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CHAPTER 18

INTELLECTUAL PROPERTY

Section A: General Provisions

Article 18.1: Definitions

1. For the purposes of this Chapter:

Berne Convention means the *Berne Convention for the Protection of Literary and Artistic Works*, as revised at Paris, July 24, 1971;

Budapest Treaty means the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended on September 26, 1980;

Declaration on TRIPS and Public Health means the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2), adopted on November 14, 2001;

geographical indication means an indication that identifies 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;

intellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement;

Madrid Protocol means the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, done at Madrid, June 27, 1989;

Paris Convention means the *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm, July 14, 1967;

performance means a performance fixed in a phonogram unless otherwise specified;

with respect to copyright and related rights, the term **right to authorise or prohibit** refers to exclusive rights;

Singapore Treaty means the *Singapore Treaty on the Law of Trademarks*, done at Singapore, March 27, 2006;

UPOV 1991 means the *International Convention for the Protection of New Varieties of Plants*, as revised at Geneva, March 19, 1991;

WCT means the *WIPO Copyright Treaty*, done at Geneva, December 20, 1996;

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WIPO means the World Intellectual Property Organization;

For greater certainty, **work** includes a cinematographic work, photographic work and computer program; and

WPPT means the *WIPO Performances and Phonograms Treaty*, done at Geneva, December 20, 1996.

2. For the purposes of Article 18.8 (National Treatment), Article 18.31(a) (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 18.62.1 (Related Rights):

a **national** means, in respect of the relevant right, a person of a Party that would meet the criteria for eligibility for protection provided for in the agreements listed in Article 18.7 (International Agreements) or the TRIPS Agreement.

Article 18.2: Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 18.3: Principles

1. A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Chapter.

2. Appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 18.4: Understandings in Respect of this Chapter

Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

- (a) promote innovation and creativity;

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- (b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and
- (c) foster competition and open and efficient markets,

through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users and the public.

Article 18.5: Nature and Scope of Obligations

Each Party shall give effect to the provisions of this Chapter. A Party may, but shall not be obliged to, provide more extensive protection for, or enforcement of, intellectual property rights under its law than is required by this Chapter, provided that such protection or enforcement does not contravene the provisions of this Chapter. Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice.

Article 18.6: Understandings Regarding Certain Public Health Measures

1. The Parties affirm their commitment to the Declaration on TRIPS and Public Health. In particular, the Parties have reached the following understandings regarding this Chapter:

- (a) The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all. Each Party has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
- (b) In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the General Council of August 30, 2003 on the *Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health* (WT/L/540) and the WTO General Council Chairman's Statement Accompanying the Decision (JOB(03)/177, WT/GC/M/82), as well as the Decision of the WTO General Council of December 6, 2005 on the *Amendment of the TRIPS Agreement*, (WT/L/641) and the WTO General Council Chairperson's Statement Accompanying the Decision (JOB(05)319 and Corr. 1,WT/GC/M/100) (collectively, the "TRIPS/health solution"),

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this Chapter does not and should not prevent the effective utilisation of the TRIPS/health solution.

- (c) With respect to the aforementioned matters, if any waiver of any provision of the TRIPS Agreement, or any amendment of the TRIPS Agreement, enters into force with respect to the Parties, and a Party's application of a measure in conformity with that waiver or amendment is contrary to the obligations of this Chapter, the Parties shall immediately consult in order to adapt this Chapter as appropriate in the light of the waiver or amendment.

2. Each Party shall notify, if it has not already done so, the WTO of its acceptance of the *Protocol amending the TRIPS Agreement*, done at Geneva on December 6, 2005.

Article 18.7: International Agreements

1. Each Party affirms that it has ratified or acceded to the following agreements:

- (a) *Patent Cooperation Treaty*, as amended September 28, 1979;
- (b) Paris Convention; and
- (c) Berne Convention.

2. Each Party shall ratify or accede to each of the following agreements, if it is not already a Party to that agreement, by the date of entry into force of this Agreement for that Party:

- (a) Madrid Protocol;
- (b) Budapest Treaty;
- (c) Singapore Treaty;¹
- (d) UPOV 1991;²
- (e) WCT; and
- (f) WPPT.

¹ A Party may satisfy the obligations in paragraph 2(a) and 2(c) by ratifying or acceding to either the Madrid Protocol or the Singapore Treaty.

² Annex 18-A applies to this subparagraph.

Article 18.8: National Treatment

1. In respect of all categories of intellectual property covered in this Chapter,³ each Party shall accord to nationals of another Party treatment no less favourable than it accords to its own nationals with regard to the protection⁴ of intellectual property rights.

2. With respect to secondary uses of phonograms by means of analog communications and free over-the-air broadcasting and other non-interactive communications to the public, however, a Party may limit the rights of the performers and producers of another Party to the rights its persons are accorded within the jurisdiction of that other Party.

3. A Party may derogate from paragraph 1 in relation to its judicial and administrative procedures, including requiring a national of another 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 or regulations that are not inconsistent with this Chapter; and
- (b) not applied in a manner that would constitute a disguised restriction on trade.

4. Paragraph 1 does not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 18.9: Transparency

1. Further to Article 26.2 (Publication) and Article 18.73.1 (Enforcement Practices with Respect to Intellectual Property Rights), each Party shall endeavour to make available on the Internet its laws, regulations, procedures and administrative

³ For greater certainty, with respect to copyrights and related rights that are not covered under Section H (Copyright and Related Rights), nothing in this Agreement limits a Party from taking an otherwise permissible derogation from national treatment with respect to those rights.

⁴ For the purposes of this paragraph, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as 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 the circumvention of effective technological measures set out in Article 18.68 (TPMs) and the provisions concerning rights management information set out in Article 18.69 (RMI). For greater certainty, “matters affecting the use of intellectual property rights specifically covered by this Chapter” in respect of works, performances and phonograms, include any form of payment, such as licensing fees, royalties, equitable remuneration, or levies, in respect of uses that fall under the copyright and related rights in this Chapter. The preceding sentence is without prejudice to a Party’s interpretation of “matters affecting the use of intellectual property rights” in footnote 3 of the TRIPS Agreement.

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rulings of general application concerning the protection and enforcement of intellectual property rights.

2. Each Party shall, subject to its law, endeavour to make available on the Internet information that it makes public concerning applications for trademarks, geographical indications, designs, patents and plant variety rights.^{5,6}

3. Each Party shall, subject to its law, make available on the Internet information that it makes public concerning registered or granted trademarks, geographical indications, designs, patents and plant variety rights, sufficient to enable the public to become acquainted with those registered or granted rights.⁷

Article 18.10: Application of Chapter to Existing Subject Matter and Prior Acts

1. Unless otherwise provided in this Chapter, including in Article 18.64 (Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement), this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement for a Party and that is protected on that date in the territory of a Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

2. Unless provided in Article 18.64 (Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement), a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement for that Party has fallen into the public domain in its territory.

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

Article 18.11: Exhaustion of Intellectual Property Rights

Nothing in this Agreement prevents a Party from determining whether or under what conditions the exhaustion of intellectual property rights applies under its legal system.⁸

⁵ For greater certainty, paragraphs 2 and 3 are without prejudice to a Party's obligations under Article 18.24 (Electronic Trademarks System).

⁶ For greater certainty, paragraph 2 does not require a Party to make available on the Internet the entire dossier for the relevant application.

⁷ For greater certainty, paragraph 3 does not require a Party to make available on the Internet the entire dossier for the relevant registered or granted intellectual property right.

⁸ For greater certainty, this Article is without prejudice to any provisions addressing the exhaustion of intellectual property rights in international agreements to which a Party is a party.

Section H: Copyright and Related Rights

Article 18.57: Definitions

For the purposes of Article 18.58 (Right of Reproduction) and Article 18.60 (Right of Distribution) through Article 18.70 (Collective Management), the following definitions apply with respect to performers and producers of phonograms:

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” if the means for decrypting are provided to the public by the broadcasting organization or with its consent;

communication to the public of a performance or a phonogram means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram;

fixation means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

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;

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;

producer of a phonogram means a person that 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

publication of a performance or 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 18.58: Right of Reproduction

Each Party shall provide⁶³ to authors, performers and producers of phonograms⁶⁴ the exclusive right to authorise or prohibit all reproduction of their

⁶³ For greater certainty, the Parties understand that it is a matter for each Party's law to prescribe that works, performances or phonograms in general or any specified categories of works, performances and phonograms are not protected by copyright or related rights unless the work, performance or phonogram has been fixed in some material form.

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works, performances or phonograms in any manner or form, including in electronic form.

Article 18.59: Right of Communication to the Public

Without prejudice to Article 11(1)(ii), Article 11*bis*(1)(i) and (ii), Article 11*ter*(1)(ii), Article 14(1)(ii), and Article 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.⁶⁵

Article 18.60: Right of Distribution

Each Party shall provide to authors, performers and producers of phonograms the exclusive right to authorise or prohibit the making available to the public of the original and copies⁶⁶ of their works, performances and phonograms through sale or other transfer of ownership.

Article 18.61: No Hierarchy

Each Party shall provide that in cases in which authorisation is needed from both the author of a work embodied in a phonogram and a performer or producer that owns rights in the phonogram:

- (a) the need for the authorisation of the author does not cease to exist because the authorisation of the performer or producer is also required; and
- (b) the need for the authorisation of the performer or producer does not cease to exist because the authorisation of the author is also required.

⁶⁴ References to “authors, performers, and producers of phonograms” refer also to any of their successors in interest.

⁶⁵ The Parties understand 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. The Parties further understand that nothing in this Article precludes a Party from applying Article 11*bis*(2) of the Berne Convention.

⁶⁶ The expressions “copies” and “original and copies”, that are subject to the right of distribution in this Article, refer exclusively to fixed copies that can be put into circulation as tangible objects.

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Article 18.62: Related Rights

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 that are nationals⁶⁷ of another Party; and to performances or phonograms first published or first fixed⁶⁸ in the territory of another Party.⁶⁹ A performance or phonogram shall be considered first published in the territory of a Party if it is published in the territory of that Party within 30 days of its original publication.
2. Each Party shall provide to performers the exclusive right to authorise or prohibit:
 - (a) the broadcasting and communication to the public of their unfixed performances, unless 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 exclusive right to authorise or prohibit the broadcasting or any communication to the public of their performances or phonograms, by wire or wireless means,^{70,71} and the making available to the public of those performances or 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 subparagraph (a) and Article 18.65 (Limitations and Exceptions), the application of the right referred to in subparagraph (a) to analog transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for those activities, is a matter of each Party's law.⁷²

⁶⁷ For the purposes of determining criteria for eligibility under this Article, with respect to performers, a Party may treat "nationals" as those who would meet the criteria for eligibility under Article 3 of the WPPT.

⁶⁸ For the purposes of this Article, fixation means the finalisation of the master tape or its equivalent.

⁶⁹ For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both. For greater certainty, consistent with Article 18.8 (National Treatment), each Party shall accord to performances and phonograms first published or first fixed in the territory of another Party treatment no less favourable than it accords to performances or phonograms first published or first fixed in its own territory.

⁷⁰ With respect to broadcasting and communication to the public, a Party may satisfy the obligation by applying Article 15(1) and Article 15(4) of the WPPT and may also apply Article 15(2) of the WPPT, provided that it is done in a manner consistent with that Party's obligations under Article 18.8 (National Treatment).

⁷¹ For greater certainty, the obligation under this paragraph does not include broadcasting or communication to the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audiovisual work.

⁷² For the purposes of this subparagraph the Parties understand that a Party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that these retransmissions are

Article 18.63: Term of Protection for Copyright and Related Rights

Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:⁷³

- (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;⁷⁴ 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 publication⁷⁵ of the work, performance or phonogram; or
 - (ii) failing such authorised publication within 25 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.⁷⁶

Article 18.64: Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement

Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to works, performances and phonograms, and the rights in and protections afforded to that subject matter as required by this Section.

lawfully permitted by that Party's government communications authority; any entity engaging in these retransmissions complies with the relevant rules, orders or regulations of that authority; and these retransmissions do not include those delivered and accessed over the Internet. For greater certainty this footnote does not limit a Party's ability to avail itself of this subparagraph.

⁷³ For greater certainty, in implementing this Article, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of a work, performance or phonogram during its term of protection, consistent with Article 18.65 (Limitations and Exceptions) and that Party's international obligations.

⁷⁴ The Parties understand that if a Party provides its nationals a term of copyright protection that exceeds life of the author plus 70 years, nothing in this Article or Article 18.8 (National Treatment) shall preclude that Party from applying Article 7.8 of the Berne Convention with respect to the term in excess of the term provided in this subparagraph of protection for works of another Party.

⁷⁵ For greater certainty, for the purposes of subparagraph (b), if a Party's law provides for the calculation of term from fixation rather than from the first authorised publication, that Party may continue to calculate the term from fixation.

⁷⁶ For greater certainty, a Party may calculate a term of protection for an anonymous or pseudonymous work or a work of joint authorship in accordance with Article 7(3) or Article 7bis of the Berne Convention, provided that the Party implements the corresponding numerical term of protection required under this Article.

Article 18.65: Limitations and Exceptions

1. With respect to this Section, 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.

2. This Article does not reduce or extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT or the WPPT.

Article 18.66: Balance in Copyright and Related Rights Systems

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.^{77,78}

Article 18.67: Contractual Transfers

Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right⁷⁹ in a work, performance or phonogram:

- (a) may freely and separately transfer that right by contract; and
- (b) by virtue of contract, including contracts of employment underlying the creation of works, performances or phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.⁸⁰

⁷⁷ As recognised by the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, done at Marrakesh, June 27, 2013 (Marrakesh Treaty). The Parties recognise that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

⁷⁸ For greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions).

⁷⁹ For greater certainty, this provision does not affect the exercise of moral rights.

⁸⁰ Nothing in this Article affects a Party's ability to establish: (i) which specific contracts underlying the creation of works, performances 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 protect the interests of the original right holders, taking into account the legitimate interests of the transferees.

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Article 18.68: Technological Protection Measures (TPMs)⁸¹

1. 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 that:

- (a) knowingly, or having reasonable grounds to know,⁸² circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram;⁸³ or
- (b) manufactures, imports, distributes,⁸⁴ offers for sale or rental to the public, or otherwise provides devices, products, or components, or offers to the public or provides services, that:
 - (i) are promoted, advertised, or otherwise marketed by that person⁸⁵ for the purpose of circumventing any effective technological measure;
 - (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure;⁸⁶ or
 - (iii) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

is liable and subject to the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies).

⁸¹ Nothing in this Agreement requires a Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the only purpose of which is to control market segmentation for legitimate physical copies of a cinematographic film, and is not otherwise a violation of its law.

⁸² For the purposes of this subparagraph, a Party may provide that reasonable grounds to know may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.

⁸³ For greater certainty, no Party is required to impose civil or criminal liability under this subparagraph for a person that circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, performance or phonogram, but does not control access to such that work, performance or phonogram.

⁸⁴ A Party may provide that the obligations described in this subparagraph with respect to manufacturing, importation, and distribution apply only in cases in which those activities are undertaken for sale or rental, or if those activities prejudice the interests of the right holder of the copyright or related right.

⁸⁵ The Parties understand that this provision still applies in cases in which the person promotes, advertises, or markets through the services of a third person.

⁸⁶ A Party may comply with this paragraph if the conduct referred to in this subparagraph does not have a commercially significant purpose or use other than to circumvent an effective technological measure.

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Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully⁸⁷ and for the purposes of commercial advantage or financial gain⁸⁸ in any of the above activities.⁸⁹

A Party may provide that the criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public non-commercial broadcasting entity. A Party may also provide that the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies) do not apply to any of the same entities provided that the above activities are carried out in good faith without knowledge that the conduct is prohibited.

2. In implementing paragraph 1, no 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, provided that the product does not otherwise violate a measure implementing paragraph 1.

3. Each Party shall provide that a violation of a measure implementing this Article is independent of any infringement that might occur under the Party's law on copyright and related rights.⁹⁰

4. With regard to measures implementing paragraph 1:

- (a) a Party may provide certain limitations and exceptions to the measures implementing paragraph 1(a) or paragraph 1(b) in order to enable non-infringing uses if there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party's law;⁹¹

⁸⁷ For greater certainty, for purposes of this Article and Article 18.69 (RMI), wilfulness contains a knowledge element.

⁸⁸ For greater certainty, for purposes of this Article, Article 18.69 (RMI) and Article 18.77.1 (Criminal Procedures and Penalties), the Parties understand that a Party may treat "financial gain" as "commercial purposes".

⁸⁹ For greater certainty, no Party is required to impose liability under this Article and Article 18.69 (RMI) for actions taken by that Party or a third person acting with the authorisation or consent of that Party.

⁹⁰ For greater certainty, a Party is not required to treat the criminal act of circumvention set forth in paragraph 1(a) as an independent violation, where the Party criminally penalises such acts through other means.

⁹¹ For greater certainty, nothing in this provision requires a Party to make a new determination through the legislative, regulatory, or administrative process with respect to limitations and exceptions to the legal protection of effective technological measures: (i) previously established pursuant to trade agreements in force between two or more Parties; or (ii) previously implemented by the Parties, provided that such limitations and exceptions are otherwise consistent with this paragraph.

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- (b) any limitations or exceptions to a measure that implements paragraph 1(b) shall be permitted only to enable the legitimate use of a limitation or exception permissible under this Article by its intended beneficiaries⁹² and does not authorise the making available of devices, products, components, or services beyond those intended beneficiaries;⁹³ and
- (c) a Party shall not, by providing limitations and exceptions under paragraph 4(a) and paragraph 4(b), undermine the adequacy of that Party's legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures, that authors, performers, or producers of phonograms use in connection with the exercise of their rights, or that restrict unauthorised acts in respect of their works, performances or phonograms, as provided for in this Chapter.

5. **effective technological measure** means any effective⁹⁴ technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or related rights related to a work, performance or phonogram.

Article 18.69: Rights Management Information (RMI)⁹⁵

1. In order to provide adequate and effective legal remedies to protect RMI:

- (a) each Party shall provide that any person that, without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate or conceal an infringement of the copyright or related right of authors, performers or producers of phonograms:
 - (i) knowingly⁹⁶ removes or alters any RMI;
 - (ii) knowingly distributes or imports for distribution RMI knowing that the RMI has been altered without authority;⁹⁷ or

⁹² For greater certainty, a Party may provide an exception to subparagraph 1(b) without providing a corresponding exception to subparagraph 1(a), provided that the exception to paragraph 1(b) is limited to enabling a legitimate use that is within the scope of limitations or exceptions to 1(a) as provided under this subparagraph.

⁹³ For the purposes of interpreting subparagraph 4(b) only, subparagraph 1(a) should be read to apply to all effective technological measures as defined in paragraph 5, *mutatis mutandis*.

⁹⁴ For greater certainty, a technological measure that can, in a usual case, be circumvented accidentally is not an "effective" technological measure.

⁹⁵ A Party may comply with the obligations in this Article by providing legal protection only to electronic RMI.

⁹⁶ For greater certainty, a Party may extend the protection afforded by this paragraph to circumstances in which a person engages without knowledge in the acts in sub-subparagraphs (i), (ii), and (iii), and to other related right holders.

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- (iii) knowingly distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works, performances or phonograms, knowing that RMI has been removed or altered without authority,

is liable and subject to the remedies set out in Article 18.74(Civil and Administrative Procedures and Remedies).

Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain in any of the activities described in subparagraph (a).

A Party may provide that the criminal procedures and penalties referred to in paragraph 1(b) do not apply to a non-profit library, museum, archive, educational institution or public non-commercial broadcasting entity.⁹⁸

2. For greater certainty, nothing prevents a Party from excluding from a measure that implements paragraph 1 a lawfully authorised activity that is carried out for the purpose of law enforcement, essential security interests or other related governmental purposes, such as the performance of a statutory function.

3. For greater certainty, nothing in this Article shall obligate a Party to require a right holder in a work, performance or phonogram to attach RMI to copies of the work, performance or phonogram, or to cause RMI to appear in connection with a communication of the work, performance or phonogram to the public.

4. **RMI means:**

- (a) information that 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;
- (b) information about the terms and conditions of the use of the work, performance or phonogram; or
- (c) any numbers or codes that represent the information referred to in subparagraphs (a) and (b),

⁹⁷ A Party may comply with its obligations under this sub-subparagraph by providing for civil judicial proceedings concerning the enforcement of moral rights under its copyright law. A Party may also meet its obligation under this sub-subparagraph, if it provides effective protection for original compilations, provided that the acts described in this sub-subparagraph are treated as infringements of copyright in those original compilations.

⁹⁸ For greater certainty, a Party may treat a broadcasting entity established without a profit-making purpose under its law as a public non-commercial broadcasting entity.

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if 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.

Article 18.70: Collective Management

The Parties recognise the important role of collective management societies for copyright and related rights in collecting and distributing royalties⁹⁹ based on practices that are fair, efficient, transparent and accountable, which may include appropriate record keeping and reporting mechanisms.

⁹⁹ For greater certainty, royalties may include equitable remuneration.

Section I: Enforcement

Article 18.71: General Obligations

1. Each Party shall ensure that enforcement procedures as specified in this Section are available under its law¹⁰⁰ so as to permit effective action against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to future infringements.¹⁰¹ These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Each Party confirms that the enforcement procedures set forth in Article 18.74 (Civil and Administrative Procedures and Remedies), Article 18.75 (Provisional Measures) and Article 18.77 (Criminal Procedures and Penalties) shall be available to the same extent with respect to acts of trademark infringement, as well as copyright or related rights infringement, in the digital environment.

3. Each Party shall ensure that its procedures concerning the enforcement of intellectual property rights are fair and equitable. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

4. This Section does not create any obligation:

- (a) to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of each Party to enforce its law in general; or
- (b) with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.

5. In implementing the provisions of this Section in its intellectual property system, each Party shall take into account the need for proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties, as well as the interests of third parties.

¹⁰⁰ For greater certainty, “law” is not limited to legislation.

¹⁰¹ For greater certainty, and subject to Article 44 of the TRIPS Agreement and the provisions of this Agreement, each Party confirms that it makes such remedies available with respect to enterprises, regardless of whether the enterprises are private or state-owned.

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Article 18.72: Presumptions

1. In civil, criminal and, if applicable, administrative proceedings involving copyright or related rights, each Party shall provide for a presumption¹⁰² that, in the absence of proof to the contrary:

- (a) the person whose name is indicated in the usual manner¹⁰³ as the author, performer or producer of the work, performance or phonogram, or if applicable the publisher, is the designated right holder in that work, performance or phonogram; and
- (b) the copyright or related right subsists in such subject matter.

2. In connection with the commencement of a civil, administrative or criminal enforcement proceeding involving a registered trademark that has been substantively examined by its competent authority, each Party shall provide that the trademark be considered *prima facie* valid.

3. In connection with the commencement of a civil or administrative enforcement proceeding involving a patent that has been substantively examined and granted¹⁰⁴ by the competent authority of a Party, that Party shall provide that each claim in the patent be considered *prima facie* to satisfy the applicable criteria of patentability in the territory of the Party.^{105,106}

Article 18.73: Enforcement Practices with Respect to Intellectual Property Rights

1. Each Party shall provide that final judicial decisions and administrative rulings of general application pertaining to the enforcement of intellectual property rights:

¹⁰² For greater certainty, a Party may implement this Article on the basis of sworn statements or documents having evidentiary value, such as statutory declarations. A Party may also provide that these presumptions are rebuttable presumptions that may be rebutted by evidence to the contrary.

¹⁰³ For greater certainty, a Party may establish the means by which it shall determine what constitutes the “usual manner” for a particular physical support.

¹⁰⁴ For greater certainty, nothing in this Chapter prevents a Party from making available third party procedures in connection with its fulfilment of the obligations under paragraphs 2 and 3.

¹⁰⁵ For greater certainty, if a Party provides its administrative authorities with the exclusive authority to determine the validity of a registered trademark or patent, nothing in paragraphs 2 and 3 shall prevent that Party’s competent authority from suspending enforcement procedures until the validity of the registered trademark or patent is determined by the administrative authority. In those validity procedures, the party challenging the validity of the registered trademark or patent shall be required to prove that the registered trademark or patent is not valid. Notwithstanding this requirement, a Party may require the trademark holder to provide evidence of first use.

¹⁰⁶ A Party may provide that this paragraph applies only to those patents that have been applied for, examined and granted after the entry into force of this Agreement for that Party.

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- (a) preferably are in writing and state any relevant findings of fact and the reasoning or the legal basis on which the decisions and rulings are based; and
 - (b) are published¹⁰⁷ or, if publication is not practicable, otherwise made available to the public in a national language in such a manner as to enable interested persons and Parties to become acquainted with them.
2. Each Party recognises the importance of collecting and analysing statistical data and other relevant information concerning infringements of intellectual property rights as well as collecting information on best practices to prevent and combat infringements.
3. Each Party shall publish or otherwise make available to the public information on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative and criminal systems, such as statistical information that the Party may collect for such purposes.

Article 18.74: Civil and Administrative Procedures and Remedies

- 1. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered in this Chapter.¹⁰⁸
- 2. Each Party shall provide that its judicial authorities have the authority to order injunctive relief that conforms to Article 44 of the TRIPS Agreement, including to prevent goods that involve the infringement of an intellectual property right under the law of the Party providing that relief from entering into the channels of commerce.
- 3. Each Party shall provide¹⁰⁹ that, in civil judicial proceedings, its judicial authorities have the authority at least to order the infringer to pay the right holder 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 who knowingly, or with reasonable grounds to know, engaged in infringing activity.
- 4. In determining the amount of damages under paragraph 3, each Party's judicial authorities shall have the authority to consider, among other things, any legitimate

¹⁰⁷ For greater certainty, a Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet.

¹⁰⁸ For the purposes of this Article, the term "right holders" shall include those authorised licensees, federations and associations that have the legal standing and authority to assert such rights. The term "authorised licensee" shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

¹⁰⁹ A Party may also provide that the right holder may not be entitled to any of the remedies set out in paragraphs 3, 5 and 7 if there is a finding of non-use of a trademark. For greater certainty, there is no obligation for a Party to provide for the possibility of any of the remedies in paragraphs 3, 5, 6 and 7 to be ordered in parallel.

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measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.

5. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer, at least in cases described in paragraph 3, to pay the right holder the infringer's profits that are attributable to the infringement.¹¹⁰

6. In civil judicial proceedings with respect to the infringement of copyright or related rights protecting works, phonograms or performances, each Party shall establish or maintain a system that provides for one or more of the following:

- (a) pre-established damages, which shall be available on the election of the right holder; or
- (b) additional damages.¹¹¹

7. In civil judicial proceedings with respect to trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following:

- (a) pre-established damages, which shall be available on the election of the right holder; or
- (b) additional damages.¹¹²

8. Pre-established damages under paragraphs 6 and 7 shall be set out in an amount that would be sufficient to compensate the right holder for the harm caused by the infringement, and with a view to deterring future infringements.

9. In awarding additional damages under paragraphs 6 and 7, judicial authorities shall have the authority to award such additional damages as they consider appropriate, having regard to all relevant matters, including the nature of the infringing conduct and the need to deter similar infringements in the future.

10. Each Party shall provide that its judicial authorities, if appropriate, have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of at least copyright or related rights, patents and trademarks, that the prevailing party be awarded payment by the losing party of court costs or fees and

¹¹⁰ A Party may comply with this paragraph through presuming those profits to be the damages referred to in paragraph 3.

¹¹¹ For greater certainty, additional damages may include exemplary or punitive damages.

¹¹² For greater certainty, additional damages may include exemplary or punitive damages.

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appropriate attorney's fees, or any other expenses as provided for under the Party's law.

11. If a Party's judicial or other authorities appoint a technical or other expert in a civil proceeding concerning the enforcement of an intellectual property right and require that the parties to the proceeding pay the costs of that expert, that Party should seek to ensure that those costs are reasonable and related appropriately, among other things, to the quantity and nature of work to be performed and do not unreasonably deter recourse to such proceedings.

12. Each Party shall provide that in civil judicial proceedings:

- (a) at least with respect to pirated copyright goods and counterfeit trademark goods, its judicial authorities have the authority, at the right holder's request, to order that the infringing goods be destroyed, except in exceptional circumstances, without compensation of any sort;
- (b) its judicial authorities have the authority to order that materials and implements that have been used in the manufacture or creation of the infringing goods be, without undue delay and without compensation of any sort, destroyed or disposed of outside the channels of commerce in such a manner as to minimise the risk of further infringement; and
- (c) in regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed is not sufficient, other than in exceptional circumstances, to permit the release of goods into the channels of commerce.

13. Without prejudice to its law governing privilege, the protection of confidentiality of information sources or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of an intellectual property right, its judicial authorities have the authority, on a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. The information may include information regarding any person involved in any aspect of the infringement or alleged infringement and the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of the goods or services and of their channels of distribution.

14. Each Party shall provide that in relation to a civil judicial proceeding concerning the enforcement of an intellectual property right, its judicial or other authorities have the authority to impose sanctions on a party, counsel, experts or other persons subject to the court's jurisdiction for violation of judicial orders concerning the protection of confidential information produced or exchanged in that proceeding.

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15. Each Party shall ensure that its judicial authorities have the authority to order a party at whose request measures were taken and that has abused enforcement procedures with regard to intellectual property rights, including trademarks, geographical indications, patents, copyright and related rights and industrial designs, to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of that abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

16. To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, each Party shall provide that those procedures conform to principles equivalent in substance to those set out in this Article.

17. In civil judicial proceedings concerning the acts described in Article 18.68 (TPMs) and Article 18.69 (RMI):

- (a) each Party shall provide that its judicial authorities have the authority at least to:¹¹³
 - (i) impose provisional measures, including seizure or other taking into custody of devices and products suspected of being involved in the prohibited activity;
 - (ii) order the type of damages available for copyright infringement, as provided under its law in accordance with this Article;¹¹⁴
 - (iii) order court costs, fees or expenses as provided for under paragraph 10; and
 - (iv) order the destruction of devices and products found to be involved in the prohibited activity; and
- (b) a Party may provide that damages shall not be available against a non-profit library, archive, educational institution, museum or public non-commercial broadcasting entity, if it sustains the burden of proving that it was not aware or had no reason to believe that its acts constituted a prohibited activity.

¹¹³ For greater certainty, a Party may, but is not required to, put in place separate remedies in respect of Article 18.68 (TPMs) and Article 18.69 (RMI), if those remedies are available under its copyright law.

¹¹⁴ If a Party's copyright law provides for both pre-established damages and additional damages, that Party may comply with the requirements of this subparagraph by providing for only one of these forms of damages.

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Article 18.75: Provisional Measures

1. Each Party's authorities shall act on a request for relief in respect of an intellectual property right *inaudita altera parte* expeditiously in accordance with that Party's judicial rules.

2. Each Party shall provide that its judicial authorities have the authority to require the applicant for a provisional measure in respect of an intellectual property right to provide any reasonably available evidence in order to satisfy the judicial authority, with a sufficient degree of certainty, that the applicant's right is being infringed or that the infringement is imminent, and to order the applicant to provide security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to those procedures.

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

Article 18.76: Special Requirements related to Border Measures

1. Each Party shall provide for applications to suspend the release of, or to detain, any suspected counterfeit or confusingly similar trademark or pirated copyright goods that are imported into the territory of the Party.¹¹⁵

2. Each Party shall provide that any right holder initiating procedures for its competent authorities¹¹⁶ to suspend release of suspected counterfeit or confusingly similar trademark or pirated copyright goods into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the law of the Party providing the procedures, 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 suspect

¹¹⁵ For the purposes of this Article:

- (a) counterfeit trademark goods means any goods, including packaging, bearing without authorization 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 Party providing the procedures under this section; and
- (b) 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 Party providing the procedures under this section.

¹¹⁶ For the purposes of this Article, unless otherwise specified, competent authorities may include the appropriate judicial, administrative or law enforcement authorities under a Party's law.

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goods reasonably recognisable by its competent authorities. The requirement to provide that information shall not unreasonably deter recourse to these procedures.

3. Each Party shall provide that its competent authorities have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit or confusingly similar 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 does not unreasonably deter recourse to these procedures. A Party may provide that the security may be in the form of a bond conditioned to hold the defendant 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.

4. Without prejudice to a Party's law pertaining to privacy or the confidentiality of information:

- (a) if a Party's competent authorities have detained or suspended the release of goods that are suspected of being counterfeit trademark or pirated copyright goods, that Party may provide that its competent authorities have the authority to inform the right holder without undue delay of the names and addresses of the consignor, exporter, consignee or importer; a description of the goods; the quantity of the goods; and, if known, the country of origin of the goods;¹¹⁷ or
- (b) if a Party does not provide its competent authority with the authority referred to in subparagraph (a) when suspect goods are detained or suspended from release, it shall provide, at least in cases of imported goods, its competent authorities with the authority to provide the information specified in subparagraph (a) to the right holder normally within 30 working days of the seizure or determination that the goods are counterfeit trademark goods or pirated copyright goods.

5. Each Party shall provide that its competent authorities may initiate border measures *ex officio*¹¹⁸ with respect to goods under customs control¹¹⁹ that are:

- (a) imported;
- (b) destined for export;¹²⁰ or
- (c) in transit,^{121,122}

¹¹⁷ For greater certainty, a Party may establish reasonable procedures to receive or access that information.

¹¹⁸ For greater certainty, that *ex officio* action does not require a formal complaint from a third party or right holder.

¹¹⁹ For the purposes of this Article, a Party may treat "goods under customs control" as meaning goods that are subject to a Party's customs procedures.

¹²⁰ For the purposes of this Article, a Party may treat goods "destined for export" as meaning exported.

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and that are suspected of being counterfeit trademark goods or pirated copyright goods.

6. Each Party shall adopt or maintain a procedure by which its competent authorities may determine within a reasonable period of time after the initiation of the procedures described in paragraph 1, paragraph 5(a), paragraph 5(b) and, if applicable, paragraph 5(c), whether the suspect goods infringe an intellectual property right.¹²³ If a Party provides administrative procedures for the determination of an infringement, it may also provide its authorities with the authority to impose administrative penalties or sanctions, which may include fines or the seizure of the infringing goods following a determination that the goods are infringing.

7. Each Party shall provide that its competent authorities have the authority to order the destruction of goods following a determination that the goods are infringing. In cases in which the goods are not destroyed, each Party shall ensure that, except in exceptional circumstances, the goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit the release of the goods into the channels of commerce.

8. If a Party establishes or assesses, in connection with the procedures described in this Article, an application fee, storage fee or destruction fee, that fee shall not be set at an amount that unreasonably deters recourse to these procedures.

9. This Article also shall apply to goods of a commercial nature sent in small consignments. A Party may exclude from the application of this Article small quantities of goods of a non-commercial nature contained in travellers' personal luggage.¹²⁴

Article 18.77: Criminal Procedures and Penalties

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy

¹²¹ This subparagraph applies to suspect goods that are in transit from one customs office to another customs office in the Party's territory from which the goods will be exported.

¹²² As an alternative to this subparagraph, a Party shall instead endeavour to provide, if appropriate and with a view to eliminating international trade in counterfeit trademark goods or pirated copyright goods, available information to another Party in respect of goods that it has examined without a local consignee and that are transhipped through its territory and destined for the territory of the other Party, to inform that other Party's efforts to identify suspect goods upon arrival in its territory.

¹²³ A Party may comply with the obligation in this Article with respect to a determination that suspect goods under paragraph 5 infringe an intellectual property right through a determination that the suspect goods bear a false trade description.

¹²⁴ For greater certainty, a Party may also exclude from the application of this Article small quantities of goods of a non-commercial nature sent in small consignments.

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on a commercial scale. In respect of wilful copyright or related rights piracy, “on a commercial scale” includes at least:

- (a) acts carried out for commercial advantage or financial gain; and
- (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.^{125,126}

2. Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties.¹²⁷

3. Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation¹²⁸ and domestic use, in the course of trade and on a commercial scale, of a label or packaging:¹²⁹

- (a) to which a trademark has been applied without authorisation that is identical to, or cannot be distinguished from, a trademark registered in its territory; and
- (b) that is intended to be used in the course of trade on goods or in relation to services that are identical to goods or services for which that trademark is registered.

4. Recognising the need to address the unauthorised copying¹³⁰ of a cinematographic work from a performance in a movie theatre that causes significant harm to a right holder in the market for that work, and recognising the need to deter such harm, each Party shall adopt or maintain measures, which shall at a minimum include, but need not be limited to, appropriate criminal procedures and penalties.

¹²⁵ The Parties understand that a Party may comply with subparagraph (b) by addressing such significant acts under its criminal procedures and penalties for non-authorised uses of protected works, performances and phonograms in its law.

¹²⁶ A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.

¹²⁷ The Parties understand that a Party may comply with its obligation under this paragraph by providing that distribution or sale of counterfeit trademark goods or pirated copyright goods on a commercial scale is an unlawful activity subject to criminal penalties. Furthermore, criminal procedures and penalties as specified in paragraphs 1, 2 and 3 are applicable in any free trade zones in a Party.

¹²⁸ A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.

¹²⁹ A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to be applied to attempts to commit a trademark offence.

¹³⁰ For the purposes of this Article, a Party may treat the term “copying” as synonymous with reproduction.

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5. With respect to the offences for which this Article requires a Party to provide for criminal procedures and penalties, each Party shall ensure that criminal liability for aiding and abetting is available under its law.

6. With respect to the offences described in paragraphs 1 through 5, each Party shall provide the following:

- (a) Penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistent with the level of penalties applied for crimes of a corresponding gravity.¹³¹
- (b) Its judicial authorities have the authority, in determining penalties, to account for the seriousness of the circumstances, which may include circumstances that involve threats to, or effects on, health or safety.¹³²
- (c) Its judicial or other competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence and assets derived from, or obtained through the alleged infringing activity. If a Party requires identification of items subject to seizure as a prerequisite for issuing a judicial order referred to in this subparagraph, that Party shall not require the items to be described in greater detail than necessary to identify them for the purpose of seizure.
- (d) Its judicial authorities have the authority to order the forfeiture, at least for serious offences, of any assets derived from or obtained through the infringing activity.
- (e) Its judicial authorities have the authority to order the forfeiture or destruction of:
 - (i) all counterfeit trademark goods or pirated copyright goods;
 - (ii) materials and implements that have been predominantly used in the creation of pirated copyright goods or counterfeit trademark goods; and
 - (iii) any other labels or packaging to which a counterfeit trademark has been applied and that have been used in the commission of the offence.

¹³¹ The Parties understand that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

¹³² A Party may also account for such circumstances through a separate criminal offence.

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In cases in which counterfeit trademark goods and pirated copyright goods are not destroyed, the judicial or other competent authorities shall ensure that, except in exceptional circumstances, those goods are disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall further provide that forfeiture or destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant.

- (f) Its judicial or other competent authorities have the authority to release or, in the alternative, provide access to, goods, material, implements, and other evidence held by the relevant authority to a right holder for civil¹³³ infringement proceedings.
- (g) Its competent authorities may act upon their own initiative to initiate legal action without the need for a formal complaint by a third person or right holder.¹³⁴

7. With respect to the offences described in paragraphs 1 through 5, a Party may provide that its judicial authorities have the authority to order the seizure or forfeiture of assets, or alternatively, a fine, the value of which corresponds to the assets derived from, or obtained directly or indirectly through, the infringing activity.

Article 18.78: Trade Secrets¹³⁵

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention, each Party shall ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state-owned enterprises) without their consent in a manner contrary to honest commercial practices.¹³⁶ As used in this Chapter, trade secrets encompass, at a minimum, undisclosed information as provided for in Article 39.2 of the TRIPS Agreement.

2. Subject to paragraph 3, each Party shall provide for criminal procedures and penalties for one or more of the following:

- (a) the unauthorised and wilful access to a trade secret held in a computer system;

¹³³ A Party may also provide this authority in connection with administrative infringement proceedings.

¹³⁴ With regard to copyright and related rights piracy provided for under paragraph 1, a Party may limit application of this paragraph to the cases in which there is an impact on the right holder's ability to exploit the work, performance or phonogram in the market.

¹³⁵ For greater certainty, this Article is without prejudice to a Party's measures protecting good faith lawful disclosures to provide evidence of a violation of that Party's law.

¹³⁶ For the purposes of this paragraph "a manner contrary to honest commercial practices" means at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties that knew, or were grossly negligent in failing to know, that those practices were involved in the acquisition.

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- (b) the unauthorised and wilful misappropriation¹³⁷ of a trade secret, including by means of a computer system; or
- (c) the fraudulent disclosure, or alternatively, the unauthorised and wilful disclosure, of a trade secret, including by means of a computer system.

3. With respect to the relevant acts referred to in paragraph 2, a Party may, as appropriate, limit the availability of its criminal procedures, or limit the level of penalties available, to one or more of the following cases in which:

- (a) the acts are for the purposes of commercial advantage or financial gain;
- (b) the acts are related to a product or service in national or international commerce;
- (c) the acts are intended to injure the owner of such trade secret;
- (d) the acts are directed by or for the benefit of or in association with a foreign economic entity; or
- (e) the acts are detrimental to a Party's economic interests, international relations, or national defence or national security.

Article 18.79: Protection of Encrypted Program-Carrying Satellite and Cable Signals

1. Each Party shall make it a criminal offence to:

- (a) manufacture, assemble, modify,¹³⁸ import, export, sell, lease or otherwise distribute a tangible or intangible device or system knowing or having reason to know¹³⁹ that the device or system meets at least one of the following conditions:
 - (i) it is intended to be used to assist;
 - (ii) it is primarily of assistance; or
 - (iii) its principal function is solely to assist,

¹³⁷ A Party may deem the term "misappropriation" to be synonymous with "unlawful acquisition".

¹³⁸ For greater certainty, a Party may treat "assemble" and "modify" as incorporated in "manufacture".

¹³⁹ For the purposes of this paragraph, a Party may provide that "having reason to know" may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act, as part of the Party's "knowledge" requirements. A Party may treat "having reason to know" as "meaning "wilful negligence".

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in decoding an encrypted program-carrying satellite signal without the authorisation of the lawful distributor¹⁴⁰ of such signal;¹⁴¹ and

- (b) with respect to an encrypted program-carrying satellite signal, wilfully:
 - (i) receive¹⁴² such a signal; or
 - (ii) further distribute¹⁴³ such 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 for a person that holds an interest in an encrypted program-carrying satellite signal or its content and that is injured by an activity described in paragraph 1.

3. Each Party shall provide for criminal penalties or civil remedies¹⁴⁴ for wilfully:

- (a) manufacturing or distributing equipment knowing that the equipment is intended to be used in the unauthorised reception of any encrypted program-carrying cable signal; and
- (b) receiving, or assisting another to receive,¹⁴⁵ an encrypted program-carrying cable signal without authorisation of the lawful distributor of the signal.

Article 18.80: Government Use of Software

1. Each Party recognises the importance of promoting the adoption of measures to enhance government awareness of respect for intellectual property rights and of the detrimental effects of the infringement of intellectual property rights.

¹⁴⁰ With regard to the criminal offences and penalties in paragraph 1 and paragraph 3, a Party may require a demonstration of intent to avoid payment to the lawful distributor, or a demonstration of intent to otherwise secure a pecuniary benefit to which the recipient is not entitled.

¹⁴¹ The obligation regarding export may be met by making it a criminal offence to possess and distribute a device or system described in this paragraph. For the purposes of this Article, a Party may provide that a “lawful distributor” means a person that has the lawful right in that Party’s territory to distribute the encrypted program-carrying signal and authorise its decoding.

¹⁴² For greater certainty and for the purposes of paragraph 1(b) and paragraph 3(b), a Party may provide that wilful receipt of an encrypted program-carrying satellite or cable signal means receipt and use of the signal, or means receipt and decoding of the signal.

¹⁴³ For greater certainty, a Party may interpret “further distribute” as “retransmit to the public”.

¹⁴⁴ If a Party provides for civil remedies, it may require a demonstration of injury.

¹⁴⁵ A Party may comply with its obligation in respect of “assisting another to receive” by providing for criminal penalties to be available against a person wilfully publishing any information in order to enable or assist another person to receive a signal without authorisation of the lawful distributor of the signal.

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2. Each Party shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies use only non-infringing computer software protected by copyright and related rights, and, if applicable, only use that computer software in a manner authorised by the relevant licence. These measures shall apply to the acquisition and management of the software for government use.¹⁴⁶

¹⁴⁶ For greater certainty, paragraph 2 should not be interpreted as encouraging regional government agencies to use infringing computer software or, if applicable, to use computer software in a manner which is not authorised by the relevant licence.