

# ICLG

The International Comparative Legal Guide to:

# Trade Marks 2013

2nd Edition

A practical cross-border insight into trade mark work

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# Chile

Beuchat, Barros & Pfenninger

Andrés Melossi



## 1 Relevant Authorities and Legislation

### 1.1 What is the relevant Chilean trade mark authority?

The National Institute of Industrial Property (INSTITUTO NACIONAL DE LA PROPIEDAD INDUSTRIAL), also known by its acronym: INAPI, is the relevant trademark authority.

### 1.2 What is the relevant Chilean trade mark legislation?

The Industrial Property Law (Law 19.039), and its Regulations, as well as Chilean Law No. 20.254 that states provisions to the National Institute of Industrial Property, are the relevant legislations.

## 2 Application for a Trade Mark

### 2.1 What can be registered as a trade mark?

Any visible sign can be registered as a trademark, as long as it is possible to be represented in a bi-dimensional graphical way, such as letters, words, numbers, devices, colours or a combination of these. Chilean legislation also considers sound marks within these categories but three-dimensional marks are not recognised in our trademark system.

Also, the Chilean system recognises, as a trademark, slogans and, in addition to products and services as the object of protection, Chilean legislation provides protection to commercial stores and industry names.

### 2.2 What cannot be registered as a trade mark?

The following cannot be registered as a trademark:

- a) Official shields, flags or other emblems, designations or acronyms of any State, the name of international organisations and the name of the government departments.
- b) Technical or scientific denominations, plant name varieties, common denominations recommended by the World Health Organization and those indicating therapeutic actions.
- c) The full name, nickname or portrait of a physical person, unless consent is given by him/her or by his/her heirs.
- d) The reproduction or imitation of official signs and hallmarks for control or warranty adopted by a State, or the reproduction or imitation of medals, diplomas or awards granted by domestic or international exhibitions which have not been obtained by the applicant.

- e) Generic marks and expressions or signs indicative of the gender, nature, origin, nationality, destination, weight, value or quality of products, or non-distinctive marks and those used for describing products, services, commercial outlets and industries.
- f) Those that could mislead or deceive in respect of the source, quality or product genre, services or products, including those belonging to various classes whose coverage have a relationship with or indicate a connection with the respective goods, services or facilities.
- g) Marks that graphically or phonetically resemble or are confusingly similar with other registered marks in other countries for the same products or services, as long as they enjoy fame and notoriety in the country of origin, as well as identical or confusingly similar marks to famous Chilean registered trademarks.
- h) Marks confusingly similar with other already registered, applied for or previously used marks in Chile, for the same or related products or services.
- i) The shape or colour of the products or packaging and isolated colours.
- j) Those that could mislead or confuse the consumers with the origin or attributes of a Geographical Indication or Appellation of Origin.
- k) Those contrary to public order, morality or the good commerce practices, including fair competition and business ethics.

### 2.3 What information is needed to register a trade mark?

The following information is needed:

- a) Complete indication of the trademark word or label, and the products/services of the international class/es in which it must be registered.
- b) Full name of the applicant and address.
- c) Power of Attorney.
- d) Priority number and date, if applicable.

### 2.4 What is the general procedure for trade mark registration?

After having filed the application, the Trademark Office issues a preliminary report (approximately 2-3 months from the filing date), either accepting the application for publication or specifying formal objections.

The applicant has 30 working days to answer the formal objections. After this, the application can be declared abandoned or accepted to procedure.

If the application is accepted to procedure, this must be published in the Official Gazette. Oppositions can be filed within 30 working days from the publication date.

If oppositions are filed, the applicant has a 30-working-day term to reply to the same (please note that the Trademark Office notifies the oppositions *ex-officio*).

At this stage, and within the opposition term, the Chilean Trademark Office can raise new observations but based on substantive grounds (relative or absolute).

Once the reply of both the Chilean Trademark Office observation and the opposition has been filed, the file will pass for a final ruling, which, depending on the complexity of the case and the delay at the Trademark Office, can take approximately 8-10 months.

If no oppositions are filed, the docket will pass directly to the Head of the Chilean Trademark Office to be accepted or rejected *ex-officio* based on substantive grounds. A resolution takes approximately 2-3 months.

If the trademark is accepted, fiscal taxes must be paid and the title will be issued within 60 days from the payment of the taxes.

If the application is rejected, an appeal can be filed before the Intellectual Property Court within 15 working days from the rejection date. A final ruling from the Intellectual Property Court (IP Court) takes between 8-10 months, approximately.

If the IP Court confirms the rejection, and if the case so merits, a Cassation Appeal can be filed before the Supreme Court, within 15 working days from the ruling. This can take some 6 months.

Finally, if no objection/oppositions are ruled/filed during the procedure, the same takes about 8 months.

## 2.5 How can a trade mark be adequately graphically represented?

There are no rules for representing word marks. However, for non-electronic device mark filings, the applicant must attach three samples of the device mark in a 7cm x 7cm format, and for sound marks, the pentagram must be represented.

## 2.6 How are goods and services described?

The goods and services can be described according to the general description of the Nice Classification, or with a more specific description, depending on the applicant's interest.

## 2.7 What territories (including dependents, colonies, etc.) are or can be covered by a Chilean trade mark?

Only the Chilean Territory is covered by a Chilean trademark.

## 2.8 Who can own a Chilean trade mark?

Physical persons and entities can own a Chilean trademark.

## 2.9 Can a trade mark acquire distinctive character through use?

Yes, trade marks that, according to its nature, are not eligible to be registered can be registered if they acquire distinctiveness in the national market.

## 2.10 How long on average does registration take?

Registration takes between 5-8 months, if no office actions or oppositions arise.

## 2.11 What is the average cost of obtaining a Chilean trade mark?

The average cost is US\$ 900, considering official fees and attorney fees.

## 2.12 Is there more than one route to obtaining a registration in Chile?

No, the only way is through a formal trademark application filed by the applicant.

## 2.13 Is a Power of Attorney needed?

Yes, it is. This document must be signed by the client's representatives and sent with the original signature without any other formality. However, in order to avoid eventual office actions from the Chilean Trademark Office, as well as using the same document for possible conflicts in the field of domain names ".cl", it is advisable to have the PoA legalised at the nearest Chilean Consulate.

## 2.14 How is priority claimed?

Priority is claimed in the application form and at the moment of filing. The priority document must be filed within 90 working days from the filing date and be translated into Spanish.

## 2.15 Does Chile recognise Collective or Certification marks?

Yes, collective and certification marks are recognised.

## 3 Absolute Grounds for Refusal

### 3.1 What are the absolute grounds for refusal of registration?

The absolute grounds are:

- Signs that do not fit with the trademark legal definition (example: signs not possible to be represented in a graphical way).
- Non-distinctive marks (example: generic signs).
- Descriptive trademarks.
- Official shields, flags or other emblems, designations or acronyms.
- Trademarks offensive to the moral, fair commercial practice and good practice behaviour.
- Misleading trademarks.

### 3.2 What are the ways to overcome an absolute grounds objection?

An absolute grounds objection can be overcome by giving arguments and producing evidence (if any) for the sake of proving to the INAPI that the absolute grounds objections are wrongly invoked and that the filed mark does not meet any of such grounds.

### 3.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

The appeal can be filed within 15 working days from the decision date.

### 3.4 What is the route of appeal?

The appeal is filed at the INAPI, which must send the file to the *Tribunal de Propiedad Industrial*, which is the second instance.

## 4 Relative Grounds for Refusal

### 4.1 What are the relative grounds for refusal of registration?

The relative grounds are:

- a) Marks that graphically or phonetically resemble or are confusingly similar with other registered marks in other countries for the same products or services, as long as they enjoy fame and notoriety in the country of origin, as well as identical or confusingly similar marks to famous Chilean registered trademarks.
- b) Marks confusingly similar with other already registered, applied for or previously used marks in Chile, for the same or related products or services.
- c) Marks that could mislead or confuse the consumers with the origin or attributes of a Geographical Indication or Appellation of Origin.

### 4.2 Are there ways to overcome a relative grounds objection?

A relative grounds objection can be overcome by giving arguments and producing evidence (if any) for the sake of proving to the INAPI that the absolute grounds objections are wrongly invoked and that the filed mark does not meet any of such grounds.

### 4.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

The appeal can be filed within 15 working days from the decision date.

### 4.4 What is the route of appeal?

The appeal is filed at the INAPI, which must send the file to the *Tribunal de Propiedad Industrial*, which is the second instance.

## 5 Opposition

### 5.1 On what grounds can a trade mark be opposed?

The opposition can be based on absolute or relative grounds.

### 5.2 Who can oppose the registration of a Chilean trade mark?

Any physical person or entity that may have an interest can oppose the registration.

### 5.3 What is the procedure for opposition?

If oppositions are filed within 30 working days from the publication of the application, this opposition is served on the applicant who

then has a 30-working-day term to reply to the same. Once the reply has been filed, and if there are conflicting matters of fact, a probationary period of 30 working days is open for filing evidence.

Once the probationary period has ended, the file will pass to the National Director of the INAPI for a final ruling, which, depending on the complexity of the case and the delay at the Trademark Office, can take 8-10 months.

## 6 Registration

### 6.1 What happens when a trade mark is granted registration?

The registration grants the owner the right to exclusiveness upon the mark.

### 6.2 From which date following application do an applicant's trade mark rights commence?

An applicant's rights commence when the Chilean Trademark Office recognises the payment of the final official fee.

### 6.3 What is the term of a trade mark?

The term of a trademark is 10 years.

### 6.4 How is a trade mark renewed?

A trademark is renewed through a formal application filed before the elapsing date of the registration or, after this, within 30 working days provided as a grace period.

## 7 Registrable Transactions

### 7.1 Can an individual register the assignment of a trade mark?

Registrations can be assigned with a simple written document, without any formalities other than containing the original signatures in the document which is to be filed to the Chilean Trademark Office. Regarding the requirements of the assignment, our system applies the principle *locus regit actum*.

### 7.2 Are there different types of assignment?

Since the Industrial Property Law does not establish any different type of assignment, this matter is ruled by the common civil and commercial law, which allows the parties to adopt many kinds of assignments.

### 7.3 Can an individual register the licensing of a trade mark?

The owner of a registered or pending trademark may license the mark. This licence can be given in relation to all or some of the goods or services to which said mark applies.

### 7.4 Are there different types of licence?

According to Chilean legislation, licences are a kind of contract not ruled on, so the parties can adopt many kinds of permission of use.

**7.5 Can a trade mark licensee sue for infringement?**

Yes, in general terms. Since the assignee has a legitimate interest in the exclusivity in the use of the mark, it is understood that the licensee can initiate legal actions.

**7.6 Are quality control clauses necessary in a licence?**

Since the content of a licence, or any other contract that contains permission to use a trademark, is a non-regulated matter in our system, the quality control clauses are part of the licence only if the parties so agree.

**7.7 Can an individual register a security interest under a trade mark?**

The rights deriving from an application for the registration of a mark or those conferred by a registered mark may be encumbered in the manner and according to the civil and commercial law. Such encumbrance of rights shall be recorded at the INAPI in order to be enforceable against third parties.

**7.8 Are there different types of security interest?**

Although the Chilean Industrial Law does not provide any distinct type of security interest, the parties can, according with the common legislation, agree on different kinds of security interest.

**8 Revocation****8.1 What are the grounds for revocation of a trade mark?**

There is no revocation procedure in Chile.

**8.2 What is the procedure for revocation of a trade mark?**

See question 8.1.

**8.3 Who can commence revocation proceedings?**

See question 8.1.

**8.4 What grounds of defence can be raised to a revocation action?**

See question 8.1.

**8.5 What is the route of appeal from a decision of revocation?**

See question 8.1.

**9 Invalidity****9.1 What are the grounds for invalidity of a trade mark?**

The grounds are the same as those mentioned in question 2.2.

**9.2 What is the procedure for invalidation of a trade mark?**

Once the demand is served on the trademark registration owner or its agent (if the owner does not have a domicile in Chile) there is a term of 30 working days to reply to the demand.

Once the reply has been filed, there is a probationary period of 30 working days if there are conflicting matters of fact. Once the probationary period has ended, the file will pass to the National Director of the INAPI for a final ruling.

**9.3 Who can commence invalidation proceedings?**

The annulment action commences at the request of any person who has a legal interest therein.

**9.4 What grounds of defence can be raised to an invalidation action?**

The grounds include giving arguments and producing evidence (if any) for the sake of proving to the INAPI that the grounds of the plaintiff are wrongly invoked and that the registered trademark does not meet any of such grounds.

**9.5 What is the route of appeal from a decision of invalidity?**

The appeal is filed at the INAPI, which must send the file to the *Tribunal de Propiedad Industrial*, which is the second instance.

**10 Trade Mark Enforcement****10.1 How and before what tribunals can a trade mark be enforced against an infringer?**

Chilean law provides the following actions for the enforcements of IP rights:

Civil Action, filed with the Ordinary Civil Tribunals.

Criminal Action, filed with the Ordinary Criminal Tribunals.

**10.2 What are the pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?**

There is no pre-trial procedural stage in the Chilean System.

**10.3 Are (i) preliminary and (ii) final injunctions available and if so on what basis in each case?**

Yes, the Chilean system provides preliminary and final injunctions based on the *fumus boni iuris* and *periculum in mora*.

In some cases, the injunction is granted after offering a warranty of seriousness.

**10.4 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?**

Yes, it can.

### 10.5 Are submissions or evidence presented in writing or orally and is there any potential for cross-examination of witnesses?

In civil trials, evidence is presented in writing and witness examination is not allowed.

In criminal trials, all the evidence (including cross-examination of witnesses) is allowed.

### 10.6 Can infringement proceedings be stayed pending resolution of validity in another court or the Intellectual Property Office?

Yes, it is possible in criminal trials, but in civil cases it is an arguable matter.

### 10.7 After what period is a claim for trade mark infringement time-barred?

The time bar for civil actions is 5 years.

The time bar for criminal actions is 5 years.

### 10.8 Are there criminal liabilities for trade mark infringement?

Yes, there are.

### 10.9 If so, who can pursue a criminal prosecution?

The trademark owner or any other that may be considered a victim of the infringement can pursue a criminal prosecution.

### 10.10 What, if any, are the provisions for unauthorised threats of trade mark infringement?

There are no provisions in the Industrial Property Law for unauthorised threats of trademark infringement.

## 11 Defences to Infringement

### 11.1 What grounds of defence can be raised by way of non-infringement to a claim of trade mark infringement?

The grounds include giving arguments and producing evidence (if any) for the sake of proving to the Tribunal that the grounds of the plaintiff are wrongly invoked.

Amongst the arguments used, we can also consider: that the use of the mark is within a situation of parallel importation; that the trademarks are not confusingly similar; that the trademark used is registered in the name of the defendant or that the defendant has a better right for the use; and an annulment action against the registration is pending.

### 11.2 What grounds of defence can be raised in addition to non-infringement?

See question 11.1.

## 12 Relief

### 12.1 What remedies are available for trade mark infringement?

Compensation or indemnification for material damages is always possible to seek in both civil and criminal trials and the effective damage must be calculated.

The amount of the compensation or indemnification must consider the revenue obtained by the defendant based on the price of the infringing products/services or the price of the original ones, whatever is the highest according to the plaintiff's request.

### 12.2 Are costs recoverable from the losing party and if so what proportion of the actual expense can be recovered?

Attorneys' fees and costs of the trial are recoverable from the losing party, if the final ruling provides so.

## 13 Appeal

### 13.1 What is the right of appeal from a first instance judgment and is it only on a point of law?

The right of appeal is possible only in civil trials before the Court of Appeals.

No appeal is allowed in criminal trials. Criminal trials are only subject to invalidity, in which case the trial must be repeated.

### 13.2 In what circumstances can new evidence be added at the appeal stage?

New evidence can be added before the verbal hearing, during the second instance.

## 14 Border Control Measures

### 14.1 What is the mechanism for seizing or preventing the importation of infringing goods or services and if so how quickly are such measures resolved?

Border measures are resolved very fast. The Chilean Customs Office is constantly checking the INAPI's data base and informs the owner's representatives of any suspected infringing goods.

If the owner shows interest, the Custom Office is entitled to retain the goods at the customs port.

For keeping the goods retained at the customs port, the trademark owner shall file an infringement action before a civil or criminal judge to seize such infringing goods and negotiate their destruction.

## 15 Other Related Rights

### 15.1 To what extent are unregistered trade mark rights enforceable in Chile?

Unregistered trademark rights are not enforceable in Chile. Unregistered trademark rights are recognised in a limited way, only for filing oppositions or annulment actions.

**15.2 To what extent does a company name offer protection from use by a third party?**

If the company name is not registered as a trademark, the protection can be obtained in the following cases:

- a) Under the Corporation Law. If the company name belongs to a corporation, then the oldest corporation can force the new corporation to change its name.
- b) Under the Chilean Unfair Competition Law. The victim of unfair competition behaviour can sue the offender in order to stop the unfair competition behaviour.

**15.3 Are there any other rights that confer IP protection, for instance book title and film title rights?**

Chilean Copyright Law has a special provision so that book titles and film titles are protected as part of the general protection of the work.

**16 Domain Names****16.1 Who can own a domain name?**

Any person or entity can own a domain name.

**16.2 How is a domain name registered?**

Domain names are registered through a simple online application at the Nic Chile web page.

**16.3 What protection does a domain name afford *per se*?**

The protection is only for its use as a web page localiser or an Internet mail address.

**17 Current Developments****17.1 What have been the significant developments in relation to trade marks in the last year?**

During the last year, the most significant development in relation with trademarks is the adoption of the Trademark Law Treaty.

**17.2 Are there any significant developments expected in the next year?**

The INAPI is working on a new IP law that might be sent to the congress during this year.

**17.3 Are there any general practice or enforcement trends that have become apparent in Chile over the last year or so?**

No, there are not.

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- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



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