strategy,[1] a working plan to build the information society in Chile from 2007-2012. The strategy includes the idea of adopting a new set of laws on data protection, cyber crime and intellectual property, among others. As part of this strategy, the government is promoting local government services online, as well as an electronic register of services and service providers (such as notaries and a real estate register).

In August 2008 a new law dealing with access to public information was adopted, which will become effective in April 2009. This law significantly strengthens citizen control and accountability. The law recognises most of the principles established by the OECD recommendations on the matter.[2] Additionally, the new law creates the Transparency Council,[3] a public and independent entity that supervises the fulfilment of the law. This includes punishing any infringements, resolving complaints, and making recommendations to the president and the Congress on the matter.

The right to access information

Today, the main criticism against the Chilean media industry (and the role of the government in the sector) is the concentration of ownership. This has had a pernicious effect on public deliberation as well as on accessing content and information. In December 1999, the so-called Transparency Act secured the right to access state-held information, with some exceptions. However, it was only in August 2005 that a constitutional modification was published guaranteeing access to state-held information.

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1 www.estrategiadigital.gob.cl/files/Digital%20Strategy_CHILE.pdf

2 Law 20.285 on Public Transparency and Access to State Administration Information, published 20 August 2008: www.leychile.cl/Navegar?idNorma=276363; reports and legislative discussion about the new act are available at www.bcn.cl/ley-transparencia

3 www.consejotransparencia.cl

There are many questions emerging regarding the strengths and weaknesses of the new access to information legislation. There are some grey areas, especially in how information is being made accessible, the process of requesting the information, and how it is provided.

Civil society organisations like Proacceso,[4] CIPER Chile,[5] the freedom of expression programme at the University of Chile,[6] and the NGO coalition ACCION[7] have been monitoring and evaluating the mechanisms for accessing information, and educating civil society leaders (especially at the local level) and journalists in how to use the new legal framework.

The Transparency Council is also monitoring how public services, ministries and state secretaries make their information accessible through websites. The Council is working on the development of an electronic platform that will facilitate online access, regardless of the operating system used. However, it remains necessary to modify the intellectual property rights act to guarantee the appropriate reuse of state documents.

Current debate about intellectual property legislation has included discussions on what to protect, piracy and illegal distribution, how to protect copyright holders, and how to ensure public access and fair use of content. In many universities or public schools it is common to have access to photocopies of books, since many students cannot afford them because value-added tax (VAT) is included in the final price, making them very expensive to buy. Another practical example is the case of public libraries for blind people where it is common to have access to audio books that in most cases do not have legal authorisation to use the original material. In these cases, being able to access e-books or audio books through electronic online libraries for free would improve the situation.

Here positions have been divided. On the one hand there is the private sector, and related copyright organisations working in the music and entertainment industry, which want to ensure the protection of their works and the enforcement of the existing legal and regulatory framework that punishes illegal downloading, or the illegal distribution of copyrighted digital content.[8] On the other hand there are citizen's movements that claim their right to access cultural productions and information, based on the "fair use" or "public domain" approach, and reject the idea that people are committing a crime when they download, share or copy content from websites or peer-to-peer networks.[9]

In July 2009, the Chilean Senate proposed the introduction of "fair uses" for educational, academic and research purposes, but the proposed text has not been approved yet.

New trends

Over the coming years, the government should concentrate its efforts on the implementation of free trade agreements with the United States and EU, and adopt public policies according to the requirements of the OECD in order to become a member. This situation will imply an awareness of global debates and trends.

There is an impressive growth in the number of open access and open culture initiatives, most of them related to universities (e.g., access to theses, websites and journals), but also in media blogs. Several new net labels are creating new distribution platforms for independent musical groups and bands. Most of these initiatives use the Creative Commons licence, available in Chile since 2005. Several public service websites have also adopted Creative Commons licences, such as the Library of the National Congress and the website for the Modernisation of State Programme.

Because of these developments, the country has a good opportunity to improve and develop a high quality legal framework in the area of accessing online information and intellectual property rights. Political will, more knowledge in the area and a civil society prepared to take action are critical ingredients to leveraging this opportunity.

Action steps

While important improvements have been discussed and implemented in national law relating to access to public information, there are still two main challenges: improving the enforcement of the current legislation, and citizens' awareness of the right to access information and its value as a public good (and not only a commodity that can be purchased). Education to strengthen public advocacy from civil society and citizens groups must be developed, as well as a strong information campaign at the national level in order to decentralise the current debate.

A critical problem in the Chilean legal system is the lack of public authorities that supervise the adequate fulfilment of legislation, especially those laws related to civil rights and public liberties. This is the case, for example, in a decree related to public services websites. In these cases, those affected can sue, but this is a highly expensive procedure. The Transparency Council is a newcomer in this field, but its capacity is limited. There is also a need for a body to supervise the data protection act, as well as citizen rights when it comes to accessing personal data. ■

4 www.proacceso.cl

5 ciperchile.cl

6 www.libertaddeexpresion.uchile.cl

7 www.accionag.cl

8 See the web-based platform of a group of Chilean artists and authors, "Trato Justo" (Fair Treatment): www.tratojustoartistas.cl

9 See the web-based platform of a group of civil society organisations, "Trato Justo para Tod@s" (Fair Treatment for @ll): www.tratojustoparatodos.cl

GLOBAL INFORMATION SOCIETY WATCH (GISWatch) 2009 is the third in a series of yearly reports critically covering the state of the information society *from the perspectives of civil society organisations across the world.*

GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels

- **Encouraging** critical debate

- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy.* It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

In addition, 48 country reports analyse the status of access to online information and knowledge in countries as diverse as the Democratic Republic of Congo, Mexico, Switzerland and Kazakhstan, while six regional overviews offer a bird's eye perspective on regional trends.

GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).