

## CHAPTER SEVENTEEN

### INTELLECTUAL PROPERTY RIGHTS

#### ARTICLE 17.1 : GENERAL PROVISIONS

1. Each Party shall, at a minimum, give effect to this Chapter. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the additional protection and enforcement is not inconsistent with this Agreement.

#### *International Agreements*

2. Each Party affirms that it has ratified or acceded to the following agreements, as revised and amended:

- (a) the *Patent Cooperation Treaty* (1970);
- (b) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
- (c) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
- (d) the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1980);
- (e) the *International Convention for the Protection of New Varieties of Plants* (1991);
- (f) the *Trademark Law Treaty* (1994);
- (g) the *Paris Convention for the Protection of Industrial Property* (1967) (the Paris Convention); and
- (h) the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (the Berne Convention).

3. Further to Article 1.1.2 (General), the Parties affirm their rights and obligations with respect to each other under the TRIPS Agreement.

4. Each Party shall ratify or accede to the *WIPO Copyright Treaty* (1996) and the *WIPO Performances and Phonograms Treaty* (1996) by the date of entry into force of this Agreement, subject to the fulfilment of their necessary internal requirements.

5. Each Party shall make its best efforts to comply with the provisions of the Geneva Act of the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999),

and the *Patent Law Treaty* (2000), subject to the enactment of laws necessary to apply those provisions in its territory.

### *National Treatment*

6. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals<sup>17-1</sup> of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection<sup>17-2</sup> and enjoyment of such intellectual property rights and any benefits derived from such rights. With respect to secondary uses of phonograms by means of analogue communications and free over-the-air radio broadcasting, however, a Party may limit the rights of the performers and producers of the other Party to the rights its persons are accorded in the territory of the other Party.

7. A Party may derogate from paragraph 6 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and
- (b) not applied in a manner that would constitute a disguised restriction on trade.

8. Paragraph 6 does not apply to procedures provided in multilateral agreements concluded under the auspices of World Intellectual Property Organization (WIPO) in relation to the acquisition or maintenance of intellectual property rights.

### *Application of Agreement to Existing Subject Matter*

9. Except as it provides otherwise, including Article 17.4.5, this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement, that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

10. Except as otherwise provided in this Chapter, including Article 17.4.5, a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement has fallen into the public domain in the territory of the Party where the protection is claimed.

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<sup>17-1</sup>For the purposes of Articles 17.1.6, 17.1.7, 17.2.12(b), and 17.6.1, a **national of a Party** also means, in respect of the relevant right, an entity of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in Articles 17.1.2 and 17.1.4, and the TRIPS Agreement

<sup>17-2</sup>For the purposes of this paragraph, **protection** includes matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights, as well as those matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for the purposes of this paragraph, **protection** also includes the prohibition on circumvention of effective technological measures specified in Article 17.4.7 and the rights and obligations concerning rights management information specified in Article 17.4.8.

### *Application of Agreement to Prior Acts*

11. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.

### *Transparency*

12. Further to Article 20.2 (Publication), and with the object of making its protection and enforcement of intellectual property rights as transparent as possible, each Party shall ensure that all laws, regulations, and procedures concerning the protection or enforcement of intellectual property rights shall be in writing and shall be published,<sup>17-3</sup> or where such publication is not practicable, made publicly available, in a national language in such a manner as to enable governments and right holders to become acquainted with them.

### ARTICLE 17.2 : TRADEMARKS, INCLUDING GEOGRAPHICAL INDICATIONS

1. Each Party shall provide that marks<sup>17-4</sup> shall include marks in respect of goods and services, collective marks, and certification marks. Each Party shall also provide that geographical indications are eligible for protection as marks.<sup>17-5</sup>

2. Neither Party may require, as a condition of registration, that marks be visually perceptible, nor may a Party deny registration of a mark solely on the ground that the sign of which it is composed is a sound or a scent.<sup>17-6</sup>

3. Each Party shall ensure that its measures mandating the use of the term customary in common language as the common name for a good or service (“common name”) including, *inter alia*, requirements concerning the relative size, placement, or style of use of the mark in relation to the common name, do not impair the use or effectiveness of marks used in relation to such goods or services.

4. Each Party shall provide that the owner<sup>17-4</sup> of a registered mark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs, including geographical indications, for goods or services that are related to those goods or services in respect of which the owner’s mark is registered, where such

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<sup>17-3</sup>A Party may satisfy the requirement for publication by making the law, regulation, or procedure available to the public on the Internet.

<sup>17-4</sup>For the purposes of this Article, in respect of the law of Australia, **marks** means “trademarks”.

<sup>17-5</sup>A geographical indication shall be capable of constituting a mark to the extent that the geographical indication consists of any sign, or any combination of signs (such as words, including geographic and personal names, as well as letters, numerals, figurative elements and colours, including single colours), capable of identifying a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. For the purposes of this Chapter, **originating** does not have the meaning ascribed to that term in Article 1.2 (General Definitions).

<sup>17-6</sup>A Party may require an adequate description, which can be represented graphically, of the mark.

use would result in a likelihood of confusion. In case of the use of an identical sign, including a geographical indication, for identical goods or services, a likelihood of confusion shall be presumed.

5. Each Party may provide limited exceptions to the rights conferred by a mark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interest of the owner of the mark and of third parties.

6. Article 6bis of the *Paris Convention* shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known mark,<sup>17-7</sup> whether registered or not, provided that use of that mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the mark, and provided that the interests of the owner of the mark are likely to be damaged by such use.

7. Recognising the importance of registration systems for marks that provide rights of presumptive validity, through the conduct of examination as to substance as well as to formalities, and through opposition and cancellation procedures, each Party shall provide a system for the registration of marks, which shall include:

- (a) providing to the applicant a communication in writing, which may be electronic, of the reasons for any refusal to register a mark;
- (b) an opportunity for the applicant to respond to communications from the authorities responsible for registration of marks, to contest an initial refusal, and to appeal judicially any final refusal to register;
- (c) an opportunity for interested parties to oppose the registration of a mark or to seek cancellation of a mark after it has been registered; and
- (d) a requirement that decisions in opposition or cancellation proceedings be reasoned and in writing.

8. Each Party shall provide:

- (a) a system for the electronic application, processing, registration, and maintenance of marks; and
- (b) a publicly available electronic database, including an on-line database, of applications for marks and registrations.

9. Each Party shall provide that initial registration and each renewal of registration of a mark shall be for a term of no less than ten years.

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<sup>17-7</sup> In determining whether a mark is well known, the reputation of the mark need not extend beyond the sector of the public that normally deals with the relevant goods or services.

10. Neither Party may require recordal of licences for marks.
11. Each Party shall endeavour to reduce differences in law and practice between the Parties' respective systems for the protection of marks, including differences that affect the cost to users. In addition, each Party shall endeavour to participate in international trademark harmonisation efforts, including the WIPO fora dealing with reform and development of the international trademark system.
12.
  - (a) Each Party shall provide a system that permits owners to assert rights in marks, and interested parties to challenge rights in marks, through administrative or judicial means, or both.
  - (b) Consistent with sub-paragraph (a), where a Party provides the means to apply for protection or petition for recognition of geographical indications, through a system for the protection of marks or otherwise, it shall accept such applications and petitions without the requirement for intercession by a Party on behalf of its nationals, and shall:
    - (i) process applications or petitions, as relevant, for geographical indications with a minimum of formalities;
    - (ii) make its regulations governing filing of such applications or petitions, as relevant, readily available to the public;
    - (iii) ensure that applications or petitions, as relevant, for geographical indications are published for opposition, and provide procedures for opposing geographical indications that are the subject of applications or petitions. Each Party shall also provide procedures to cancel any registration resulting from an application or a petition;
    - (iv) ensure that measures governing the filing of applications or petitions, as relevant, for geographical indications set out clearly the procedures for these actions. These procedures shall include contact information sufficient for applicants or petitioners, as relevant, to obtain specific procedural guidance regarding the processing of those applications or petitions; and
    - (v) provide that grounds for refusing an application for protection or recognition of a geographical indication include the following:
      - (A) the geographical indication is likely to cause confusion with a mark that is the subject of a good-faith pending application or registration; and

- (B) the geographical indication is likely to cause confusion with a pre-existing mark, the rights to which have been acquired through use in good faith in the territory of the Party.

#### ARTICLE 17.3 : DOMAIN NAMES ON THE INTERNET

1. In order to address trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain (ccTLD) provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy.
2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information for domain-name registrants.

#### ARTICLE 17.4 : COPYRIGHT

1. Each Party shall provide<sup>17-8</sup> that the following have the right to authorise or prohibit<sup>17-9</sup> all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form):
  - (a) authors, in respect of their works;
  - (b) performers, in respect of their performances;<sup>17-10</sup> and
  - (c) producers of phonograms, in respect of their phonograms.<sup>17-11</sup>
2. Each Party shall provide to authors, performers, and producers of phonograms the right to authorise or prohibit the making available to the public of the original and copies<sup>17-12</sup> of their works, performances, and phonograms through sale or other transfer of ownership.<sup>17-13</sup>
3. In order to ensure that no hierarchy is established between rights of authors, on the one hand, and rights of performers and producers of phonograms, on the other hand, each Party shall provide that in cases where authorisation is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorisation of the author does not cease to exist because the authorisation of the performer or

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<sup>17-8</sup>The Parties reaffirm that it is a matter for each Party's law to prescribe that works and phonograms shall not be protected by copyright unless they have been fixed in some material form.

<sup>17-9</sup>For the purposes of Articles 17.4, 17.5, and 17.6, a **right to authorise or prohibit** means an exclusive right.

<sup>17-10</sup>For the purposes of Articles 17.4, 17.5, and 17.6, a **performance** refers to a performance fixed in a phonogram unless otherwise specified.

<sup>17-11</sup>References in this Chapter to **authors, performers and producers of phonograms** include any successors in interest.

<sup>17-12</sup>The expressions **copies** and **original and copies** subject to the right of distribution in this paragraph refer exclusively to fixed copies that can be put into circulation as tangible objects.

<sup>17-13</sup>Nothing in this Agreement shall affect a Party's right to determine the conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of their works, performances, or phonograms with the authorisation of the right holder.

producer is also required. Likewise, each Party shall provide that in cases where authorisation is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorisation of the performer or producer does not cease to exist because the authorisation of the author is also required.

4. Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:
  - (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and
  - (b) on a basis other than the life of a natural person, the term shall be:
    - (i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance, or phonogram; or
    - (ii) failing such authorised publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.
5. Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to the subject matter, rights, and obligations in this Article and Articles 17.5 and 17.6.
6.
  - (a) Each Party shall provide that for copyright, any person acquiring or holding any economic right in a work, performance, or phonogram:
    - (i) may freely and separately transfer that right by contract; and
    - (ii) by virtue of a contract, including contracts of employment underlying the creation of works, performances, and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.
  - (b) Each Party may establish measures to give effect to the measures specified in Article 14<sup>ter</sup> of the Berne Convention.
7.
  - (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:
    - (i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or

- (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
  - (A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
  - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
  - (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

- (b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.
- (c) In implementing sub-paragraph (a), neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing sub-paragraph (a).
- (d) Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.
- (e) Each Party shall confine exceptions to any measures implementing sub-paragraph (a) to the following activities, which shall be applied to relevant measures in accordance with sub-paragraph (f):
  - (i) non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person



engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;

- (ii) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorisation for such activities, to the extent necessary for the sole purpose of identifying and analysing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
- (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing sub-paragraph (a)(ii);
- (iv) non-infringing good faith activities that are authorised by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;
- (v) non-infringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;
- (vi) lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes;
- (vii) access by a non-profit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and
- (viii) non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.

- (f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (e) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:
  - (i) any measures implementing sub-paragraph (a)(i) may be subject to exceptions with respect to each activity set forth in sub-paragraph (e);
  - (ii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions with respect to activities set forth in sub-paragraph (e)(i), (ii), (iii), (iv), and (vi); and
  - (iii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that protect any copyright, may be subject to exceptions with respect to the activities set forth in sub-paragraph (e)(i) and (vi).

8. In order to provide adequate and effective legal remedies to protect rights management information:

- (a) each Party shall provide that any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of any copyright:
  - (i) knowingly removes or alters any rights management information;
  - (ii) distributes or imports for distribution rights management information knowing that the rights management information has been removed or altered without authority; or
  - (iii) distributes to the public, imports for distribution, broadcasts, communicates, or makes available to the public copies of works, performances, or phonograms, knowing that rights management information has been removed or altered without authority,

shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that these criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity;

- (b) each Party shall confine exceptions to measures implementing sub-paragraph (a) to lawfully authorised activities carried out by government employees, agents, or

contractors for the purpose of law enforcement, intelligence, essential security, or similar government purposes;

(c) **rights management information** means:

- (i) electronic information that identifies a work, performance, or phonogram; the author of the work; the performer of the performance; the producer of the phonogram; or the owner of any right in the work, performance, or phonogram; or
- (ii) electronic information about the terms and conditions of the use of the work, performance, or phonogram; or
- (iii) any electronic numbers or codes that represent such information,

when any of these items is attached to a copy of the work, performance, or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram to the public. Nothing in this paragraph shall obligate a Party to require the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection with a communication of the work, performance, or phonogram to the public.

9. Each Party shall provide appropriate laws, orders, regulations, government issued guidelines, or administrative or executive decrees providing that its central government agencies not use infringing computer software and only use computer software as authorised in the relevant licence. These measures shall provide for the regulation of the acquisition and management of software for such government use and may take the form of procedures such as those under which an agency prepares and maintains inventories of software present on the agency's computers and inventories of software licenses.

10. With respect to Articles 17.4, 17.5, and 17.6:

- (a) each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder;
- (b) notwithstanding sub-paragraph (a) and Article 17.6.3(b), neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal;
- (c) unless otherwise specifically provided in this Chapter, nothing in this Article shall be construed as reducing or extending the scope of applicability of the limitations

and exceptions permitted under the agreements referred to in Articles 17.1.2 and 17.1.4 and the TRIPS Agreement.

#### ARTICLE 17.5 : COPYRIGHT WORKS

Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorise or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

#### ARTICLE 17.6 : PERFORMERS AND PRODUCERS OF PHONOGRAMS

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms who are nationals of the other Party and to performances first fixed or phonograms first fixed or first published in the territory of the other Party. A performance or phonogram shall be considered first published in the territory of a Party in which it is published within 30 days of its original publication.<sup>17-14</sup>
2. Each Party shall provide to performers the right to authorise or prohibit:
  - (a) the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance; and
  - (b) the fixation of their unfixed performances.
3.
  - (a) Each Party shall provide to performers and producers of phonograms the right to authorise or prohibit the broadcasting or any communication to the public of their performances or phonograms by wire or wireless means, including the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.
  - (b) Notwithstanding sub-paragraph (a) and Article 17.4.10, the application of this right to traditional free over-the-air (*i.e.*, non-interactive) broadcasting, and exceptions or limitations to this right for such broadcasting activity, shall be a matter of each Party's law.
  - (c) Each Party may adopt limitations to this right in respect of other non-interactive transmissions in accordance with Article 17.4.10, provided that the limitations do not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration.

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<sup>17-14</sup>For the purposes of this Article, **fixation** includes the finalisation of the master tape or its equivalent.

4. Neither Party may subject the enjoyment and exercise of the rights of performers and producers of phonograms provided for in this Chapter to any formality.

5. For the purposes of this Article and Article 17.4, the following definitions apply with respect to performers and producers of phonograms:

- (a) **broadcasting** means the transmission to the public by wireless means or satellite of sounds or sounds and images, or representations thereof, including wireless transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organisation or with its consent; “broadcasting” does not include transmissions over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public;
- (b) **communication to the public** of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of paragraph 3, **communication to the public** includes making the sounds or representations of sounds fixed in a phonogram audible to the public;
- (c) **fixation** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;
- (d) **performers** means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (e) **phonogram** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (f) **producer of a phonogram** means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and
- (g) **publication** of a performance or a phonogram means the offering of copies of the performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.

#### ARTICLE 17.7 : PROTECTION OF ENCRYPTED PROGRAMME-CARRYING SATELLITE SIGNALS

1. Each Party shall make it a criminal offence:

- (a) to manufacture, assemble, modify, import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing or having reason to

know that the device or system is primarily of assistance in decoding an encrypted programme-carrying satellite signal without the authorisation of the lawful distributor of such signal; and

- (b) wilfully to receive and make use of, or further distribute, a programme-carrying signal that originated as an encrypted programme-carrying satellite signal knowing that it has been decoded without the authorisation of the lawful distributor of the signal.

2. Each Party shall provide for civil remedies, including compensatory damages, for any person injured by any activity described in paragraph 1, including any person that holds an interest in the encrypted program-carrying signal or its content.

#### ARTICLE 17.8 : DESIGNS

1. Each Party shall maintain protection for industrial designs that provides a right of presumptive validity and shall endeavour to simplify and streamline its administrative system for the benefit of users.

2. Each Party shall endeavour to reduce differences in law and practice between the Parties' industrial design systems. In addition, each Party shall endeavour to participate in international activities concerning industrial designs, including those ongoing within WIPO.

#### ARTICLE 17.9 : PATENTS

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. The Parties confirm that patents shall be available for any new uses or methods of using a known product. For the purposes of this Article, a Party may treat the terms "inventive step" and "capable of industrial application" as synonymous with the terms "non-obvious" and "useful", respectively.

2. Each Party may only exclude from patentability:

- (a) inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by law; and
- (b) diagnostic, therapeutic, and surgical methods for the treatment of humans and animals.

3. A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the

patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

4. Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory, at least where the patentee has placed restrictions on importation by contract or other means.

5. Each Party shall provide that a patent may only be revoked on grounds that would have justified a refusal to grant the patent, or on the basis of fraud, misrepresentation, or inequitable conduct.

6. Consistent with paragraph 3, if a Party permits a third person to use the subject matter of a subsisting patent to generate information necessary to support an application for marketing approval of a pharmaceutical product, that Party shall provide that any product produced under such authority shall not be made, used, or sold in the territory of that Party other than for purposes related to generating information to meet requirements for marketing approval for the product, and if the Party permits exportation, the product shall only be exported outside the territory of that Party for purposes of meeting marketing approval requirements of that Party.

7. A Party shall not permit the use<sup>17-15</sup> of the subject matter of a patent without the authorisation of the right holder except in the following circumstances:

- (a) to remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's laws relating to prevention of anti-competitive practices;<sup>17-16</sup> or
- (b) in cases of public non-commercial use, or of national emergency, or other circumstances of extreme urgency, provided that:
  - (i) the Party shall limit such use to use by the government or third persons authorised by the government;
  - (ii) the Party shall ensure that the patent owner is provided with reasonable compensation for such use; and
  - (iii) the Party may not require the patent owner to provide undisclosed information or technical know-how related to a patented invention that has been authorised for use in accordance with this paragraph.

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<sup>17-15</sup>“Use” in this paragraph refers to use other than that allowed under paragraph 3 and Article 30 of the TRIPS Agreement.

<sup>17-16</sup>With respect to sub-paragraph (a), the Parties recognize that a patent does not necessarily confer market power.

8. (a) If there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of a patent owner, shall, adjust the term of the patent to compensate for such delays. An unreasonable delay shall at least include a delay in the issuance of a patent of more than four years from the date of filing of the application in the Party, or two years after a request for examination of the application has been made, whichever is later. For the purposes of this paragraph, any delays that occur in the issuance of a patent due to periods attributable to actions of the patent applicant or any opposing third person need not be included in the determination of such delay.
- (b) With respect to a pharmaceutical product<sup>17-17</sup> that is subject to a patent, each Party shall make available an adjustment of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process.
9. Each Party shall disregard information contained in public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure, (a) was made or authorised by, or derived from, the patent applicant and (b) occurs within 12 months prior to the date of filing of the application in the territory of the Party.
10. Each Party shall provide patent applicants with at least one opportunity to make amendments, corrections, and observations in connection with their applications.
11. Each Party shall provide that a disclosure of a claimed invention shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date.
12. Each Party shall provide that a claimed invention is sufficiently supported by its disclosure if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention, as of the filing date.
13. Each Party shall provide that a claimed invention is useful if it has a specific, substantial, and credible utility.
14. Each Party shall endeavour to reduce differences in law and practice between their respective systems, including in respect of differences in determining the rights to an invention, the prior art effect of applications for patents, and the division of an application containing multiple inventions. In addition, each Party shall endeavour to participate in international patent harmonisation efforts, including the WIPO fora addressing reform and development of the international patent system.

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<sup>17-17</sup>For Australia, the term pharmaceutical substance as used in Section 70 of the Patents Act 1990 on the date of entry into force of this Agreement may be treated as synonymous with the term **pharmaceutical product** as used in this sub-paragraph.



15. Each Party shall endeavour to establish a cooperative framework between their respective patent offices as a basis for progress towards the mutual exploitation of search and examination work.

#### ARTICLE 17.10 : MEASURES RELATED TO CERTAIN REGULATED PRODUCTS

1. (a) If a Party requires, as a condition of approving the marketing of a new pharmaceutical product, the submission of undisclosed test or other data concerning safety or efficacy of the product, the Party shall not permit third persons, without the consent of the person who provided the information, to market the same or a similar product on the basis of that information, or the marketing approval granted to the person who submitted such information, for at least five years from the date of marketing approval by the Party.
- (b) If a Party requires, as a condition of approving the marketing of a new agricultural chemical product, including certain new uses of the same product, the submission of undisclosed test or other data concerning safety or efficacy of that product, the Party shall not permit third persons, without the consent of the person who provided the information, to market the same or a similar product on the basis of that information, or the marketing approval granted to the person who submitted such information, for ten years from the date of the marketing approval of the new agricultural chemical product by the Party.
- (c) If a Party permits, as a condition of approving the marketing of a new pharmaceutical or agricultural chemical product, third persons to submit evidence concerning the safety or efficacy of a product that was previously approved in another territory, such as evidence of prior marketing approval, the Party shall not permit third persons, without the consent of the person who previously submitted information concerning safety or efficacy, to market the same or a similar product on the basis of evidence of prior marketing approval in another territory, or information concerning safety or efficacy that was previously submitted to obtain marketing approval in another territory, for at least five years, and ten years for agricultural chemical products, from the date of marketing approval by the Party, or the other territory, whichever is late.<sup>17-18</sup>
- (d) For the purposes of this Article, a **new product** is one that does not contain a chemical entity that has been previously approved for marketing in the Party.
- (e) If any undisclosed information concerning the safety or efficacy of a product submitted to a government entity, or entity acting on behalf of a government, for

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<sup>17-18</sup>The Parties acknowledge that, at the time of entry into force of this Agreement, neither Party permits third persons, not having the consent of the person that previously submitted information concerning the safety and efficacy of a product in order to obtain marketing approval in another territory, to market a same or similar product in the territory of the Party on the basis of such information or evidence of prior marketing approval in another territory.

the purposes of obtaining marketing approval is disclosed by a government entity, or entity acting on behalf of a government, each Party is required to protect such information from unfair commercial use in the manner set forth in this Article.

2. With respect to pharmaceutical products, if a Party requires the submission of: (a) new clinical information (other than information related to bioequivalency) or (b) evidence of prior approval of the product in another territory that requires such new information, which is essential to the approval of a pharmaceutical product, the Party shall not permit third persons not having the consent of the person providing the information to market the same or a similar pharmaceutical product on the basis of the marketing approval granted to a person submitting the information for a period of at least three years from the date of the marketing approval by the Party or the other territory, whichever is later.<sup>17-19</sup>

3. When a product is subject to a system of marketing approval in accordance with paragraph 1 or 2, as applicable, and is also subject to a patent in the territory of that Party, the Party shall not alter the term of protection that it provides pursuant to paragraph 1 or 2 in the event that the patent protection terminates on a date earlier than the end of the term of protection specified in paragraph 1 or 2, as applicable.

4. Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting the safety or efficacy information, to rely on evidence or information concerning the safety or efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory:

(a) that Party shall provide measures in its marketing approval process to prevent those other persons from:

- (i) marketing a product, where that product is claimed in a patent; or
- (ii) marketing a product for an approved use, where that approved use is claimed in a patent,

during the term of that patent, unless by consent or acquiescence of the patent owner; and

(b) if the Party permits a third person to request marketing approval to enter the market with:

- (i) a product during the term of a patent identified as claiming the product; or

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<sup>17-19</sup>As an alternative to this paragraph, where a Party, on the date of entry into force of this Agreement, has in place a system for protecting information submitted in connection with the approval of a pharmaceutical product that utilizes a previously approved chemical component from unfair commercial use, the Party may retain that system, notwithstanding the obligations of this paragraph.

- (ii) a product for an approved use, during the term of a patent identified as claiming that approved use,

the Party shall provide for the patent owner to be notified of such request and the identity of any such other person.

#### ARTICLE 17.11 : ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

##### *General obligations*

1. For greater clarity, the obligations specified in this Article are limited to the enforcement of intellectual property rights, or, if mentioned, a particular intellectual property right.
2. Each Party shall provide that final judicial decisions or administrative rulings for the enforcement of intellectual property rights that under the Party's law are of general applicability shall be in writing and shall state any relevant findings of fact and the reasoning, or the legal basis on which the decisions or rulings are based. Each Party shall provide that such decisions or rulings shall be published<sup>17-20</sup> or, where such publication is not practicable, otherwise made available to the public, in a national language in such a manner as to enable governments and right holders to become acquainted with them.
3. Each Party shall inform the public of its efforts to provide effective enforcement of intellectual property rights in its civil, administrative, and criminal system, including any statistical information that the Party may collect for such purpose.
4. In civil, criminal, and if applicable, administrative procedures, involving copyright, each Party shall provide for a presumption that, in the absence of evidence to the contrary, the person whose name is indicated in the usual manner is the right holder in the work, performance, or phonogram as designated. Each Party shall also provide for a presumption, in the absence of evidence to the contrary, of all the factual elements necessary to establish under its law that copyright subsists in such subject matter.

##### *Civil and Administrative Procedures and Remedies*

5. Each Party shall make available to right holders<sup>17-21</sup> civil judicial procedures concerning the enforcement of any intellectual property right.

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<sup>17-20</sup>A Party may satisfy the requirement for publication by making the measure available to the public on the Internet.

<sup>17-21</sup>For the purpose of this Article, the term **right holder** shall include exclusive licensees as well as federations and associations having the legal standing and authority to assert such rights; the term **exclusive licensee** shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

6. Each Party shall provide that:
- (a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer to pay the right holder:
    - (i) damages adequate to compensate for the injury the right holder has suffered as a result of the infringement; and
    - (ii) at least in the case of copyright infringement and trademark counterfeiting, the profits of the infringer that are attributable to the infringement and that are not taken into account in computing the amount of the damages referred to in clause (i).
  - (b) in determining damages for infringement of intellectual property rights, its judicial authorities shall consider, *inter alia*, any legitimate measure of the value of the infringed on good or service that the right holder submits, including the suggested retail price.
7. (a) In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright, and in cases of trademark counterfeiting, establish or maintain pre-established damages, which shall be available on the election of the right holder. Such pre-established damages shall be in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.
- (b) As an alternative to the requirements in sub-paragraph (a) with respect to both copyright and to trademark counterfeiting, a Party may maintain a system of additional damages in civil judicial proceedings involving infringement of copyright in works, phonograms, and performances; provided that if such additional damages, while available, are not regularly awarded in proceedings involving deliberate acts of infringement where needed to deter infringement, that Party shall promptly ensure that such damages are regularly awarded or establish a system of pre-established damages as specified in sub-paragraph (a) with respect to copyright infringement.
8. Each Party shall provide that its judicial authorities shall have the authority to order, at the conclusion of civil judicial proceedings at least for copyright infringement and trademark counterfeiting, that the prevailing party be awarded payment of court costs or fees and reasonable attorney's fees by the losing party.<sup>17-22</sup> Further, each Party shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party be awarded payment of reasonable attorney's fees by the losing party.

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<sup>17-22</sup> A Party may limit this authority in exceptional circumstances.

9. In civil judicial proceedings concerning copyright infringement and trademark counterfeiting, each Party shall provide that its judicial authorities shall have the authority to order the seizure of suspected infringing goods, any related materials and implements, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

10. Each Party shall provide that:

- (a) in civil judicial proceedings, at the right holder's request, goods that have been found to be pirated or counterfeit in breach of a copyright or trademark of the right holder shall be destroyed, except in exceptional circumstances;<sup>17-23</sup>
- (b) its judicial authorities shall have the authority to order that materials and implements that have been used in the manufacture or the creation of such pirated or counterfeit goods be, without compensation of any sort, promptly destroyed or, in exceptional circumstances, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimise the risks of further infringements; and
- (c) in regard to counterfeit trademarked goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.

11. Each Party shall provide that in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to order the infringer to provide any information that the infringer possesses regarding any person involved in any aspect of the infringement and regarding the means of production or distribution channel of the infringing material, and to provide this information to the right holder's representative in the proceedings.<sup>17-24</sup>

12. Each Party shall provide that in judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to:

- (a) fine or imprison, in appropriate cases, a party to litigation who fails to abide by valid orders issued by such authorities; and
- (b) impose sanctions on parties to litigation, their counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders regarding the protection of confidential information produced or exchanged in a proceeding.

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<sup>17-23</sup>A Party may give effect to paragraph 10(a) through, *inter alia*, the exercise of judicial discretion or pursuant to specific causes of action, as applicable.

<sup>17-24</sup>For greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege.

13. (a) In civil judicial proceedings concerning the acts described in Article 17.4.7 and 17.4.8, each Party shall provide that its judicial authorities shall have the authority to order or award at least:
- (i) provisional measures, including the seizure of devices and products suspected of being involved in the proscribed activity;
  - (ii) damages of the type available for infringement of copyright;
  - (iii) payment to the prevailing party of court costs and fees and reasonable attorney's fees;<sup>17-25</sup> and
  - (iv) destruction of devices and products found to be involved in the proscribed activity.
- (b) A Party may provide that damages shall not be available against a non-profit library, archive, education institution, or public non-commercial broadcasting entity that sustains the burden of proving that it was not aware or had no reason to believe that its acts constituted a proscribed activity.

14. Each Party shall provide that its judicial authorities shall have the authority to enjoin a party to a civil judicial proceeding from the exportation of goods that are alleged to infringe an intellectual property right.

15. If a Party's judicial or other authorities appoint technical or other experts in civil judicial proceedings concerning the enforcement of intellectual property rights, and require that the parties to litigation or other civil or criminal proceedings bear the costs of such experts, the Party should seek to ensure that these costs are reasonable and related appropriately to, *inter alia*, the quantity and nature of work to be performed and do not unreasonably deter recourse to such litigation or proceeding.

#### *Provisional measures*

16. Each Party's authorities shall act on requests for relief *inaudita altera parte* expeditiously in accordance with the Party's judicial rules.

17. With respect to provisional measures, each Party shall provide that its judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a reasonable security or equivalent assurance set at a level sufficient to protect the respondent and to prevent abuse, and so as not to unreasonably deter recourse to such procedures.

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<sup>17-25</sup> Reasonable attorney's fees may include those levied pursuant to relevant court fee schedules.

18. In proceedings concerning the grant of provisional measures in relation to enforcement of a patent, each Party shall provide for a rebuttable presumption that the patent is valid.

*Special requirements related to border measures*

19. Each Party shall provide that any right holder initiating procedures for that Party's customs authorities to suspend the release of suspected counterfeit<sup>17-26</sup> or confusingly similar trademark goods, or pirated copyright goods,<sup>17-27</sup> into free circulation is required to provide adequate evidence to satisfy the competent authorities, administrative or judicial that, under the laws of the territory of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods reasonably recognisable by the Party's customs authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to these procedures. Each Party shall provide that the application to suspend the release of goods shall remain in force for a period of not less than one year from the date of application or the period that the good is protected by copyright or the relevant trademark is registered, whichever is shorter.

20. Each Party shall provide that its competent authorities shall have the authority to require a right holder initiating procedures to suspend the release of goods suspected of being counterfeit trademark or pirated copyright goods to provide

a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. Each Party may provide that such security may be in the form of a documentary guarantee conditioned to hold the importer or owner of the imported merchandise harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good.

21. Where its competent authorities have made a determination that goods are counterfeit or pirated, a Party shall provide that its competent authorities have the authority to inform the right holder of the names and addresses of the consignor, the importer, and the consignee, and of the quantity of the goods in question.

22. Each Party shall provide that its customs authorities may initiate border measures *ex officio* with respect to imported merchandise suspected of infringing being counterfeit trademark or pirated copyright goods, without the need for a specific formal complaint.

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<sup>17-26</sup>For the purposes of paragraphs 19 through 24, **counterfeit trademark goods** means any goods, including packaging, bearing without authorisation a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.

<sup>17-27</sup>For the purposes of paragraphs 19 through 24, **pirated copyright goods** means any goods that are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

23. Each Party shall provide that goods that have been suspended from release by its customs authorities, and that have been forfeited as pirated or counterfeit, shall be destroyed, except in exceptional cases. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorised to permit the exportation of counterfeit or pirated goods that have been seized, nor shall they be authorised to permit such goods to be subject to movement under customs control, except in exceptional circumstances.

24. Each Party shall provide that where an application fee or merchandise storage fee is assessed in connection with border measures to enforce a trademark or copyright, the fee shall not be set at an amount that unreasonably deters recourse to these measures.

25. Each shall provide the other, on mutually agreed terms, with technical advice on the enforcement of border measures concerning intellectual property rights, and the Parties shall promote bilateral and regional cooperation on such matters.

#### *Criminal procedures and remedies*

26. (a) Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Wilful copyright piracy on a commercial scale includes:

- (i) significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain; and
- (ii) wilful infringements for the purposes of commercial advantage or financial gain.

(b) Each Party shall treat wilful importation or exportation<sup>17-28</sup> of pirated copyright goods or of counterfeit trademark goods as unlawful activities subject to criminal penalties to at least the same extent as trafficking or distributing such goods in domestic commerce.

27. In cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, each Party shall provide:

- (a) penalties that include imprisonment and monetary fines sufficiently high to provide a deterrent to infringement consistent with a policy of removing the monetary incentive of the infringer. Also, each Party shall encourage its judicial authorities to impose fines at levels sufficient to provide a deterrent to future infringements;

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<sup>17-28</sup> A Party may comply with paragraph 26(b) in relation to exportation through its measures concerning distribution or trafficking.



- (b) that its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offence, any assets traceable to the infringing activity, and any documentary evidence relevant to the offence;<sup>17-29</sup>
- (c) that its judicial authorities shall have the authority, among other measures, to order the forfeiture of any assets traceable to the infringing activity for at least indictable offences, and shall, except in exceptional circumstances, order the forfeiture and destruction of all goods found to be counterfeit or pirated, and, at least with respect to wilful copyright piracy, order the forfeiture and destruction of materials and implements that have been used in the creation of the infringing goods. Each Party shall further provide that such forfeiture and destruction shall occur without compensation to the defendant; and
- (d) that the appropriate authorities, as determined by each Party, shall have the authority to initiate criminal legal action *ex officio* with respect to the offences described in this Chapter without the need for a formal complaint by a private party or right holder.

28. Each Party shall provide for criminal procedures and penalties for the knowing transport, transfer, or other disposition of, in the course of trade, or the making or obtaining control of, with intent to so transport, transfer, or otherwise dispose of, in the course of trade, to another for anything of value:

- (a) either false or counterfeit labels affixed or designed to be affixed to, at least the following:
  - (i) a phonogram;
  - (ii) a copy of a computer program or documentation;
  - (iii) the packaging for a computer program; or
  - (iv) a copy of a motion picture or other audiovisual work; or
- (b) counterfeit documentation or packaging for a computer program where the documentation or packaging has been made or obtained without the authorisation of the right holder.

*Limitations on liability for service providers*

29. Consistent with Article 41 of the TRIPS Agreement, for the purposes of providing enforcement procedures that permit effective action against any act of copyright infringement

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<sup>17-29</sup>Each Party shall provide that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order.

covered under this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies, each Party shall provide, consistent with the framework specified in this Article:

- (a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials; and
- (b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this sub-paragraph.<sup>17-30</sup>
  - (i) These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions, and shall be confined to those functions:<sup>17-31</sup>
    - (A) transmitting, routing, or providing connections for material without modification of its content, or the intermediate and transient storage of such material in the course thereof;
    - (B) caching carried out through an automatic process;
    - (C) storage at the direction of a user of material residing on a system or network controlled or operated by or for the service provider; and
    - (D) referring or linking users to an online location by using information location tools, including hyperlinks and directories.
  - (ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).
  - (iii) Qualification by a service provider for the limitations as to each function in clause (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv) through (vii).
  - (iv) With respect to function referred to in clause (i)(B), the limitations shall be conditioned on the service provider:

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<sup>17-30</sup>Paragraph 29(b) is without prejudice to the availability of defences to copyright infringement that are of general applicability.

<sup>17-31</sup>Either Party may request consultations with the other Party to consider how to address under this paragraph functions of a similar nature to the functions identified in paragraphs (A) through (D) above that a Party identifies after the entry into force of this Agreement.

- (A) permitting access to cached material in significant part only to users of its system or network who have met conditions on user access to that material;
  - (B) complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the person making the material available online in accordance with a relevant industry standard data communications protocol for the system or network through which that person makes the material available that is generally accepted in the Party's territory;
  - (C) not interfering with technology used at the originating site consistent with industry standards generally accepted in the Party's territory to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and
  - (D) expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.
- (v) With respect to functions referred to in clause (i)(C) and (D), the limitations shall be conditioned on the service provider:
- (A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;
  - (B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement in accordance with clause (ix); and
  - (C) publicly designating a representative to receive such notifications.
- (vi) Eligibility for the limitations in this sub-paragraph shall be conditioned on the service provider:
- (A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and
  - (B) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify

copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and non-discriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.

- (vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity, except to the extent consistent with such technical measures.
- (viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic online location. If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary provided that such other remedies are the least burdensome to the service provider among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy, and whether less burdensome, comparably effective enforcement methods are available. Except for orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network, each Party shall provide that such relief shall be available only where the service provider has received notice and an opportunity to appear before the judicial authority.
- (ix) For the purposes of the notice and take down process for the functions referred to in clause (i)(C) and (D), each Party shall establish appropriate procedures for effective notifications of claimed infringement, and effective counter-notifications by those whose material is the subject of a notice for removal or disabling, on the basis of a good faith belief that it was issued by mistake or misidentification in accordance with clause (v)(B). Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.

- (x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the person making the material available on its system or network that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless the person giving the original effective notification seeks judicial relief within a reasonable time.
- (xi) Each Party shall provide for an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.
- (xii) For the purposes of the function referred to in clause (i)(A), **service provider** means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for the purposes of the functions referred to in clause (i)(B) through (D), **service provider** means a provider or operator of facilities for online services or network access.

#### ARTICLE 17.12 : TRANSITIONAL PROVISIONS

Recognizing that Australian law currently restricts making and distributing devices or providing services to circumvent effective technological measures, Australia shall fully implement the obligations set forth in Article 17.4.7 within two years of the date of entry into force of this Agreement. In the interim, Australia may not adopt any new measure that is less consistent with Article 17.4.7 or apply any new or existing measure so as to reduce the level of protection provided on the date of entry into force of this Agreement.