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TRANS-PACIFIC PARTNERSHIP

INTELLECTUAL PROPERTY RIGHTS CHAPTER

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**CHAPTER []
INTELLECTUAL PROPERTY RIGHTS**

ARTICLE 1: GENERAL PROVISIONS

1. Each Party shall, at a minimum, give effect to this Chapter.

International Agreements

2. Further to Article 1, the Parties affirm their existing rights and obligations with respect to each other under the TRIPS Agreement.

3. Each Party shall ratify or accede to the following agreements by the date of entry into force of this Agreement:

- (a) *Patent Cooperation Treaty* (1970), as amended in 1979;
- (b) *Paris Convention for the Protection of Industrial Property* (1967);
- (c) *Berne Convention for the Protection of Literary and Artistic Works* (1971);
- (d) *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
- (e) *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
- (f) *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;
- (g) *International Convention for the Protection of New Varieties of Plants* (1991) (UPOV Convention);
- (h) *Singapore Treaty on the Law of Trademarks* (2006);
- (i) *WIPO Copyright Treaty* (1996); and
- (j) *WIPO Performances and Phonograms Treaty* (1996).

4. Each Party shall notify the WTO of its acceptance of the Protocol amending the TRIPS Agreement done at Geneva on December 6, 2005.

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- 5. Each Party shall make all reasonable efforts ratify or accede to the following agreements by the date of entry into force of the Agreement:**
- (a) *Patent Law Treaty* (2000); and**
 - (b) *Hague Agreement Concerning the International Registration of Industrial Designs* (1999).**

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More Extensive Protection and Enforcement

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6. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.

National Treatment

7. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals¹ of the other Parties treatment no less favorable than it accords to its own nationals with regard to the protection² and enjoyment of such intellectual property rights and any benefits derived from such rights.
8. A Party may derogate from paragraph [7] in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:
- (a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and
 - (b) not applied in a manner that would constitute a disguised restriction on trade.
9. Paragraph [7] does not apply to procedures provided in multilateral agreements to which any Party is a party and which were concluded under the auspices of the World Intellectual Property Organization (WIPO) in relation to the acquisition or maintenance of intellectual property rights.

Application of Agreement to Existing Subject Matter and Prior Acts

1 [For purposes of Articles [___(NT & Judicial/Admin Procedures)___(GIs/Nationals), and ___(Performers/Phonograms/Related Rights,)] a **national of a Party** shall also mean, in respect of the relevant right, an entity of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in [Article 1.3] and the TRIPS Agreement.]

2 [For purposes of this paragraph, “protection” includes 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 purposes of this paragraph, “protection” also includes the prohibition on circumvention of effective technological measures set out in Article ___ and the rights and obligations concerning rights management information set out in Article ___.]

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10. Except as it otherwise provides, including in Article ____ (Berne 18/TRIPS 14.6), this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.
11. Except as otherwise provided in this Chapter, including Article ____ (Berne 18/TRIPS 14.6), a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement has fallen into the public domain in its territory.
12. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.

Transparency

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

ARTICLE 2: TRADEMARKS, INCLUDING GEOGRAPHICAL INDICATIONS

Trademarks

1. No Party may require, as a condition of registration, that a sign be visually perceptible, nor may a Party deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound or a scent.
2. Each Party shall provide that trademarks shall include certification marks. Each Party shall also provide that geographical indications are eligible for protection as trademarks.⁴

3 A Party may satisfy requirement for publication by making the law, regulation, or procedure available to the public on the Internet.

4 For purposes of this Chapter, **geographical indications** means indications that 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, as well as letters, numerals, figurative elements, and colors, including single colors), in any form whatsoever, shall be eligible to be a geographical indication. The term “originating” in this chapter does not have the meaning ascribed to that term in Article ____ (Definitions).

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

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

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

6. No Party may require as a condition for determining that a mark is a well-known mark that the mark has been registered in the Party or in another jurisdiction. Additionally, no Party may deny remedies or relief with respect to well-known marks based solely on the lack of:

- (a) a registration;
- (b) inclusion on a list of well-known marks; or
- (c) prior recognition of the mark as well-known.

7. Article 6bis of the *Paris Convention for the Protection of Industrial Property* (1967) shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,⁵ 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.

8. Each Party shall provide for appropriate measures to refuse or cancel the registration and prohibit the use of a trademark or geographical indication that is identical or similar to a well-known trademark, for related goods or services, if the use of that trademark or geographical indication is likely to cause confusion, or to cause mistake, or to deceive or risk associating the trademark or geographical indication with the owner of the well-known trademark, or constitutes unfair exploitation of the reputation of the well-known trademark.

5 For purposes of determining whether a mark is well-known, no Party shall require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

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9. Each Party shall provide a system for the registration of trademarks, which shall include:
 - (a) a requirement to provide to the applicant a communication in writing, which may be provided electronically, of the reasons for a refusal to register a trademark;
 - (b) an opportunity for the applicant to respond to communications from the competent authorities, to contest an initial refusal, and to appeal judicially a final refusal to register;
 - (c) an opportunity for interested parties to oppose a trademark application and to seek cancellation of a trademark registration after it has been granted; and
 - (d) a requirement that decisions in opposition and cancellation proceedings be reasoned and in writing. Written decisions may be provided electronically.
10. Each Party shall provide a:
 - (a) system for the electronic application for, and electronic processing, registering, and maintenance of, trademarks; and
 - (b) publicly available electronic database, including an online database, of trademark applications and registrations.
11. Each Party shall provide that:
 - (a) each registration and publication that concerns a trademark application or registration that indicates goods or services shall indicate the goods or services by their names, grouped according to the classes of the classification established by the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (1979), as revised and amended (Nice Classification); and
 - (b) goods or services may not be considered as being similar to each other solely on the ground that, in any registration or publication, they are classified in the same class of the Nice Classification. Conversely, each Party shall provide that goods or services may not be considered as being dissimilar from each other solely on the ground that, in any registration or publication, they are classified in different classes of the Nice Classification.
12. Each Party shall provide that initial registration and each renewal of registration of a trademark shall be for a term of no less than ten years.
13. No Party may require recordation of trademark licenses to establish the validity of the license, to assert any rights in a trademark, or for other purposes.

Geographical Indications

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14. If a Party provides the means to apply for protection or petition for recognition of geographical indications, through a system of protection of trademarks or otherwise, it shall, with respect to those applications or petitions, as relevant:
- (a) accept those applications and petitions without requiring intercession by a Party on behalf of its nationals;
 - (b) process those applications or petitions with a minimum of formalities;
 - (c) ensure that its regulations governing filing of those applications or petitions are readily available to the public and clearly set out the procedures for these actions;
 - (d) make available contact information sufficient to allow the general public to obtain guidance concerning the procedures for filing applications or petitions and the processing of those applications or petitions in general; and allow applicants, petitioners, or their representatives to ascertain the status of, and to obtain procedural guidance concerning, specific applications and petitions; and
 - (e) ensure that applications or petitions for geographical indications are published for opposition and provide procedures for opposing geographical indications that are the subject of applications or petitions.
 - (f) each Party shall also provide procedures to cancel a registration resulting from an application or a petition.
15. (a) Each Party shall provide that the grounds for refusing protection or recognition of a geographical indication and for allowing opposition to, and cancellation of, a geographical indication shall include the following:
- (i) the geographical indication is likely to cause confusion with a trademark or geographical indication that is the subject of a good faith pending application or registration in the territory of such Party and that has a priority date that predates the protection or recognition of the later geographical indication in such territory;
 - (ii) the geographical indication is likely to cause confusion with a trademark or geographical indication, the rights to which have been acquired in the territory of the Party through use in good faith, that has a priority date that predates the protection or recognition of the later geographical indication in such territory;
 - (iii) the geographical indication is likely to cause confusion with a trademark or geographical indication that has become well known in the territory of the Party and that has a priority date that predates the protection or recognition of the later geographical indication in such territory; and

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- (iv) the geographical indication is a generic term for the goods or services associated with the geographical indication in the Party's territory;
 - (b) For purposes of this section, the date of protection of the geographical indication in a territory of a Party shall be:
 - (i) in the case of protection or recognition provided as a result of an application or petition, the date of such application or petition was filed; and
 - (ii) in the case of protection or recognition provided through other means, the date of protection or recognition specified under the Party's laws.
16. If a Party elects to register or otherwise designate any sign as a geographical indication by means other than an ordinary application for protection under the Party's domestic procedures, whether pursuant to an agreement with a government or a governmental entity or otherwise, that Party must:
- (a) provide, within its territory, an opportunity for interested parties to oppose such designations or registrations, and to seek cancellations of such designations or registrations;
 - (b) require that decisions in such oppositions and cancellations are reasoned and in writing; and
 - (c) provide that the grounds for such oppositions and cancellations include those set forth in paragraph [15].
17. No Party shall, whether pursuant to an agreement with a government or a governmental entity or otherwise:
- (a) in the case of geographical indications for goods other than wines or spirits, prohibit third parties from using translated versions of the geographical indication;⁶
 - (b) prohibit third parties from using a term that is evoked by the geographical indication; or
 - (c) prohibit third party uses of any component of a multi-component geographical indication protected by virtue of the agreement, even if (i) such components are

6 For greater certainty, nothing in this Agreement shall prohibit a Party from barring third parties from using translations of geographical indications if: (1) such uses give rise to a likelihood of confusion, and (2) the geographical indications became protected through means other than an agreement between a Party and a government or governmental entity.

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generic, or (ii) third- party use of such components would not give rise to a likelihood of confusion.

18. For purposes of this Agreement, a term is generic if it is the term customary in common language as the common name for the goods or services associated with the trademark or geographical indication.⁷

19. In connection with proceedings referred to in paragraphs [15 and 16], a Party's authorities shall take into account the following factors:

- (a) whether the term is used to refer to the type of product in question in dictionaries, newspapers, relevant websites, publicly-available research databases, or any other competent sources, including but not limited to, the *Harmonized Commodity Description and Coding System*;
- (b) whether a standard promulgated by the *Codex Alimentarius* uses the term to refer to the type of product in question;
- (c) whether persons other than the person who claims rights in the term use the term as the name for the type of product in question;
- (d) whether the product in question is imported into the Party's territory, in significant quantities, from outside the proposed protected region, and whether those imported products are named by the term; and
- (e) whether the product associated with the term is manufactured or traded in significant quantities outside the proposed protected region.

20. [Placeholder for possible provision that may identify examples of particular outcomes that would result from the application of the factors enumerated in paragraph 19.]

21. Where a determination is made that a multi-component term is protected as a geographical indication, each Party shall provide the possibility that particular components of the compound term may, be considered generic, based upon the factors set forth in paragraph [19].

22. Each Party shall permit the use, and as appropriate, shall provide for the registration, of signs or indications that identify services or products other than wines or spirits, and that reference a geographical area that is not the true place of origin of the services or of the product, provided that:

- (a) the sign or indication is used in a manner that does not mislead the public as to the geographical origin of the goods or services;

⁷ No Party shall preclude the possibility that a term that it recognized as a trademark or geographical indication may not, at a time following that designation, become a generic designation for the associated goods or services.

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- (b) use of the sign or indication does not constitute an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967);
- (c) use of the sign or indication would not cause a likelihood of confusion with respect to an earlier-in-time similar or identical trademark or geographical indication that is used for identical or similar goods or services; and
- (d) where a request for registration is concerned, the sign or indication is not a generic term for the associated goods or services.

ARTICLE 3: DOMAIN NAMES ON THE INTERNET

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

ARTICLE 4: COPYRIGHT AND RELATED RIGHTS

1. Each Party shall provide that authors, performers, and producers of phonograms⁸ have the right⁹ to authorize or prohibit all reproductions of their works, performances, and phonograms,¹⁰ in any manner or form, permanent or temporary (including temporary storage in electronic form).
2. Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the importation into that Party's territory of copies of the work, performance, or phonogram made without authorization, or made outside that Party's territory with the authorization of the author, performer, or producer of the phonogram.¹¹

8 References to "authors, performers, and producers of phonograms" refer also to any successors in interest.

9 With respect to copyrights and related rights in this Chapter, the "right to authorize or prohibit" and the "right to authorize" refer to exclusive rights.

10 With respect to copyright and related rights in this Chapter, a "performance" means a performance fixed in a phonogram unless otherwise specified.

11 With respect to copies of works and phonograms that have been placed on the market by the relevant right holder, the obligations described in Article [4.2] apply only to books, journals, sheet music, sound recordings, computer programs, and audio and visual works (i.e., categories of products in which the value of the copyrighted material represents substantially all of the value of the product). Notwithstanding the foregoing, each Party may

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

4. In order to ensure that no hierarchy is established between rights of authors, on the one hand, and rights of performers and producers of phonograms, on the other hand, each Party shall provide that in cases where 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 authorization of the performer or producer is also required. Likewise, each Party shall provide 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.

5. Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:

- (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and
- (b) on a basis other than the life of a natural person, the term shall be:
 - (i) not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or
 - (ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance, or phonogram.

6. Each Party shall apply Article 18 of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (Berne Convention) and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to the subject matter, rights, and obligations in this Article and Articles [5] and [6].

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

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

provide the protection described in Article [4.2] to a broader range of goods.

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8. [Placeholders for provision on (1) exceptions and limitations, (2) Internet retransmission, and (3) any other appropriate copyright/related rights provisions]

Technological Protection Measures

9. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:
- (i) circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter; or
 - (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, that:
 - (A) are promoted, advertised, or marketed by that person, or by another person acting in concert with that person and with that person's knowledge, for the purpose of circumvention of any effective technological measure,
 - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
 - (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

shall be liable and subject to the remedies set out in Article [12.12]. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities. Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (f) of Article [15.5] as applicable to infringements, *mutatis mutandis*.¹²

- (b) In implementing subparagraph (a), no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer

¹² For purposes of greater certainty, no Party is required to impose liability under Articles 9 and 10 for actions taken by a Party or a third party acting with the authorization or consent of a Party.

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electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing subparagraph (a).

- (c) Each Party shall provide that a violation of a measure implementing this paragraph is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights.
- (d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the following activities, which shall be applied to relevant measures in accordance with subparagraph (e):
 - (i) 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 the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
 - (ii) noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of research consisting of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
 - (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing subparagraph (a)(ii);
 - (iv) 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;
 - (v) 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;

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- (vi) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes;
 - (vii) access by a nonprofit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and
 - (viii) noninfringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms when an actual or likely adverse impact on those noninfringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence; provided that any limitation or exception adopted in reliance upon this clause shall have effect for a renewable period of not more than three years from the date of conclusion of such proceeding.
- (e) The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph [4.9(d)] may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:
- (i) Measures implementing subparagraph (a)(i) may be subject to exceptions and limitations with respect to each activity set forth in subparagraph (d).
 - (ii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i), (ii), (iii), (iv), and (vi).
 - (iii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i) and (vi).
- (f) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.

Rights Management Information

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

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

shall be liable and subject to the remedies set out in Article [12.12 Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities. Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b) and (f) of Article [15.5] as applicable to infringements, *mutatis mutandis*.

- (b) each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes.
- (c) **Rights management information** means:
 - (i) 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;
 - (ii) information about the terms and conditions of the use of the work, performance, or phonogram; or
 - (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 connection with the communication or making available of a work, performance or phonogram, to the public.

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- (d) For greater certainty, nothing in this paragraph shall obligate a Party to require the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection with a communication of the work, performance, or phonogram to the public.

ARTICLE 5: COPYRIGHT

Without prejudice to Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii), and 14bis(1) of the Berne Convention, each Party shall provide to authors the exclusive 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.

ARTICLE 6: 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 who are nationals of another Party and to performances or phonograms first published or first fixed in the territory of another Party. A performance or phonogram shall be considered first published in the territory of a Party in which it is published within 30 days of its original publication.¹³
2. Each Party shall provide to performers the right to authorize or prohibit:
 - (a) broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance; and
 - (b) fixation of their unfixed performances.
3.
 - (a) Each Party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting and any communication to the public of their performances or phonograms, by wire or wireless means, including the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.
 - (b) Notwithstanding subparagraph (a) and Article [4.8][*exceptions and limitations*], the application of this right to analog transmissions and non-interactive, free over-the-air broadcasts, and exceptions or limitations to this right for such activity, shall be a matter of each Party's law.

¹³ For purposes of this Article, fixation includes the finalization of the master tape or its equivalent.

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- (c) Each Party may adopt limitations to this right in respect of other noninteractive transmissions in accordance with Article [4.8] [*exceptions and limitations*], provided that the limitations do not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration.
4. No Party may subject the enjoyment and exercise of the rights of performers and producers of phonograms provided for in this Chapter to any formality.
5. For purposes of this Article and Article 4, the following definitions apply with respect to performers and producers of phonograms:
- (a) **broadcasting** means the transmission to the public by wireless means or satellite of sounds or sounds and images, or representations thereof, including wireless transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent; “broadcasting” does not include transmissions over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public;
 - (b) **communication to the public** of a performance or a phonogram means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For purposes of paragraph [3], “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public;
 - (c) **fixation** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;
 - (d) **performers** means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
 - (e) **phonogram** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
 - (f) **producer of a phonogram** means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and
 - (g) **publication of a performance or a phonogram** means the offering of copies of the performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity.

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ARTICLE 7: PROTECTION OF ENCRYPTED PROGRAM-CARRYING SATELLITE AND CABLE SIGNALS

1. Each Party shall make it a criminal offense to:
 - (a) manufacture, assemble, modify, import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite or cable signal without the authorization of the lawful distributor of such signal; and
 - (b) willfully receive and make use of,¹⁴ or willfully further distribute a program-carrying signal that originated as an encrypted satellite or cable signal knowing that it has been decoded without the authorization of the lawful distributor of the signal, or if the signal has been decoded with the authorization of the lawful distributor of the signal, willfully to further distribute the signal for purposes of commercial advantage knowing that the signal originated as an encrypted program-carrying signal and that such further distribution is without the authorization of the lawful signal distributor.
2. Each Party shall provide for civil remedies, including compensatory damages, for any person injured by any activity described in paragraph [1], including any person that holds an interest in the encrypted programming signal or its content.

ARTICLE 8: PATENTS

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application.¹⁵ In addition, the Parties confirm that: patents shall be available for any new forms, uses, or methods of using a known product; and a new form, use, or method of using a known product may satisfy the criteria for patentability, even if such invention does not result in the enhancement of the known efficacy of that product.
2. Each Party shall make patents available for inventions for the following:
 - (a) plants and animals, and
 - (b) diagnostic, therapeutic, and surgical methods for the treatment of humans or animals.

¹⁴ For greater certainty, “make use of” includes viewing of the signal, whether private or commercial.

¹⁵ For the 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. In determinations regarding inventive step (or non-obviousness), each Party shall consider whether the claimed invention would have been obvious to a skilled artisan (or a person having ordinary skill in the art) at the priority date of the claimed invention.

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3. Each Party may only exclude from patentability inventions, the prevention within its territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by law.
4. 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.
5. [Placeholder for “Bolar” provision]
6. [Placeholder for provisions concerning patent term restoration/adjustment]
7. Each Party shall provide that a patent may be revoked only on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation or inequitable conduct may be the basis for revoking a patent or holding a patent unenforceable. Where a Party provides proceedings that permit a third party to oppose the grant of a patent, a Party shall not make such proceedings available before the grant of the patent.
8. Each Party shall disregard information contained in public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure:
 - (a) was made or authorized by, or derived from, the patent applicant; and
 - (b) occurred within 12 months prior to the date of filing of the application in the territory of the Party.
9. Each Party shall provide patent applicants with at least one opportunity to make amendments, corrections, and observations in connection with their applications. Each Party shall permit applicants to make amendments to their patent claims prior to receipt of a first patent office action or communication on the merits.
10. Each Party shall provide that a disclosure of a claimed invention shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date.
11. Each Party shall provide that a claimed invention is sufficiently supported by its disclosure if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention as of the filing date.
12. Each Party shall provide that a claimed invention is industrially applicable if it has a specific, substantial, and credible utility.

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13. For published patent applications and issued patents, each Party shall make available to the public the following information connected to the patent prosecution of such patent applications and patents:

- (a) search and examination results, including any relevant prior art search histories;
- (b) communications from applicants; and
- (c) patent and non-patent related literature citations submitted by applicants, other patent offices, and relevant third parties.

ARTICLE 9: MEASURES RELATED TO CERTAIN REGULATED PRODUCTS

Agricultural Chemical Products

1. (a) If a Party requires or permits, as a condition of granting marketing approval for a new agricultural chemical product, the submission of information concerning safety or efficacy of the product, the Party shall not, without the consent of a person that previously submitted such safety or efficacy information to obtain marketing approval in the Party, authorize another to market a same or a similar product based on:

- (i) the safety or efficacy information submitted in support of the marketing approval; or
- (ii) evidence of the marketing approval,

for at least ten years from the date of marketing approval in the territory of the Party.

(b) If a Party requires or permits, in connection with granting marketing approval for a new agricultural chemical product, the submission of evidence concerning the safety or efficacy of a product that was previously approved in another territory, such as evidence of prior marketing approval in the other territory, the Party shall not, without the consent of a person that previously submitted the safety or efficacy information to obtain marketing approval in another territory, authorize another to market a same or a similar product based on:

- (i) the safety or efficacy information submitted in support of the prior marketing approval in the other territory; or
- (ii) evidence of prior marketing approval in the other territory,

for at least ten years from the date of marketing approval of the new product in the territory of the Party.

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Pharmaceutical Products

2. [Placeholder for provisions related to data protection for pharmaceutical products]
3. [Placeholder for provisions related to patent linkage]

General Provisions

4. [Placeholder for provisions related to patent term/data protection relationship]
5. [Placeholder for definitions of “new pharmaceutical product” and “new agricultural product”]

**ARTICLE 10: GENERAL OBLIGATIONS RELATING TO THE ENFORCEMENT OF INTELLECTUAL
PROPERTY RIGHTS**

1. The Parties understand that a decision that a Party makes on the distribution of enforcement resources shall not excuse that Party from complying with this Chapter.
2. In civil, administrative, and criminal proceedings involving copyright or related rights, each Party shall provide for a presumption that, in the absence of proof to the contrary, the person whose name is indicated in the usual manner as the author, producer, performer, or publisher of the work, performance, or phonogram is the designated right holder in such work, performance, or phonogram. Each Party shall also provide for a presumption that, in the absence of proof to the contrary, the copyright or related right subsists in such subject matter. In civil, administrative, and criminal proceedings involving trademarks, each Party shall provide for a rebuttable presumption that a registered trademark is valid. In civil and administrative proceedings involving patents, each Party shall provide for a rebuttable presumption that a patent is valid, and shall provide that each claim of a patent is presumed valid independently of the validity of the other claims.

**ARTICLE 11: 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 shall be in writing and shall state any relevant findings of fact and the reasoning or the legal basis on which the decisions and rulings are based. Each Party shall also provide that such decisions and rulings shall be published¹⁶ or, where publication is not practicable, otherwise made available to the public, in its national language in such a manner as to enable governments and right holders to become acquainted with them.

¹⁶ A Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet.

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2. Each Party shall promote the collection and analysis of statistical data and other relevant information concerning intellectual property rights infringements as well as the collection of information on best practices to prevent and combat infringements.
3. Each Party shall publicize information on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative and criminal systems, including statistical information that the Party collects for such purposes.
4. Nothing in this Chapter 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.

ARTICLE 12: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

1. Each Party shall make available to right holders¹⁷ civil judicial procedures concerning the enforcement of any intellectual property right.
2. Each Party shall provide for injunctive relief consistent with Article 44 of the TRIPS Agreement, and shall also make injunctions available to prevent the exportation of infringing goods.
3. Each Party shall provide that:
 - (a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer to pay the right holder:
 - (i) damages adequate to compensate for the injury the right holder has suffered as a result of the infringement,¹⁸ and
 - (ii) at least in the case of copyright or related rights infringement and trademark counterfeiting, the profits of the infringer that are attributable to the infringement and that are not taken into account in computing the amount of the damages referred to in clause (i).
 - (b) in determining damages for infringement of intellectual property rights, its judicial authorities shall consider, *inter alia*, the value of the infringed good or

¹⁷ For the purposes of this Article, the term “right holder” shall include exclusive licensees as well as federations and associations having the legal standing and authority to assert such rights; the term “exclusive licensee” shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

¹⁸ In the case of patent infringement, damages adequate to compensate for the infringement shall not be less than a reasonable royalty.

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service, measured by the suggested retail price or other legitimate measure of value submitted by the right holder.

4. In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright or related rights, and in cases of trademark counterfeiting, establish or maintain a system that provides for pre-established damages, which shall be available upon the election of the right holder. Pre-established damages shall be in an amount sufficiently high to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement. In civil judicial proceedings concerning patent infringement, each Party shall provide that its judicial authorities shall have the authority to increase damages to an amount that is up to three times the amount of the injury found or assessed.¹⁹

5. Each Party shall provide that its judicial authorities, except in exceptional circumstances, have the authority to order, at the conclusion of civil judicial proceedings concerning copyright or related rights infringement, trademark infringement, or patent infringement, that the prevailing party shall be awarded payment by the losing party of court costs or fees and, at least in proceedings concerning copyright or related rights infringement or willful trademark counterfeiting, reasonable attorney's fees. Further, each Party shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party shall be awarded payment by the losing party of reasonable attorneys' fees.

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

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

- (a) at the right holder's request, goods that have been found to be pirated or counterfeit shall be destroyed, except in exceptional circumstances;
- (b) its judicial authorities shall have the authority to order that materials and implements that have been used in the manufacture or creation of such pirated or counterfeit goods be, without compensation of any sort, promptly destroyed or, in exceptional circumstances, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements; and

¹⁹ No Party shall be required to apply this paragraph to actions for infringement against a Party or a third party acting with the authorization or consent of a Party.

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- (c) in regard to counterfeit trademarked goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.
8. Each Party shall provide that in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to order the infringer to provide any information that the infringer possesses or controls regarding any persons or entities involved in any aspect of the infringement and regarding the means of production or distribution channel of such goods or services, including the identification of third persons involved in the production and distribution of the infringing goods or services or in their channels of distribution, and to provide this information to the right holder.
9. Each Party shall provide that its judicial authorities have the authority to:
- (a) fine or imprison, in appropriate cases, a party to a civil judicial proceeding who fails to abide by valid orders issued by such authorities; and
 - (b) impose sanctions on parties to a civil judicial proceeding their counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders regarding the protection of confidential information produced or exchanged in a proceeding.
10. 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 such procedures conform to principles equivalent in substance to those set out in this Chapter.
11. In the event that a Party's judicial or other authorities appoint technical or other experts in civil proceedings concerning the enforcement of intellectual property rights and require that the parties to the litigation bear the costs of such experts, that Party should seek to ensure that such costs are closely related, *inter alia*, to the quantity and nature of work to be performed and do not unreasonably deter recourse to such proceedings.
12. In civil judicial proceedings concerning the acts described in Article 4.[9] (TPMs) and Article 4.[10] (RMI), each Party shall provide that its judicial authorities shall, at the least, have the authority to:
- (a) impose provisional measures, including seizure of devices and products suspected of being involved in the prohibited activity;
 - (b) provide an opportunity for the right holder to elect between actual damages it suffered (plus any profits attributable to the prohibited activity not taken into account in computing those damages) or pre-established damages;
 - (c) order payment to the prevailing right holder at the conclusion of civil judicial proceedings of court costs and fees, and reasonable attorney's fees, by the party engaged in the prohibited conduct; and

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- (d) order the destruction of devices and products found to be involved in the prohibited activity.

No Party shall make damages available under this paragraph against a nonprofit library, archives, educational institution, or public noncommercial broadcasting entity that sustains the burden of proving that such entity was not aware and had no reason to believe that its acts constituted a prohibited activity.

ARTICLE 13: PROVISIONAL MEASURES

1. Each Party shall act on requests for provisional relief *inaudita altera parte* expeditiously, and shall, except in exceptional cases, generally execute such requests within ten days.
2. Each Party shall provide that its judicial authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a reasonable security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse, and so as not to unreasonably deter recourse to such procedures.

ARTICLE 14: SPECIAL REQUIREMENTS RELATED TO BORDER ENFORCEMENT

1. Each Party shall provide that any right holder initiating procedures for its competent authorities to suspend release of suspected counterfeit or confusingly similar trademark goods, or pirated copyright goods²⁰ into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods reasonably recognizable by its competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to these procedures. Each Party shall provide that the application to suspend the release of goods apply to all points of entry to its territory and remain in force for a period of not less than one year from the date of

²⁰ For purposes of Article 14:

(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 country of importation; and

(b) **pirated copyright goods** means any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

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application, or the period that the good is protected by copyright or the relevant trademark registration is valid, whichever is shorter.

2. Each Party shall provide that its competent authorities shall have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit or confusingly similar trademark goods, or pirated copyright goods, to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. A Party may provide that such security may be in the form of a bond conditioned to hold the importer or owner of the imported merchandise harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good.

3. Where its competent authorities have seized goods that are counterfeit or pirated, a Party shall provide that its competent authorities have the authority to inform the right holder within 30-days²¹ of the seizure of the names and addresses of the consignor, exporter, consignee, or importer, a description of the merchandise, quantity of the merchandise, and, if known, the country of origin of the merchandise.

4. Each Party shall provide that its competent authorities may initiate border measures *ex officio*²² with respect to imported, exported, or in-transit merchandise,²³ or merchandise in free trade zones, that is suspected of being counterfeit or confusingly similar trademark goods, or pirated copyright goods.

5. Each Party shall adopt or maintain a procedure by which its competent authorities shall determine, within a reasonable period of time after the initiation of the procedures described under Article 14.1 whether the suspect goods infringe an intellectual property right. Where a Party provides administrative procedures for the determination of an infringement, it shall also provide its authorities with the authority to impose administrative penalties following a determination that the goods are infringing.

6. Each Party shall provide that goods that have been determined by its competent authorities to be pirated or counterfeit shall be destroyed, except in exceptional circumstances. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorized, except in exceptional circumstances, to

21 For purposes of this Article, “days” shall mean “business days”.

22 For greater certainty, the parties understand that *ex officio* action does not require a formal complaint from a private party or right holder.

23 For purposes of Article 14.4, **in-transit merchandise** means goods under “Customs transit” and goods “transhipped,” as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (Kyoto Convention).

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permit the exportation of counterfeit or pirated goods or to permit such goods to be subject to other customs procedures.

7. Where an application fee, merchandise storage fee, or destruction fee is assessed in connection with border measures to enforce an intellectual property right, each Party shall provide that such fee shall not be set at an amount that unreasonably deters recourse to these measures.

8. A Party may exclude from the application of this Article (border measures), small quantities of goods of a non-commercial nature contained in traveler's personal luggage.

ARTICLE 15: CRIMINAL ENFORCEMENT

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. Willful copyright or related rights piracy on a commercial scale includes:

- (a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and
- (b) willful infringements for purposes of commercial advantage or private financial gain.²⁴

Each Party shall treat willful importation or exportation of counterfeit or pirated goods as unlawful activities subject to criminal penalties.²⁵

2. Each Party shall also provide for criminal procedures and penalties to be applied, even absent willful trademark counterfeiting or copyright or related rights piracy, at least in cases of knowing trafficking in:

- (a) labels or packaging, of any type or nature, to which a counterfeit trademark²⁶ has been applied, the use of which is likely to cause confusion, to cause mistake, or to deceive; and
- (b) counterfeit or illicit labels²⁷ affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany the following:

24 For greater certainty, "financial gain" for purposes of this Article includes the receipt or expectation of anything of value.

25 A Party may comply with this obligation in relation to exportation of pirated goods through its measures concerning distribution.

26 Negotiator's Note: For greater certainty, the definition of "counterfeit trademark goods" in footnote [12] shall be used as context for this Article.

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- (i) a phonogram,
 - (ii) a copy of a computer program or a literary work,
 - (iii) a copy of a motion picture or other audiovisual work,
 - (iv) documentation or packaging for such items; and
 - (c) counterfeit documentation or packaging for items of the type described in subparagraph (b).
3. Each Party shall also provide for criminal procedures and penalties to be applied against any person who, without authorization of the holder of copyright or related rights in a motion picture or other audiovisual work, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work, or any part thereof, from a performance of such work in a public motion picture exhibition facility.
4. With respect to the offenses for which this Article requires the Parties to provide for criminal procedures and penalties, Parties shall ensure that criminal liability for aiding and abetting is available under its law.
5. With respect to the offences described in Article 15.[1]-[4] above, each Party shall provide:
- (a) penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future infringements, consistent with a policy of removing the infringer's monetary incentive. Each Party shall further establish policies or guidelines that encourage judicial authorities to impose those penalties at levels sufficient to provide a deterrent to future infringements,
-
- 27 For purposes of this Article, "illicit label" means a genuine certificate, licensing document, registration card, or similar labeling component:
- (A) that is used by the copyright owner to verify that a phonogram, a copy of a computer program or literary work, a copy of a motion picture or other audiovisual work, or documentation or packaging for such phonogram or copies is not counterfeit or infringing of any copyright; and
 - (B) that is, without the authorization of the copyright owner—
 - (i) distributed or intended for distribution not in connection with the phonogram or copies to which such labeling component was intended to be affixed by the respective copyright owner; or
 - (ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner's distribution channel and not for the purpose of verifying that a copy or phonogram is noninfringing.

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including the imposition of actual terms of imprisonment when criminal infringement is undertaken for commercial advantage or private financial gain;

- (b) that its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements used in the commission of the offense, any assets traceable to the infringing activity, and any documentary evidence relevant to the offense. Each Party shall provide that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order;
- (c) that its judicial authorities shall have the authority to order, among other measures, the forfeiture of any assets traceable to the infringing activity, and shall order such forfeiture at least in cases of trademark counterfeiting;
- (d) that its judicial authorities shall, except in exceptional cases, order
 - (i) the forfeiture and destruction of all counterfeit or pirated goods, and any articles consisting of a counterfeit mark; and
 - (ii) the forfeiture or destruction of materials and implements that have been used in the creation of pirated or counterfeit goods.

Each Party shall further provide that forfeiture and destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant;

- (e) that its judicial authorities have the authority to order the seizure or forfeiture of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity.
- (f) that, in criminal cases, its judicial or other competent authorities shall keep an inventory of goods and other material proposed to be destroyed, and shall have the authority temporarily to exempt such materials from the destruction order to facilitate the preservation of evidence upon notice by the right holder that it wishes to bring a civil or administrative case for damages²⁸; and
- (g) that its authorities may initiate legal action *ex officio* with respect to the offenses described in this Chapter, without the need for a formal complaint by a private party or right holder.

28 For greater certainty, a notice from the right holder that it wishes to bring a civil or administrative case for damages is not the sole basis for the authority to exempt materials from the destruction order.

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ARTICLE 16: SPECIAL MEASURES RELATING TO ENFORCEMENT IN THE DIGITAL ENVIRONMENT

1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Chapter, are available under its law so as to permit effective action against an act of trademark, copyright or related rights infringement which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.

2. Each Party shall provide appropriate laws, orders, regulations, government-issued guidelines, or administrative or executive decrees providing that its central government agencies not use infringing computer software and other materials protected by copyright or related rights and only use computer software and other materials protected by copyright or related rights as authorized by the relevant license. These measures shall provide for the regulation of the acquisition and management of software and other materials for government use that are protected by copyright or related rights.

3. For the purpose of providing enforcement procedures that permit effective action against any act of copyright infringement covered by this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies that constitute a deterrent to further infringements, each Party shall provide, consistent with the framework set out in this Article:

- (a) legal incentives for service providers to cooperate with copyright²⁹ owners in deterring the unauthorized storage and transmission of copyrighted materials; and
- (b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this subparagraph (b).³⁰
 - (i) These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions, and shall be confined to those functions:
 - (A) transmitting, routing, or providing connections for material without modification of its content, or the intermediate and transient storage of such material in the course thereof;
 - (B) caching carried out through an automatic process;

²⁹ For purposes of this paragraph, “copyright” includes related rights.

³⁰ This subparagraph is without prejudice to the availability of defenses to copyright infringement that are of general applicability.

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- (C) storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the service provider; and
 - (D) referring or linking users to an online location by using information location tools, including hyperlinks and directories.
- (ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material, and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).
- (iii) Qualification by a service provider for the limitations as to each function in clauses (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv) through (vii).
- (iv) With respect to functions referred to in clause (i)(B), the limitations shall be conditioned on the service provider:
 - (A) permitting access to cached material in significant part only to users of its system or network who have met conditions on user access to that material;
 - (B) complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available;
 - (C) not interfering with technology consistent with industry standards accepted in the Party's territory 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
 - (D) expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.
- (v) With respect to functions referred to in clauses (i)(C) and (D), the limitations shall be conditioned on the service provider:
 - (A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;
 - (B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective

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- notifications of claimed infringement in accordance with clause (ix); and
- (C) publicly designating a representative to receive such notifications.
- (vi) Eligibility for the limitations in this subparagraph shall be conditioned on the service provider:
- (A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and
- (B) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.
- (vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity, except to the extent consistent with such technical measures.
- (viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic online location. If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary, provided that such other remedies are the least burdensome to the service provider among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy and whether less burdensome, comparably effective enforcement methods are available. Except for orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network, each Party shall provide that such relief shall be available only where the service provider has received notice of the court order proceedings referred to in this subparagraph and an opportunity to appear before the judicial authority.

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- (ix) For purposes of the notice and take down process for the functions referred to in clauses (i)(C) and (D), each Party shall establish appropriate procedures in its law or in regulations for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.
- (x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the person making the material available on its system or network that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless the person giving the original effective notification seeks judicial relief within a reasonable time.
- (xi) Each Party shall 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.
- (xii) For purposes of the function referred to in clause (i)(A), **service provider** means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for purposes of the functions referred to in clauses (i)(B) through (D) **service provider** means a provider or operator of facilities for online services or network access.

[Placeholder for additional provisions on enforcement measures, including optical disk production]

[Placeholder for provision on understanding regarding certain public health measures]

Side Letter 1

In connection with the signing on this date of the Trans-Pacific Partnership Agreement (the "Agreement"), I have the honor to confirm the following understandings reached between

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the [Parties] and [Party] during the course of the negotiations of Chapter ## (Intellectual Property Rights) of the Agreement:

In meeting the obligations of Article 16.3(ix), the United States shall apply the pertinent provisions of its law³¹ and [x Party] shall adopt requirements for: (a) effective written notice to service providers with respect to materials that are claimed to be infringing, and (b) effective written counter-notification by those whose material is removed or disabled and who claim that it was disabled through mistake or misidentification, as set forth in this letter. Effective written notice means notice that substantially complies with the elements listed in section (a) of this letter, and effective written counter-notification means counter-notification that substantially complies with the elements listed in section (b) of this letter.

- (a) Effective Written Notice, by a Copyright³² Owner or Person Authorized to Act on Behalf of an Owner of an Exclusive Right, to a Service Provider's Publicly Designated Representative³³

In order for a notice to a service provider to comply with the relevant requirements set out in Article 16.3(ix), that notice must be a written communication, which may be provided electronically, that includes substantially the following:

1. the identity, address, telephone number, and electronic mail address of the complaining party (or its authorized agent);
2. information reasonably sufficient to enable the service provider to identify the copyrighted work(s)³⁴ claimed to have been infringed;
3. information reasonably sufficient to permit the service provider to identify and locate the material residing on a system or network controlled or operated by it or for it that is claimed to be infringing, or to be the subject of infringing activity, and that is to be removed, or access to which is to be disabled;³⁵

31 17 U.S.C. Sections 512(C)(3)(A) and 512(g)(3).

32 All references to copyright in this letter are understood to include related rights, and all references to works are understood to include the subject matter of related rights.

33 The Parties understand that a representative is publicly designated to receive notification on behalf of a service provider if the representative's name, physical and electronic address, and telephone number are posted on a publicly accessible portion of the service provider's website, and also in a register accessible to the public through the Internet, or designated in another form or manner appropriate for [insert Party name].

34 If multiple copyrighted works at, or linked to from, a single online site on a system or network controlled or operated by or for the service provider are covered by a single notification, a representative list of such works at, or linked to from, that site may be provided.

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4. a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
 5. a statement that the information in the notice is accurate;
 6. a statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the complaining party is the holder of an exclusive right that is allegedly infringed, or is authorized to act on the owner's behalf; and
 7. the signature of the person giving notice.³⁶
- (b) Effective Written Counter-Notification by a Subscriber³⁷ Whose Material Was Removed or Disabled as a Result of Mistake or Misidentification of Material

In order for a counter-notification to a service provider to comply with the relevant requirements set out in Article 16.3(ix), that counter-notification must be a written communication, which may be provided electronically, that includes substantially the following:

1. the identity, address, and telephone number of the subscriber;
2. the identity of the material that has been removed or to which access has been disabled;
3. the location at which the material appeared before it was removed or access to it was disabled;
4. a statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material;
5. a statement that the subscriber agrees to be subject to orders of any court that has jurisdiction over the place where the subscriber's address is located, or, if that address is located outside the Party's territory, any other court with jurisdiction over any place in

³⁵ In the case of notices regarding an information location tool pursuant to paragraph (b)(i)(D) of Article 16.3, the information provided must be reasonably sufficient to permit the service provider to locate the reference or link residing on a system or network controlled or operated by or for it, except that in the case of a notice regarding a substantial number of references or links at a single online site residing on a system or network controlled or operated by or for the service provider, a representative list of such references or links at the site may be provided, if accompanied by information sufficient to permit the service provider to locate the references or links.

³⁶ A signature transmitted as part of an electronic communication satisfies this requirement.

³⁷ All references to "subscriber" in this letter refer to the person whose material has been removed or disabled by a service provider as a result of an effective notice described in part (a) of this letter.

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the Party's territory where the service provider may be found, and in which a copyright infringement suit could be brought with respect to the alleged infringement;

6. a statement that the subscriber will accept service of process in any such suit; and
7. the signature of the subscriber.³⁸

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Agreement.

38 A signature transmitted as part of an electronic communication satisfies this requirement.