

## Chapter Seventeen

### Intellectual Property Rights

*The Parties,*

*Desiring* to reduce distortions and impediments to trade between the Parties;

*Desiring* to enhance the intellectual property systems of the two Parties to account for the latest technological developments and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

*Desiring* to promote greater efficiency and transparency in the administration of intellectual property systems of the Parties;

*Desiring* to build on the foundations established in existing international agreements in the field of intellectual property, including the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) and affirming the rights and obligations set forth in the TRIPS Agreement;

*Recognizing* the principles set out in the Declaration on the TRIPS Agreement on Public Health, adopted on November 14, 2001, by the WTO at the Fourth WTO Ministerial Conference, held in Doha, Qatar;

*Emphasizing* that the protection and enforcement of intellectual property rights is a fundamental principle of this Chapter that helps promote technological innovation as well as the transfer and dissemination of technology to the mutual advantage of technology producers and users, and that encourages the development of social and economic well-being;

*Convinced* of the importance of efforts to encourage private and public investment for research, development, and innovation;

*Recognizing* that the business community of each Party should be encouraged to participate in programs and initiatives for research, development, innovation, and the transfer of technology implemented by the other Party;

*Recognizing* the need to achieve a balance between the rights of right holders and the legitimate interests of users and the community with regard to protected works;

*Agree* as follows:

## Article 17.1: General Provisions

1. Each Party shall give effect to the provisions of this Chapter and may, but shall not be obliged to, implement in its domestic law more extensive protection than is required by this Chapter, provided that such protection does not contravene the provisions of this Chapter.
2. Before January 1, 2007, each Party shall ratify or accede to the *Patent Cooperation Treaty* (1984).
3. Before January 1, 2009, each Party shall ratify or accede to:
  - (a) the *International Convention for the Protection of New Varieties of Plants* (1991);
  - (b) the *Trademark Law Treaty* (1994); and
  - (c) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974).
4. Each Party shall undertake reasonable efforts to ratify or accede to the following agreements in a manner consistent with its domestic law:
  - (a) the *Patent Law Treaty* (2000);
  - (b) the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999); and
  - (c) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989).
5. Nothing in this Chapter concerning intellectual property rights shall derogate from the obligations and rights of one Party with respect to the other by virtue of the TRIPS Agreement or multilateral intellectual property agreements concluded or administered under the auspices of the World Intellectual Property Organization (WIPO).
6. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to persons of the other Party treatment no less favorable than it accords to its own persons with regard to the protection<sup>1</sup> and enjoyment of such intellectual property rights

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<sup>1</sup> For purposes of paragraphs 6 and 7, “protection” shall include matters affecting the availability, acquisition,

and any benefits derived from such rights. With respect to secondary uses of phonograms by means of analog 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 within the jurisdiction of the other Party.

7. Each Party may derogate from paragraph 6 in relation to its judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of that Party, only where such derogations are necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Chapter and where such practices are not applied in a manner that would constitute a disguised restriction on trade.

8. Paragraphs 6 and 7 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

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

10. Except as otherwise provided for in this Chapter, this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement, and which is protected by a Party on that date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Chapter. In respect of paragraphs 10 and 11, copyright and related rights obligations with respect to existing works and phonograms shall be determined solely under Article 17.7(7).

11. Neither Party shall be obligated to restore protection to subject matter which on the date of entry into force of this Chapter has fallen into the public domain in that Party.

12. Each Party shall ensure that all laws, regulations, and procedures concerning the protection or enforcement of intellectual property rights, and all final judicial decisions and administrative rulings of general applicability pertaining to the enforcement of such rights, shall be in writing and shall be published,<sup>2</sup> or where such publication is not practicable, made publicly available, in a national language in such a manner as to enable the other Party

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scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. For purposes of paragraphs 6 and 7, “protection” shall also include the prohibition on circumvention of effective technological measures pursuant to Article 17.7(5) and the provisions concerning rights management information pursuant to Article 17.7(6).

<sup>2</sup> The requirement for publication is satisfied by making the written document available to the public via the Internet.

and right holders to become acquainted with them, with the object of making the protection and enforcement of intellectual property rights transparent. Nothing in this paragraph shall require a Party to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

13. Nothing in this Chapter prevents a Party from adopting measures necessary to prevent anticompetitive practices that may result from the abuse of the intellectual property rights set forth in this Chapter.

14. For the purposes of strengthening the development and protection of intellectual property, and implementing the obligations of this Chapter, the Parties will cooperate, on mutually agreed terms and subject to the availability of appropriated funds, by means of:

- (a) educational and dissemination projects on the use of intellectual property as a research and innovation tool, as well as on the enforcement of intellectual property;
- (b) appropriate coordination, training, specialization courses, and exchange of information between the intellectual property offices and other institutions of the Parties; and
- (c) enhancing the knowledge, development, and implementation of the electronic systems used for the management of intellectual property.

#### **Article 17.2: Trademarks**

1. Each Party shall provide that trademarks shall include collective, certification, and sound marks, and may include geographical indications<sup>3</sup> and scent marks. Neither Party is obligated to treat certification marks as a separate category in its domestic law, provided that the signs as such are protected.

2. Each Party shall afford an opportunity for interested parties to oppose the application for a trademark.

3. Pursuant to Article 20 of the TRIPS Agreement, each Party shall ensure that any measures mandating the use of the term customary in common language as the common

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<sup>3</sup> A geographical indication is capable of constituting a trademark to the extent that the geographical indication consists of any sign, or any combination of signs, capable of identifying a good or service 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 or service is essentially attributable to its geographical origin.

name for a good (“common name”) including, *inter alia*, requirements concerning the relative size, placement, or style of use of the trademark in relation to the common name, do not impair the use or effectiveness of trademarks used in relation to such good.

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

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

6. Article 6bis of the *Paris Convention for the Protection of Industrial Property* (1967) (Paris Convention) shall apply, *mutatis mutandis*, to goods or services which are not similar to those identified by a well-known trademark, whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark and provided that the interests of the owner of the trademark are likely to be damaged by such use.

7. Each Party shall, according to its domestic law, provide for appropriate measures to prohibit or cancel the registration of a trademark identical or similar to a well-known trademark, if the use of that trademark by the registration applicant is likely to cause confusion, or to cause mistake, or to deceive or risk associating the trademark with the owner of the well-known trademark, or constitutes unfair exploitation of the reputation of the trademark. Such measures to prohibit or cancel registration shall not apply when the registration applicant is the owner of the well-known trademark.

8. In determining whether a trademark is well-known, a Party shall not require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

9. Each Party recognizes the importance of the *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (1999), adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO and shall be guided by the principles contained in this Recommendation.

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<sup>4</sup> It is understood that likelihood of confusion is to be determined under the domestic trademark law of each Party.

10. Each Party shall provide a system for the registration of trademarks, 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 trademark;
- (b) providing to the applicant an opportunity to respond to communications from the trademark authorities, contest an initial refusal, and appeal judicially any final refusal to register; and
- (c) a requirement that decisions in opposition or cancellation proceedings be reasoned and in writing.

11. Each Party shall work to provide, to the maximum degree practical, a system for the electronic application, processing, registration, and maintenance of trademarks.

12. In relation to trademarks, Parties are encouraged to classify goods and services according to the classification of the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (1979). In addition, each Party shall provide that:

- (a) each registration or publication which concerns a trademark application or registration and which indicates the relevant goods or services shall indicate the goods or services by their names; and
- (b) goods or services may not be considered as being similar to each other simply on the ground that, in any registration or publication, they appear in the same class of any classification system, including the Nice Classification. Conversely, goods or services may not be considered as being dissimilar from each other simply on the ground that, in any registration or publication, they appear in different classes of any classification system, including the Nice Classification.

### **Article 17.3: Domain Names on the Internet**

1. 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* (UDRP), in order to address the problem of trademark cyber-piracy.

2. Each Party shall, in addition, require that the management of its respective ccTLD provide online public access to a reliable and accurate database of contact information for

domain-name registrants, in accordance with each Party's law regarding protection of personal data.

**Article 17.4: Geographical Indications<sup>5</sup>**

1. Geographical indications, for the purposes of this Article, are indications which identify 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. Any sign or combination of signs (such as words, including geographical and personal names, letters, numerals, figurative elements, and colors), in any form whatsoever, shall be eligible for protection or recognition as a geographical indication.

2. Chile shall:

- (a) provide the legal means to identify and protect geographical indications of United States persons that meet the criteria in paragraph 1; and
- (b) provide to United States geographical indications of wines and spirits the same recognition as Chile accords to wines and spirits under the Chilean geographical indications registration system.

3. The United States shall:

- (a) provide the legal means to identify and protect the geographical indications of Chile that meet the criteria in paragraph 1; and
- (b) provide to Chilean geographical indications of wines and spirits the same recognition as the United States accords to wines and spirits under the Certificate of Label Approval (COLA) system as administered by the Alcohol and Tobacco Tax and Trade Bureau, Department of Treasury (TTB), or any successor agencies. Names that Chile desires to be included in the regulation set forth in 27 CFR Part 12 (Foreign Nongeneric), or any successor to that regulation, will be governed by paragraph 4 of this Article.

4. Each Party shall provide the means for persons of the other Party to apply for protection or petition for recognition of geographical indications. Each Party shall accept applications or petitions, as the case may be, without the requirement for intercession by a Party on behalf of its persons.

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<sup>5</sup> For the purposes of this Article, persons of a Party shall also mean government agencies.

5. Each Party shall process applications or petitions, as the case may be, for geographical indications with a minimum of formalities.
6. Each Party shall make the regulations governing filing of such applications or petitions, as the case may be, available to the public in both printed and electronic form.
7. Each Party shall ensure that applications or petitions, as the case may be, for geographical indications are published for opposition, and shall provide procedures to effect opposition of 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.
8. Each Party shall ensure that measures governing the filing of applications or petitions, as the case may be, for geographical indications set out clearly the procedures for these actions. Such procedures shall include contact information sufficient for applicants or petitioners to obtain specific procedural guidance regarding the processing of applications or petitions.
9. The Parties acknowledge the principle of exclusivity incorporated in the Paris Convention and TRIPS Agreement, with respect to rights in trademarks.
10. After the date of entry into force of this Agreement, each Party shall ensure that grounds for refusing protection or registration of a geographical indication include the following:
  - (a) the geographical indication is confusingly similar to a pre-existing pending good faith application for a trademark or a pre-existing trademark registered in that Party; or
  - (b) the geographical indication is confusingly similar to a pre-existing trademark, the rights to which have been acquired through use in good faith in that Party.
11. Within six months of the entry into force of this Agreement, each Party shall communicate to the public the means by which it intends to implement paragraphs 2 through 10.

## Article 17.5: Copyright<sup>6</sup>

1. Each Party shall provide that authors<sup>7</sup> of literary and artistic works have the right<sup>8</sup> to authorize or prohibit all reproductions of their works, in any manner or form, permanent or temporary (including temporary storage in electronic form).
2. Without prejudice to the provisions of 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 for the Protection of Literary and Artistic Works* (1971) (Berne Convention), each Party shall provide to authors of literary and artistic works the right to authorize 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.<sup>9</sup>
3. Each Party shall provide to authors of literary and artistic works the right to authorize the making available to the public of the original and copies<sup>10</sup> of their works through sale or other transfer of ownership.
4. Each Party shall provide that where the term of protection of a work (including a photographic work) is 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

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<sup>6</sup> Except as provided in Article 17.12(2), each Party shall give effect to this Article upon the date of entry into force of this Agreement.

<sup>7</sup> References to "authors" in this chapter refer also to any successors in interest.

<sup>8</sup> With respect to copyrights and related rights in this Chapter, a right to authorize or prohibit or a right to authorize shall mean an exclusive right.

<sup>9</sup> It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Chapter or the Berne Convention. It is further understood that nothing in this Article precludes a Party from applying Article 11*bis*(2) of the Berne Convention.

<sup>10</sup> The expressions "copies" and "original and copies", being subject to the right of distribution under this paragraph, refer exclusively to fixed copies that can be put into circulation as tangible objects, *i.e.*, for this purpose, "copies" means physical copies.

- (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, or
- (ii) failing such authorized publication within 50 years from the creation of the work, not less than 70 years from the end of the calendar year of the creation of the work.

**Article 17.6: Related Rights**<sup>11</sup>

1. Each Party shall provide that performers and producers of phonograms<sup>12</sup> have the right to authorize or prohibit all reproductions of their performances or phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).

2. Each Party shall provide to performers and producers of phonograms the right to authorize the making available to the public of the original and copies<sup>13</sup> of their performances or phonograms through sale or other transfer of ownership.

3. Each Party shall accord the rights provided under this Chapter to the performers and producers of phonograms who are persons of the other Party and to performances or phonograms first published or first fixed in a Party. A performance or phonogram shall be considered first published in any Party in which it is published within 30 days of its original publication.<sup>14</sup>

4. Each Party shall provide to performers the right to authorize 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.

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<sup>11</sup> Except as provided in Article 17.12(2), each Party shall give effect to this Article upon the date of entry into force of this Agreement.

<sup>12</sup> References to “performers and producers of phonograms” in this Chapter refer also to any successors in interest.

<sup>13</sup> The expressions “copies” and “original and copies”, being subject to the right of distribution under this paragraph, refer exclusively to fixed copies that can be put into circulation as tangible objects, *i.e.*, for this purpose, “copies” means physical copies.

<sup>14</sup> For the application of Article 17.6(3), fixation means the finalization of the master tape or its equivalent.

5.
  - (a) Each Party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting or any communication to the public of their fixed 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 paragraph 5(a) and Article 17.7(3), the right to authorize or prohibit the broadcasting or communication to the public of performances or phonograms through analog communication and free over-the-air broadcasting, and the exceptions or limitations to this right for such activities, shall be a matter of domestic law. Each Party may adopt exceptions and limitations, including compulsory licenses, to the right to authorize or prohibit the broadcasting or communication to the public of performances or phonograms in respect of other noninteractive transmissions in accordance with Article 17.7(3). Such compulsory licenses shall not prejudice the right of the performer or producer of a phonogram to obtain equitable remuneration.
6. Neither Party shall subject the enjoyment and exercise of the rights of performers and producers of phonograms provided for in this Chapter to any formality.
7. Each Party shall provide that where the term of protection of a performance or phonogram is to be calculated on a basis other than the life of a natural person, the term shall be:
  - (a) not less than 70 years from the end of the calendar year of the first authorized publication of the performance or phonogram, or
  - (b) failing such authorized publication within 50 years from the fixation of the performance or phonogram, not less than 70 years from the end of the calendar year of the fixation of the performance or phonogram.
8. For the purposes of Articles 17.6 and 17.7, the following definitions apply with respect to performers and producers of phonograms:
  - (a) **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;

- (b) **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;<sup>15</sup>
- (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) **producer of a phonogram** means the person, or the legal entity, who or 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;
- (e) **publication** of a fixed performance or a phonogram means the offering of copies of the fixed 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;
- (f) **broadcasting** means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent; and
- (g) **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 Article 17.6(5) “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

#### **Article 17.7: Obligations Common to Copyright and Related Rights<sup>16</sup>**

1. Each Party shall establish that in cases where authorization 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 authorization of the author does not cease to exist because the

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<sup>15</sup> It is understood that the definition of phonogram provided in this Chapter does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

<sup>16</sup> Except as provided in Article 17.12(2), each Party shall give effect to this Article upon the date of entry into force of this Agreement.

authorization of the performer and producer is also required. Likewise, each Party shall establish that in cases where authorization 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 authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

2. (a) Each Party shall provide that for copyright and related rights:
  - (i) any person owning any economic right, *i.e.*, not a moral right, may freely and separately transfer such right by contract; and
  - (ii) any person who has acquired or owns any such economic right by virtue of a contract, including contracts of employment underlying the creation of works and phonograms, shall be permitted to exercise that right in its own name and enjoy fully the benefits derived from that right.
- (b) Each Party may establish:
  - (i) which contracts of employment underlying the creation of works or phonograms shall, in the absence of a written agreement, result in a transfer of economic rights by operation of law; and
  - (ii) reasonable limits to the provisions in paragraph 2(a) to protect the interests of the original right holders, taking into account the legitimate interests of the transferees.

3. Each Party shall confine limitations or exceptions to rights to certain special cases which 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.<sup>17</sup>

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<sup>17</sup> Article 17.7(3) permits a Party to carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws which have been considered acceptable under the Berne Convention. Similarly, these provisions permit a Party to devise new exceptions and limitations that are appropriate in the digital network environment. For works, other than computer software, and other subject-matter, such exceptions and limitations may include temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work or other subject-matter to be made; and which have no independent economic significance.

Article 17.7(3) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention, the *WIPO Copyright Treaty* (1996), and the *WIPO Performances and Phonograms Treaty* (1996).

4. In order to confirm that all federal or central government agencies use computer software only as authorized, each Party shall issue appropriate laws, orders, regulations, or administrative or executive decrees to actively regulate the acquisition and management of software for such government use. Such measures may take the form of procedures such as preparing and maintaining inventories of software present on agencies' computers and inventories of software licenses.

5. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, and producers of phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, protected by copyright and related rights:

- (a) each Party shall provide that any person who knowingly<sup>18</sup> circumvents without authorization of the right holder or law consistent with this Agreement any effective technological measure that controls access to a protected work, performance, or phonogram shall be civilly liable and, in appropriate circumstances, shall be criminally liable, or said conduct shall be considered an aggravating circumstance of another offense.<sup>19</sup> No Party is required to impose civil or criminal liability for a person who circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, but does not control access to such work.
- (b) each Party shall also provide administrative or civil measures, and, where the conduct is willful and for prohibited commercial purposes, criminal measures with regard to the manufacture, import, distribution, sale, or rental of devices, products, or components or the provision of services which:
  - (i) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure, or

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<sup>18</sup> For purposes of paragraph 5, knowledge may be demonstrated through reasonable evidence taking into account the facts and circumstances surrounding the alleged illegal act.

<sup>19</sup> Paragraph 5 does not obligate a Party 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 such product does not otherwise violate any measure implementing paragraph 5(b).

- (ii) do not have a commercially significant purpose or use other than to circumvent any effective technological measure, or
- (iii) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.

Each Party shall ensure that due account is given, *inter alia*, to the scientific or educational purpose of the conduct of the defendant in applying criminal measures under any provisions implementing this subparagraph. A Party may exempt from criminal liability, and if carried out in good faith without knowledge that the conduct is prohibited, from civil liability, acts prohibited under this subparagraph that are carried out in connection with a nonprofit library, archive or educational institution.

- (c) Each Party shall ensure that nothing in subparagraphs (a) and (b) affects rights, remedies, limitations, or defenses with respect to copyright or related rights infringement.
- (d) Each Party shall confine limitations and exceptions to measures implementing subparagraphs (a) and (b) to certain special cases that do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures. In particular, each Party may establish exemptions and limitations to address the following situations and activities in accordance with subparagraph (e):
  - (i) when an actual or likely adverse effect on noninfringing uses with respect to a particular class of works or exceptions or limitation to copyright or related rights with respect to a class of users is demonstrated or recognized through a legislative or administrative proceeding established by law, provided that any limitation or exception adopted in reliance upon this subparagraph (d)(i) shall have effect for a period of not more than three years from the date of conclusion of such proceeding;
  - (ii) noninfringing 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 that person,<sup>20</sup> for the sole purpose of

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<sup>20</sup> For greater certainty, elements of a computer program are not readily available to a person seeking to engage in noninfringing reverse engineering when they cannot be obtained from the literature on the subject, from the

achieving interoperability of an independently created computer program with other programs;<sup>21</sup>

- (iii) noninfringing good faith activities, carried out by a researcher who has lawfully obtained a copy, performance, or display of a work, and who has made a reasonable attempt to obtain authorization for such activities, to the extent necessary for the sole purpose of identifying and analyzing flaws and vulnerabilities of encryption technologies;<sup>22</sup>
  - (iv) 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 does not itself violate any measures implementing subparagraphs (a) and (b);
  - (v) noninfringing good faith activities that are authorized 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;
  - (vi) noninfringing 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;
  - (vii) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, or similar government activities; and
  - (viii) access by a nonprofit library, archive, or educational institution to a work not otherwise available to it, for the sole purpose of making acquisition decisions.
- (e) Each Party may apply the exceptions and limitations for the situations and activities set forth in subparagraph (d) as follows:

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copyright holder, or from sources in the public domain.

<sup>21</sup> Such activity occurring in the course of research and development is not excluded from this exception.

<sup>22</sup> Such activity occurring in the course of research and development is not excluded from this exception.

- (i) any measure implementing subparagraph (a) may be subject to the exceptions and limitations with respect to each situation and activity set forth in subparagraph (d).
- (ii) any measure implementing subparagraph (b), as it applies to effective technological measures that control access to a work, may be subject to exceptions and limitations with respect to the activities set forth in subparagraphs (d)(ii), (iii), (iv), (v), and (vii).
- (iii) any measure implementing subparagraph (b), as it applies to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to the activities set forth in subparagraph (d)(ii) and (vii).
- (f) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a work, performance, phonogram, or any other protected material, or that protects any copyright or any rights related to copyright, and cannot, in the usual case, be circumvented accidentally.

6. 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 will induce, enable, facilitate, or conceal an infringement of any copyright or related right,
  - (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 altered without authority; or
  - (iii) distributes, imports for distribution, broadcasts, communicates, or makes available to the public copies of works or phonograms, knowing that rights management information has been removed or altered without authority,

shall be liable, upon the suit of any injured person, and subject to the remedies in Article 17.11(5). Each Party shall provide for application of criminal procedures and remedies at least in cases where acts prohibited in

the subparagraph are done willfully and for purposes of commercial advantage. A Party may exempt from criminal liability prohibited acts done in connection with a nonprofit library, archive, educational institution, or broadcasting entity established without a profit-making purpose.

(b) **Rights management information** means:

- (i) information which identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram;
- (ii) information about the terms and conditions of the use of the work, performance, or phonogram; and
- (iii) any 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 conjunction with the communication or making available of a work, performance, or phonogram to the public. Nothing in paragraph 6(a) requires the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the owner's 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.

7. Each Party shall apply Article 18 of the Berne Convention, *mutatis mutandis*, to all the protections of copyright and related rights and effective technological measures and rights management information in Articles 17.5, 17.6, and 17.7.

#### **Article 17.8: Protection of Encrypted Program-Carrying Satellite Signals**

1. Each Party shall make it:

- (a) a civil or criminal offense to manufacture, assemble, modify, import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing<sup>23</sup> that the device or system's principal function is solely to assist in

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<sup>23</sup> For purposes of paragraph 1, knowledge may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.

decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal; and

- (b) a civil or criminal offense willfully to receive or further distribute an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal.

2. Each Party shall provide that any person injured by any activity described in subparagraphs 1(a) or 1(b), including any person that holds an interest in the encrypted programming signal or the content of that signal, shall be permitted to initiate a civil action under any measure implementing such subparagraphs.

#### **Article 17.9: Patents**

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

2. Each Party will undertake reasonable efforts, through a transparent and participatory process, to develop and propose legislation within 4 years from the entry into force of this Agreement that makes available patent protection for plants that are new, involve an inventive step, and are capable of industrial application.

3. Each 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. If a Party permits the use by a third party of the subject matter of a subsisting patent to support an application for marketing approval or sanitary permit of a pharmaceutical product, the Party shall provide that any product produced under such authority shall not be made, used, or sold in the territory of the Party other than for purposes related to meeting requirements for marketing approval or the sanitary permit, and if export is permitted, the product shall only be exported outside the territory of the Party for purposes of meeting requirements for issuing marketing approval or sanitary permits in the exporting Party.

5. A Party may revoke or cancel a patent only when grounds exist that would have justified a refusal to grant the patent.<sup>24</sup>

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<sup>24</sup> Fraud in obtaining a patent may constitute grounds for revocation or cancellation.

6. Each Party shall provide for the adjustment of the term of a patent, at the request of the patent owner, to compensate for unreasonable delays that occur in granting the patent. For the purposes of this paragraph, an unreasonable delay shall be understood to include a delay in the issuance of the patent of more than five years from the date of filing of the application in the Party, or three years after a request for examination of the application has been made, whichever is later, provided that periods of time attributable to actions of the patent applicant need not be included in the determination of such delays.

7. Neither Party shall use a public disclosure to bar patentability based upon a lack of novelty or inventive step if the public disclosure (a) was made or authorized by, or derived from, the patent applicant and (b) occurs within 12 months prior to the date of filing of the application in the Party.

#### **Article 17.10: Measures Related to Certain Regulated Products**

1. If a Party requires the submission of undisclosed information concerning the safety and efficacy of a pharmaceutical or agricultural chemical product which utilizes a new chemical entity, which product has not been previously approved, to grant a marketing approval or sanitary permit for such product, the Party shall not permit third parties not having the consent of the person providing the information to market a product based on this new chemical entity, on the basis of the approval granted to the party submitting such information. A Party shall maintain this prohibition for a period of at least five years from the date of approval for a pharmaceutical product and ten years from the date of approval for an agricultural chemical product.<sup>25</sup> Each Party shall protect such information against disclosure except where necessary to protect the public.

2. With respect to pharmaceutical products that are subject to a patent, each Party shall:

- (a) make available an extension of the patent term to compensate the patent owner for unreasonable curtailment of the patent term as a result of the marketing approval process;
- (b) make available to the patent owner the identity of any third party requesting marketing approval effective during the term of the patent; and

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<sup>25</sup> Where a Party, on the date of its implementation of the TRIPS Agreement, had in place a system for protecting pharmaceutical or agricultural chemical products not involving new chemical entities from unfair commercial use which conferred a period of protection shorter than that specified in paragraph 1, that Party may retain such system notwithstanding the obligations of paragraph 1.

- (c) not grant marketing approval to any third party prior to the expiration of the patent term, unless by consent or acquiescence of the patent owner.

## **Article 17.11: Enforcement of Intellectual Property Rights**

### *General Obligations*

1. Each Party shall ensure that procedures and remedies set forth in this Article for enforcement of intellectual property rights are established in accordance with its domestic law.<sup>26</sup> Such administrative and judicial procedures and remedies, both civil and criminal, shall be made available to the holders of such rights in accordance with the principles of due process that each Party recognizes as well as with the foundations of its own legal system.
2. This Article does not create any obligation:
  - (a) to put in place a judicial system for the enforcement of intellectual property rights distinct from that already existing for the enforcement of law in general, or
  - (b) with respect to the distribution of resources for the enforcement of intellectual property rights and the enforcement of law in general.

The distribution of resources for the enforcement of intellectual property rights shall not excuse a Party from compliance with the provisions of this Article.

3. Final decisions on the merits of a case of general application shall be in writing and shall state the reasons or the legal basis upon which decisions are based.
4. Each Party shall publicize or make available to the public information that each Party might collect regarding its efforts to provide effective enforcement of intellectual property rights, including statistical information.
5. Each Party shall make available the civil remedies set forth in this Article for the acts described in the Articles 17.7(5) and 17.7(6).

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<sup>26</sup> Nothing in this Chapter prevents a Party from establishing or maintaining appropriate judicial or administrative procedural formalities for this purpose that do not impair each Party's rights and obligations under this Agreement.

6. In civil, administrative, and criminal proceedings involving copyright or related rights, each Party shall provide that:

- (a) the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance, or phonogram in the usual manner,<sup>27</sup> shall, in the absence of proof to the contrary, be presumed to be the designated right holder in such work, performance, or phonogram.
- (b) it shall be presumed, in the absence of proof to the contrary, that the copyright or related right subsists in such subject matter. A Party may require, as a condition for according such presumption of subsistence, that the work appear on its face to be original and that it bear a publication date not more than 70 years prior to the date of the alleged infringement.

*Civil and Administrative Procedures<sup>28</sup> and Remedies*

7. Each Party shall make available to right holders<sup>29</sup> civil judicial procedures concerning the enforcement of any intellectual property right.

8. Each Party shall provide that:

- (a) In civil judicial proceedings, the 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 because of an infringement of that person's intellectual property right by an infringer engaged in infringing activity, and
  - (ii) at least in the case of infringements of trademark, copyright, or related rights, the profits of the infringer that are attributable to the infringement and are not already taken into account in determining injury.

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<sup>27</sup> Each Party may establish the means by which it shall determine what constitutes the "usual manner" for a particular physical support.

<sup>28</sup> For the purposes of this Article, civil judicial procedures mean those procedures as applied to the protection and enforcement of intellectual property rights.

<sup>29</sup> For the purposes of this Article, the term "right holder" shall include duly authorized licensees as well as federations and associations having legal standing and authorization to assert such rights.

- (b) In determining injury to the right holder, the judicial authorities shall, *inter alia*, consider the legitimate retail value of the infringed goods.

9. In civil judicial proceedings, each Party shall, at least with respect to works protected by copyright or related rights and trademark counterfeiting, establish pre-established damages, prescribed by each Party's domestic law, that the judicial authorities deem reasonable in light of the goals of the intellectual property system and the objectives set forth in this Chapter.

10. Each Party shall provide that, except in exceptional circumstances, its judicial authorities have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of copyright or related rights and trademark counterfeiting, that the prevailing right holder shall be paid the court costs or fees and reasonable attorney's fees by the infringing party.

11. In civil judicial proceedings concerning copyright and related rights infringement and trademark counterfeiting, each Party shall provide that its judicial authorities shall have the authority to order the seizure of suspected infringing goods, and of material and implements by means of which such goods are produced where necessary to prevent further infringement.

12. In civil judicial proceedings, each Party shall provide that:

- (a) its judicial authorities shall have the authority to order, at their discretion, the destruction, except in exceptional cases, of the goods determined to be infringing goods;
- (b) the charitable donation of goods that infringe copyright and related rights shall not be ordered by the judicial authorities without the authorization of the right holder other than in special cases that do not conflict with the normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder;
- (c) the judicial authorities shall have the authority to order, at their discretion, that material and implements actually used in the manufacture of the infringing goods be destroyed. In considering such requests, the judicial authorities shall take into account, *inter alia*, the need for proportionality between the gravity of the infringement and remedies ordered, as well as the interests of third parties holding an ownership, possessory, contractual, or secured interest; and

- (d) in regard to counterfeited trademarked goods, the simple removal of the trademark unlawfully affixed shall not permit release of the goods into the channels of commerce. However, such goods may be donated to charity when the removal of the trademark eliminates the infringing characteristic of the good and the good is no longer identifiable with the removed trademark.

13. In civil judicial proceedings, each Party shall provide that the judicial authorities shall have the authority to order the infringer to provide any information the infringer may have regarding persons involved in the infringement, and regarding the distribution channels of infringing goods. Judicial authorities shall also have the authority to impose fines or imprisonment on infringers who do not comply with such orders, in accordance with each Party's domestic law.

14. To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in paragraphs 1 through 13.

#### *Provisional Measures*

15. Each Party shall provide that requests for relief *inaudita altera parte* shall be acted upon expeditiously in accordance with the judicial procedural rules of that Party.

16. Each Party shall provide that:

- (a) its judicial authorities have the authority to require the applicant for any provisional measure to provide any reasonably available evidence in order to satisfy themselves to a sufficient degree of certainty that the applicant is the holder of the right in question<sup>30</sup> and that infringement of such right is imminent, and to order the applicant to provide a reasonable security or equivalent assurance in an amount that is sufficient to protect the defendant and prevent abuse, set at a level so as not to unreasonably deter recourse to such procedures.
- (b) in the event that judicial or other authorities appoint experts, technical or otherwise, that must be paid by the parties, such costs shall be set at a reasonable level taking into account the work performed, or if applicable, based on standardized fees, and shall not unreasonably deter recourse to provisional relief.

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<sup>30</sup> In accordance with the provisions in paragraph 6(a).

### *Special Requirements Related to Border Measures*

17. Each Party shall provide that any right holder initiating procedures for suspension by the customs authorities of the release of suspected counterfeit trademark or pirated copyright goods<sup>31</sup> into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the laws of the Party of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information to make the suspected goods reasonably recognizable to the customs authorities. The sufficient information required shall not unreasonably deter recourse to these procedures.

18. Each Party shall provide the competent authorities with the authority to require an applicant to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

19. Where the competent authorities have made a determination that goods are counterfeit or pirated, a Party shall grant the competent authorities the authority to inform the right holder, at the right holder's request, of the names and addresses of the consignor, the importer, and the consignee, and of the quantity of the goods in question.

20. Each Party shall provide that the competent authorities are permitted to initiate border measures *ex officio*, without the need for a formal complaint from a person or right holder. Such measures shall be used when there is reason to believe or suspect that goods being imported, destined for export, or moving in transit are counterfeit or pirated. In case of goods in transit, each Party, in conformity with other international agreements subscribed

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<sup>31</sup> For the purposes of paragraphs 17 through 19:

- (a) **counterfeit trademark goods** means any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- (b) **pirated copyright goods** means any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which 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.

to by it, may provide that *ex officio* authority shall be exercised prior to sealing the container, or other means of conveyance, with the customs seal, as applicable.<sup>32</sup>

21. Each Party shall provide that:

- (a) goods that have been found to be pirated or counterfeit by the competent authorities shall be destroyed, except in exceptional cases.
- (b) in regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.
- (c) in no event shall the competent authorities engage in, or permit, the re-exportation of counterfeit or pirated goods, nor shall they permit such goods to be subject to other customs procedures.

#### *Criminal Procedures and Remedies*

22. Each Party shall provide for application of criminal procedures and penalties at least in cases of willful trademark counterfeiting or piracy, on a commercial scale, of works, performances, or phonograms protected by copyright or related rights. Specifically, each Party shall ensure that:

- (a) (i) willfull infringement<sup>33</sup> of copyright and related rights for a commercial advantage or financial gain, is subject to criminal procedures and penalties;<sup>34</sup>
- (ii) copyright or related rights piracy on a commercial scale includes the willful infringing reproduction or distribution, including by electronic means, of copies with a significant aggregate monetary value, calculated based on the legitimate retail value of the infringed goods;

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<sup>32</sup> The Parties recognize their obligations with respect to technological cooperation and other matters set forth in Chapter Five (Customs Administration), concerning, *inter alia*, improved customs enforcement, including with respect to intellectual property rights.

<sup>33</sup> For purposes of paragraph 22, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.

<sup>34</sup> For purposes of paragraph 22, commercial advantage or financial gain shall be understood to exclude *de minimis* infringements. Nothing in this Agreement prevents prosecutors from exercising any discretion that they may have to decline to pursue cases.

- (b) available remedies include sentences of imprisonment and/or monetary fines that are sufficient to provide a deterrent to future infringements and present a level of punishment consistent with the gravity of the offense, which shall be applied by the judicial authorities in light of, *inter alia*, these criteria;
- (c) judicial authorities have the authority to order the seizure of suspected counterfeit or pirated goods, assets legally traceable to the infringing activity, documents and related materials, and implements that constitute evidence of the offense. Each Party shall further provide that its judicial authorities have the authority to seize items in accordance with its domestic law. Items that are subject to seizure pursuant to a search order need not be individually identified so long as they fall within general categories specified in the order;
- (d) judicial authorities have the authority to order, among other measures, the forfeiture of any assets legally traceable to the infringing activity, and the forfeiture and destruction of all counterfeit and pirated goods and, at least with respect to copyright and related rights piracy, any related materials and implements actually used in the manufacture of the pirated goods. Parties shall not make compensation available to the infringer for any such forfeiture or destruction; and
- (e) Appropriate authorities, as determined by each Party, have the authority, in cases of copyright and related rights piracy and trademark counterfeiting, to exercise legal action *ex officio* without the need for a formal complaint by a person or right holder.

*Limitations on Liability for Internet Service Providers*

- 23. (a) For the purpose of providing enforcement procedures that permit effective action against any act of infringement of copyright<sup>35</sup> covered under this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies, each Party shall provide, consistent with the framework set forth in this Article:
  - (i) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials; and

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<sup>35</sup> For purposes of paragraph 23, “copyright” shall also include related rights.

- (ii) 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 below.
- (b) These limitations shall preclude monetary relief and provide reasonable limitations on court-ordered relief to compel or restrain certain actions for the following functions and shall be confined to those functions:
- (i) transmitting, routing, or providing connections for material without modification of its content;<sup>36</sup>
  - (ii) caching carried out through an automatic process;
  - (iii) storage at the direction of a user of material residing on a system or network controlled or operated by or for the provider, including e-mails and its attachments stored in the provider's server, and web pages residing on the provider's server; and
  - (iv) referring or linking users to an online location by using information location tools, including hyperlinks and directories.

These limitations shall apply only where the provider does not initiate the transmission, or select the material or its recipients (except to the extent that a function described in subparagraph (iv) in itself entails some form of selection). This paragraph does not preclude the availability of other defenses to copyright infringement that are of general applicability, and qualification for the limitations as to each function shall be considered separately from qualification for the limitations as to other functions.

- (c) With respect to function (b)(ii), the limitations shall be conditioned on the service provider:
- (i) complying with conditions on user access and rules regarding the updating of the cached material imposed by the supplier of the material;

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<sup>36</sup> Modification of the content of material shall not include technological manipulation of material for the purpose of facilitating network transmission, such as division into packets.

- (ii) not interfering with technology consistent with widely accepted industry standards lawfully used at the originating site to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and
- (iii) expeditiously removing or disabling access, upon receipt of an effective notification of claimed infringement in accordance with subparagraph (f), to cached material that has been removed or access to which has been disabled at the originating site.

With respect to functions (b)(iii) and (iv), the limitations shall be conditioned on the service provider:

- (i) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;
  - (ii) expeditiously removing or disabling access to the material residing on its system or network upon obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, including through effective notifications of claimed infringement in accordance with subparagraph (f); and
  - (iii) publicly designating a representative to receive such notifications.
- (d) Eligibility for application of the limitations in this paragraph shall be conditioned on the service provider:
- (i) adopting and reasonably implementing<sup>37</sup> a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and
  - (ii) accommodating and not interfering with standard technical measures that lawfully protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of interested parties, approved by relevant authorities, as applicable, that

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<sup>37</sup> A Party may determine in its domestic law that “reasonably implementing” entails, *inter alia*, making such policy continuously available to its users of its system or network.

are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.

Eligibility for application of the limitations in this paragraph 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.

- (e) If the service provider qualifies for the limitation with respect to function (b)(i), court-ordered relief to compel or restrain certain actions shall be limited to measures to terminate specified accounts, or to take 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 subparagraph (b), 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 and users or subscribers among comparably effective forms of relief. Any such relief shall be issued with due regard for the relative burden to the service provider, to users or subscribers 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, such relief shall be available only where the service provider has received notice and an opportunity to appear before the judicial authority.
- (f) For purposes of the notice and take down process for functions (b)(ii), (iii), and (iv), each Party shall establish appropriate procedures through an open and transparent process which is set forth in domestic law, for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. At a minimum, each Party shall require that an effective notification of claimed infringement be a written communication, physically or electronically<sup>38</sup> signed by a person who represents, under penalty of perjury or other criminal penalty, that he is an authorized representative of a right

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<sup>38</sup> In accordance with domestic law.

holder in the material that is claimed to have been infringed, and containing information that is reasonably sufficient to enable the service provider to identify and locate material that the complaining party claims in good faith to be infringing and to contact that complaining party. At a minimum, each Party shall require that an effective counter-notification contain the same information, *mutatis mutandis*, as a notification of claimed infringement, and in addition, contain a statement that the subscriber making the counter-notification consents to the jurisdiction of the courts of the Party. Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification which causes injury to any interested party as a result of a service provider relying on the misrepresentation.

- (g) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, it 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 supplier of the material that it has done so and, if the supplier makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless the original notifying party seeks judicial relief within a reasonable time.
- (h) Each Party shall establish 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.
- (i) **Service provider** means, for purposes of function (b)(i), 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, or for purposes of functions (b)(ii) through (iv) a provider or operator of facilities for online services (including in cases where network access is provided by another provider) or network access.

#### **Article 17.12: Final Provisions**

1. Except as otherwise provided in this Chapter, each Party shall give effect to the provisions of this Chapter upon the date of entry into force of this Agreement.
2. In those cases in which the full implementation of the obligations contained in this Chapter requires a Party to amend its domestic legislation or additional financial resources,

those amendments and financial resources shall be in force or available as soon as practicable, and in no event later than:

- (a) two years from the date of entry into force of this Agreement, with respect to the obligations in Article 17.2 on trademarks, Article 17.4(1) through 17.4(9) on geographical indications, Article 17.9(1), 17.9(3) through 17.9(7) on patents, and Articles 17.5(1) and 17.6(1) on temporary copies;
- (b) four years from the date of entry into force of this Agreement, with respect to the obligations in Article 17.11 on enforcement (including border measures), and Article 17.6(5) with respect to the right of communication to the public, and non-interactive digital transmissions, for performers and producers of phonograms; and
- (c) five years from the date of entry into force of this Agreement, with respect to the obligations in Article 17.7(5) on effective technological measures.