

CHAPTER 15 INTELLECTUAL PROPERTY RIGHTS

Section A: General Provisions

ARTICLE 15.1: OBJECTIVES

The objectives of this Chapter are:

- (a) to increase the benefits from trade and investment, to promote innovation and creativity by providing certainty for the right holders and users of intellectual property rights, and to facilitate the enforcement of intellectual property rights;
- (b) to facilitate production and commercialization of innovative and creative products;
- (c) to encourage the transfer and dissemination of technology, in a manner conducive to social and economic welfare; and
- (d) to strike the balance between the legitimate interest of the right holders and the public at large.

ARTICLE 15.2: INTERNATIONAL AGREEMENTS

1. Each Party reaffirms its existing rights and obligations with respect to each other under the TRIPS Agreement and any other agreements relating to intellectual property to which they are parties. To this end, nothing in this Chapter shall derogate from the existing rights and obligations that Parties have to each other under the TRIPS Agreement or any other intellectual property agreements.

2. Each Party shall make all reasonable efforts to accede to the following agreements:

- (a) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
- (b) the *International Convention for the Protection of New Varieties of Plants* (1991) (UPOV Convention 1991)¹;
- (c) the *Patent Law Treaty* (2000);
- (d) the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999); and

¹ With regard to this subparagraph, for El Salvador, it is understood that an effective protection of plant varieties either by patents, a *sui generis* system, or by any combination thereof by the date of entry into force of this Agreement shall be considered to be consistent with this Chapter.

- (e) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989).

ARTICLE 15.3: MORE EXTENSIVE PROTECTION

The Parties shall, at a minimum, give effect to this Chapter. The Parties may but shall not be obliged to provide more extensive protection for, and enforcement of intellectual property rights under their laws than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.

ARTICLE 15.4: NATIONAL TREATMENT

1. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals² of the other Party treatment no less favorable than it accords to its own nationals with regard to the protection³ and enjoyment of such intellectual property rights and any benefits derived from such rights.

2. A Party may derogate from paragraph 1 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.

3. Paragraph 1 shall not apply to procedures provided in multilateral agreements to which either Party is a party concluded under the auspices of the World Intellectual Property Organization (hereinafter referred to as the “WIPO”) in relation to the acquisition or maintenance of intellectual property rights.

ARTICLE 15.5: APPLICATION OF CHAPTER TO EXISTING SUBJECT MATTER AND PRIOR ACTS

² For the purposes of Articles 15.4.1, 15.4.2 and 15.38, a “national” of a Party shall include, in respect of the relevant right, any person (as defined in Article 1.6 (Definitions)), of that Party that would meet the criteria for eligibility for protection of that right provided for in the agreements mentioned in Article 15.2 and the TRIPS Agreement.

³ For the purposes of Article 15.4.1, “protection” includes: (1) 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; and (2) the prohibition on circumvention of effective technological measures set out in Article 15.32, the rights and obligations concerning rights management information set out in Article 15.33 and protection of encrypted program-carrying signals set out in Article 15.35.

1. Except as it provides otherwise, this Chapter shall give rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement and which is protected on said date in the territory of the Party where protection is claimed, or which meets or comes subsequently to meet the criteria for protection under this Chapter.

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

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

ARTICLE 15.6: TRANSPARENCY

With the objective of making the protection and enforcement of intellectual property rights transparent, each Party shall ensure that all laws, regulations, and procedures concerning the protection or enforcement of intellectual property rights are in writing and are published⁴, or where publication is not practicable, made publicly available, in its national language in such a manner as to enable governments and right holders to become acquainted with them.

ARTICLE 15.7: GENERAL PROVISIONS

1. The Parties recognize the need to maintain a balance between the rights of the right holders and the public interest.

2. The Parties recognize the importance of the principles established in:

- (a) the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2), adopted on November 14, 2001 by the WTO at its Fourth Ministerial Conference, held in Doha, Qatar;
- (b) the *Decision of the WTO General Council on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, adopted on August 30, 2003;
- (c) the *Protocol Amending the TRIPS Agreement*, done at Geneva on December 6, 2005; and
- (d) Resolution WHA61.21, *Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property*, adopted on May 24, 2008 by the Assembly of the World Health Organization.

⁴ For greater certainty, a Party may satisfy the requirement in Article 15.6 to publish a law, regulation, or procedure by making it available to the public on the Internet.

3. Each Party may, in formulating or amending its legislation, adopt measures necessary, and make use of exceptions and flexibilities to protect public health and nutrition, and to promote the public interest in sectors of vital importance.

4. The Parties shall be free to establish their own regime for exhaustion of intellectual property rights.

Section B: Trademarks

ARTICLE 15.8: TRADEMARKS PROTECTION

1. The Parties shall grant adequate and effective protection to trademark right holders of goods and services.

2. Each Party shall provide that trademarks shall include collective, certification, and sound marks, and may include scent marks.

3. 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 for goods or services that are identical or similar 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, for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Parties making rights available on the basis of use.

ARTICLE 15.9: EXCEPTIONS

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 into account the legitimate interests of the owner of the trademark and of third parties.

ARTICLE 15.10: WELL-KNOWN TRADEMARKS

1. Neither Party may require as a mandatory condition for determining that a mark is a well-known mark, that the trademark has been registered in the territory of the Party or in another jurisdiction, included on a list of well-known trademarks, or given prior recognition as a well-known trademark.

2. Article 6bis of the *Paris Convention for the Protection of Industrial Property* (1967) (hereinafter referred to as the "Stockholm Act") shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified as a well-known

trademark⁵, 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.

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

ARTICLE 15.11: REGISTRATION AND APPLICATION OF TRADEMARKS

1. 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 trademark 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 before registration and to seek cancellation or invalidation of a trademark after it has been registered; and
- (d) a requirement that decisions in opposition and cancellation proceedings be reasoned and in writing. Written decisions may be provided electronically.

2. Each Party shall provide, to the maximum degree practical, a system for the electronic application, processing, registration, and maintenance for trademarks, and work to provide, to the maximum degree practical, a publicly available electronic database – including an on-line database – of trademark applications and registrations.

3. Each Party shall provide that initial registration and each renewal of registration of a trademark shall be for a term of no less than 10 years.

ARTICLE 15.12: CLASSIFICATION OF GOODS AND SERVICES

Each Party shall provide that:

⁵ For the purposes of determining whether a mark is well-known, neither Party may require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

- (a) each registration and publication that concerns a trademark application or registration and that indicates goods or services shall indicate the goods or services by their common 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) (hereinafter referred to as the “Nice Classification”), as revised and amended; 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 appear 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 appear in different classes of the Nice Classification.

ARTICLE 15.13: NON-RECORDATION OF A LICENSE

Neither Party may require recordation of trademark licenses to establish the validity of the license, to assert any rights in a trademark, or for other purposes⁶.

Section C: Patents

ARTICLE 15.14: PATENTABLE SUBJECT MATTER

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that they are new, involve an inventive step, and are capable of industrial application⁷.
2. Each Party may 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 their law.
3. The Parties may also exclude from patentability:
 - (a) diagnostic, therapeutic, and surgical methods for the treatment of humans or animals; and

⁶ A Party may establish a means to allow licensees to record licenses for the purposes of providing notice to the public as to the existence of the license. However, neither Party may make notice to the public a requirement for asserting any rights under the license.

⁷ For the purposes of Section C, a Party may treat the terms “inventive step” and “capable of industrial application” as synonymous with the terms “non-obvious” and “useful” respectively.

- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

ARTICLE 15.15: EXCEPTIONS

1. 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 into account the legitimate interests of third parties.

2. Consistent with paragraph 1, if a Party permits a third person to use the subject matter of a subsisting patent to generate information necessary to support an application for marketing approval of a pharmaceutical or agricultural chemical product, that Party shall provide that any product produced under such authority shall not be made, used, or sold in its territory other than for the purposes related to generating such information to support an application for meeting marketing approval requirements of that Party to market the product once the patent expires, and if the Party permits exportation of such product, the Party shall provide that the product shall only be exported outside its territory for the purposes of generating information to support an application for meeting marketing approval requirements of that Party.

ARTICLE 15.16: GRACE PERIOD

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.

ARTICLE 15.17: AMENDMENTS, CORRECTIONS, AND OBSERVATIONS

Each Party shall provide patent applicants with at least one opportunity to make amendments, corrections, and observations in connection with their applications.

ARTICLE 15.18: CLAIMED INVENTION

1. 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.

2. 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.

3. Each Party shall provide that a claimed invention is industrially applicable if it has a specific, substantial, and credible utility.

ARTICLE 15.19: ACCELERATED EXAMINATION

Each Party may provide an applicant with accelerated examination for the patent application in accordance with its laws and regulations.

Section D: Measures Related to Certain Regulated Products

ARTICLE 15.20: MEASURES RELATED TO CERTAIN REGULATED PRODUCTS

1. The Parties agree that undisclosed data concerning safety and efficacy that is submitted as a condition of approving the marketing of new pharmaceutical or agricultural chemical products shall be protected through the principle of national treatment.

2. By providing protection periods of at least five years⁸ for pharmaceutical products and 10 years for agricultural chemical products, in their legislation, the Parties afford a satisfactory level of protection that corresponds to the relevant obligations they have entered into.

Section E: Designs

ARTICLE 15.21: DESIGNS PROTECTION

1. The Parties shall ensure in their laws adequate and effective protection of industrial designs.

2. The owner of a protected design shall have the right to prevent third parties not having the owner's consent, at least from making, offering for sale, selling, importing, or using articles bearing or embodying the protected design when such acts are undertaken for commercial purposes.

3. The Parties may provide the legal means to prevent the use of the unregistered appearance of a product, in cases where the contested use results from copying the unregistered appearance of such product.

⁸ Panama shall provide and maintain the protection period in its legislation. For greater certainty, such protection period is normally five years for pharmaceutical products.

ARTICLE 15.22: EXCEPTIONS

Each Party may provide limited exceptions to the protection of designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking into account the legitimate interests of third parties.

Section F: Unfair Competition and Undisclosed Information

ARTICLE 15.23: UNFAIR COMPETITION

For the purposes of this Agreement, as regards to unfair competition, protection will be granted in accordance with Article 10*bis* of the Stockholm Act.

ARTICLE 15.24: UNDISCLOSED INFORMATION

Each Party shall ensure in its laws and regulations adequate and effective protection of undisclosed information in accordance with Article 39 of the TRIPS Agreement.

Section G: Copyright and Related Rights

Sub-Section A: Copyright and Related Rights

ARTICLE 15.25: COPYRIGHT AND RELATED RIGHTS

The Parties shall comply with the following agreements⁹:

- (a) the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (hereinafter referred to as the “Berne Convention”);
- (b) the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961) (hereinafter referred to as the “Rome Convention”);
- (c) the WIPO Copyright Treaty (1996); and
- (d) the WIPO Performances and Phonograms Treaty (1996).

⁹ Article 15.25 shall apply without prejudice to the reservations that a Party has made under one or more agreements referred to in this Article.

ARTICLE 15.26: RIGHT OF REPRODUCTION

Each Party shall provide that authors, performers and producers of phonograms have the right to authorize or prohibit¹⁰ all reproductions of their works, performances¹¹, phonograms and broadcasts in any manner or form, permanent or temporary (including temporary storage in electronic form).

ARTICLE 15.27: RIGHT OF DISTRIBUTION

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 copies¹² of their works, performances, and phonograms through sale or other transfer of ownership.

ARTICLE 15.28: TERM OF PROTECTION

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

- (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and
- (b) on a basis other than the life of a natural person, the term shall be:
 - (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram; or
 - (ii) failing such authorized publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

ARTICLE 15.29: 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 the subject matter, rights, and obligations in this Section.

¹⁰ For the purposes of this Chapter, the "right to authorize or prohibit" with respect to copyrights and related rights refers to exclusive rights.

¹¹ For the purposes of this Chapter, a "performance" with respect to copyrights and related rights means a performance fixed in a phonogram unless otherwise specified.

¹² As used in Article 15.27, "copies" and "original and copies", being subject to the right of distribution in this Article, refer exclusively to fixed copies that can be put into circulation as tangible objects.

ARTICLE 15.30: NO FORMALITY

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

ARTICLE 15.31: CONTRACTUAL TRANSFERS

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 production of phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.

ARTICLE 15.32: TECHNOLOGICAL PROTECTION MEASURES

1. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of any 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.

2. Each Party shall provide adequate legal protection and effective legal remedies against the manufacture, import, distribution, sale, rental or advertisement for sale or rental, of devices, products, or components, or the provision of services which:

- (a) are promoted, advertised, or marketed, for the purpose of circumvention of;
- (b) have only a limited commercially significant purpose or use, other than to circumvent of; or
- (c) are primarily designed, produced, or performed, for the purpose of enabling or facilitating the circumvention of,

any effective technological measure.

3. **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 related rights.

4. The Parties shall confine exceptions and limitations to measures implementing paragraphs 1 and 2 to the following activities:

- (a) 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;
- (b) 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;
- (c) 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 paragraph 2;
- (d) 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;
- (e) 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;
- (f) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes;
- (g) access by a nonprofit library, archive, or educational institution to a work, performance, phonogram, or broadcast not otherwise available to it, for the sole purpose of making acquisition decisions; and
- (h) 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, provided that any limitation or exception adopted in reliance on this clause shall have effect for a renewable period of not more than four years from the date the proceeding concludes.

ARTICLE 15.33: RIGHTS MANAGEMENT INFORMATION

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

- (a) each Party shall provide that any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of any copyright 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 15.55. 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 the purposes of commercial advantage or private financial gain in any of the foregoing activities;

- (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, national defense, 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, phonogram, or broadcast to the public; and

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

ARTICLE 15.34: LIMITATIONS AND EXCEPTIONS

The Parties may, in their legislation, provide for limitations and exceptions to, the rights granted to the right holders referred to in this Section in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holders.

ARTICLE 15.35: PROTECTION OF ENCRYPTED PROGRAM-CARRYING SATELLITE SIGNALS

1. Each Party shall make it a criminal offense:
 - (a) to manufacture, assemble, modify, import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal; and
 - (b) willfully to receive and make use of, or further distribute, a program-carrying signal that originated as an encrypted satellite 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 the 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 15.36: COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

The Parties recognize the importance of the performance of the collecting societies, and the establishment of arrangements between them, with the purpose of mutually ensuring easier access to and delivery of content between the territories of the Parties, and the achievement of a high level of development with regard to the execution of their tasks. In this regard, each Party shall endeavor to achieve a high level of effectiveness and to

improve transparency with respect to the execution of the task of their respective collecting societies.

Sub-Section B: Copyright

ARTICLE 15.37: RIGHT OF COMMUNICATION TO THE PUBLIC

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

Sub-Section C: Related Rights

ARTICLE 15.38: PROTECTED SUBJECT MATTER

With respect to the rights accorded under this Chapter to performers, producers of phonograms, and broadcasting organizations, each Party shall accord those rights:

- (a) to the performers and producers of phonograms who are nationals of the other Party;
- (b) with respect to performances and phonograms that are first published or first fixed in the territory of the other Party¹³; and
- (c) to broadcasting organizations if they have their headquarters on its territory and the broadcasts are transmitted from transmitters situated on the same territory.

ARTICLE 15.39: RIGHTS OF PERFORMERS

Each Party shall provide to performers the right to authorize or prohibit:

- (a) the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance;
- (b) the fixation of their unfixed performances; and

¹³ With respect to the protection of phonograms, a Party may apply the criterion of fixation instead of the criterion of publication.

- (c) making available to the public of those performances in such a way that members of the public may access them from a place and at a time individually chosen by them.

ARTICLE 15.40: RIGHT OF PHONOGRAM PRODUCERS

Each Party shall provide to phonogram producers the right to authorize or prohibit the making available to the public of their phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

ARTICLE 15.41: RIGHT TO REMUNERATION OF PERFORMERS AND PHONOGRAM PRODUCERS

Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes, for broadcasting or for any communication to the public. The Parties may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between both categories of right holders.

ARTICLE 15.42: RIGHT OF BROADCASTING ORGANIZATIONS

1. Each Party shall provide broadcasting organizations with the right to authorize or prohibit:

- (a) the re-broadcasting of their broadcasts;
- (b) the reproduction of fixations of their broadcasts; and
- (c) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of a entrance fee. It shall be a matter for each Party's law where protection of this right is claimed to determine the conditions under which it may be exercised.

2. Each Party shall provide that the term of protection of a broadcast shall not be less than 50 years after the taking place of the broadcast.

3. Notwithstanding Article 15.35, neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.¹⁴

¹⁴ For the purposes of paragraph 3 and for greater certainty, the Parties understand that retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory shall not constitute retransmission on the Internet.

ARTICLE 15.43: DEFINITIONS

For the purposes of Sub-Sections A and C, the following definitions shall apply with respect to performers, producers of phonograms and broadcasting organizations:

broadcasting means the transmission to the public by wireless means or satellite for public reception 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;

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 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

publication of a performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.

Section H: Enforcement of Intellectual Property Rights

Sub-Section A: General Obligations

ARTICLE 15.44: 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 be in writing and 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 those decisions and rulings be published¹⁵ 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.

¹⁵ A Party may satisfy the publication requirement in Article 15.44 by making the decision or ruling available to the public on the Internet.

2. Each Party shall publicize information that it may collect on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative, and criminal systems, including any statistical information.¹⁶

ARTICLE 15.45: PRESUMPTIONS

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 is the designated right holder in such work or other subject matter. 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.

Sub-Section B: Civil and Administrative Procedures and Remedies

ARTICLE 15.46: ENTITLED RIGHT HOLDERS

Each Party shall make available to right holders¹⁷ civil judicial procedures concerning the enforcement of any intellectual property right.

ARTICLE 15.47: DAMAGES

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; or
 - (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, which may be presumed to be the amount of damages referred to in sub-subparagraph (i); and
- (b) in determining damages for infringement of intellectual property rights, its judicial authorities shall consider, *inter alia*, the value of the infringed good or service, measured by the suggested retail price, or other legitimate measure of value submitted by the right holder.

¹⁶ For greater certainty, nothing in Article 15.44 is intended to prescribe the type, format, and method of publication of the information.

¹⁷ For the purposes of this Article, “right holder” includes a federation or an association having the legal standing and authority to assert such rights, and also includes a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property.

ARTICLE 15.48: PRE-ESTABLISHED DAMAGES

In civil judicial proceedings, each Party, at least with respect to works, phonograms, and performances protected by copyright or related rights, and in cases of trademark counterfeiting, may establish or maintain pre-established damages, which shall be available on the election of the right holder.

ARTICLE 15.49: LEGAL COSTS

Each Party shall provide that its judicial authorities, except in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning copyright or related rights infringement, or trademark 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 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 attorney's fees.

ARTICLE 15.50: SEIZURE

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 act of infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

ARTICLE 15.51: DESTRUCTION

Each Party shall provide that:

- (a) its judicial authorities shall have the authority to order, at their discretion or, at the right holder's request, the destruction of the goods that have been found to be pirated or counterfeit;
- (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

- (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.

ARTICLE 15.52: RIGHT OF INFORMATION

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, for the purposes of collecting evidence, any information that the infringer possesses or controls regarding any person or persons 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 or the judicial authorities.

ARTICLE 15.53: CONFIDENTIALITY ORDER

Each Party shall provide that its judicial authorities shall have the authority to impose sanctions, in appropriate cases, on a party¹⁸ to a proceeding who fails to abide by confidentiality orders issued by such authorities.

ARTICLE 15.54: ADMINISTRATIVE PROCEDURES

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.

ARTICLE 15.55: REMEDIES

In civil judicial proceedings concerning the acts described in Articles 15.32 and 15.33, 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 award of either actual damages it suffered 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

¹⁸ A "party" may include parties to a civil judicial proceeding, their counsel, experts, or other persons subject to the court's jurisdiction.

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

Neither Party may 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 it was not aware and had no reason to believe that its acts constituted a prohibited activity.

ARTICLE 15.56: PROHIBITION OF INFRINGING IMPORTS AND THEIR EXPORTATION

In civil judicial proceedings concerning the enforcement of intellectual property rights, each Party shall provide that its judicial authorities shall have the authority to order a party to desist from an infringement, in order, *inter alia*, to prevent infringing imports from entering the channels of commerce and to prevent their exportation.

ARTICLE 15.57: EXPERTS' COSTS

In the event that a Party's judicial or other competent 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, the 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.

ARTICLE 15.58: ALTERNATIVE DISPUTE RESOLUTION

Each Party may permit use of alternative dispute resolution procedures to resolve civil disputes concerning copyright and related rights.

ARTICLE 15.59: PROVISIONAL MEASURES

1. Each Party shall act on requests for provisional measures *inaudita altera parte* expeditiously in accordance with its rules of judicial procedure.
2. Each Party shall provide that its judicial authorities have the authority to require the plaintiff, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the plaintiff's right is being infringed or that such infringement is imminent, and to order the plaintiff 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.

Sub-Section C: Special Requirements Related to Border Measures

ARTICLE 15.60: INFORMATION PROVIDED BY RIGHT HOLDERS TO COMPETENT AUTHORITIES

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 goods¹⁹ 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 shall apply to all points of entry to its territory.

ARTICLE 15.61: INFORMATION PROVIDED BY COMPETENT AUTHORITIES TO RIGHT HOLDERS

Where the competent authorities have made a determination that goods are counterfeit or pirated, a Party shall inform the right holder within a reasonable time frame of the names and addresses of the consignor, the importer, or the consignee, and of the quantity of the goods in question.

ARTICLE 15.62: REASONABLE SECURITY OR ASSURANCE

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 infringing 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 the security or equivalent assurance shall not unreasonably deter recourse to these procedures.

ARTICLE 15.63: *EX OFFICIO* BORDER ENFORCEMENT

¹⁹ For the purposes of Articles 15.60 through 15.66:

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

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.

Each Party shall provide that its competent authorities may initiate border measures *ex officio*²⁰ with respect to imported, exported, or in-transit merchandise²¹. Such measures shall be used when there is a reason to believe or suspect that such merchandise is counterfeit or pirated.

ARTICLE 15.64: DESTRUCTION

Each Party shall provide that goods that have been suspended from release by its competent authorities, and that have been forfeited as 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.

ARTICLE 15.65: FEES

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

ARTICLE 15.66: EXCHANGE OF TECHNICAL INFORMATION

Each Party shall endeavor to provide the other Party, on mutually agreed terms, information on the enforcement of border measures concerning intellectual property rights, to promote bilateral and regional cooperation on these matters.

Sub-Section D: Criminal Procedures and Remedies

ARTICLE 15.67: CRIMINAL PROCEDURES AND PENALTIES

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 infringements on a commercial scale.

ARTICLE 15.68: PENALTIES, SEIZURE, FORFEITURE, AND DESTRUCTION

1. Remedies available in accordance with Article 15.55 shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies

²⁰ For greater certainty, the Parties understand that *ex officio* action shall not require a formal complaint from a private party or right holder.

²¹ For the purposes of Article 15.63, **in-transit merchandise** means goods under “customs transit” and goods “transshipped,” as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (Kyoto Protocol).

available shall also include the seizure of suspected goods, and any materials and implements predominantly used in the commission of the alleged offence, as well as forfeiture and destruction of the infringing goods, and any materials and implements predominately used in the commission of the offence.

2. The Parties may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.

Sub-Section E: Effective Action against Infringement in the Digital Environment

ARTICLE 15.69: LIMITATIONS ON LIABILITY OF SERVICE PROVIDERS

The Parties agree to maintain the type of limitations of responsibility of service providers they currently foresee in their legislation in order to comply with their international obligations.

ARTICLE 15.70: MEASURES AGAINST REPETITIVE INFRINGEMENT ON THE INTERNET

Each Party shall endeavor to take effective measures to curtail repetitive infringement of copyright and related rights on the Internet or other digital networks.

Section I: Technology Transfer and Cooperation

ARTICLE 15.71: TECHNOLOGY TRANSFER

1. The Parties recognize the importance of technological innovation as well as the transfer and dissemination of technological information to the mutual advantage of technology producers and users, particularly in the new digital economy. In this regard, the Parties are encouraged to promote cooperation in relation to science, technology, entrepreneurship and innovation, subject to the available resources and conditions.

2. The Parties recognize that technology transfer contributes to the strengthening of national capabilities with the aim of establishing a sound and viable technological base.

ARTICLE 15.72: COOPERATION

1. The areas of cooperation may include the following:

- (a) exchange of information on the legal framework concerning intellectual property right and relevant rules of protection and enforcement;
- (b) exchange of experience on legislative process;

- (c) capacity building for officials on intellectual property rights;
 - (d) promotion and dissemination of information on intellectual property rights in, *inter alia*, business circles and civil society; promotion of public awareness of consumers and right holders;
 - (e) exchange information on the implementation of intellectual property rights in, *inter alia*, business circles and civil society;
 - (f) exchange information on the implementation of intellectual property systems aimed at promoting the efficient registration of intellectual property rights; and
 - (g) other areas of mutual interest concerning intellectual property rights.
2. Cooperation activities shall be conducted on mutually agreed terms and subject to the availability of funds.

Section J: Committee on Intellectual Property Rights

ARTICLE 15.73: COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS

1. The Parties hereby establish the Committee on Intellectual Property Rights (hereinafter referred to as the “Committee”). The Committee shall be comprised by the following, for:

- (a) Korea, the Ministry of Trade, Industry and Energy in collaboration with the competent institutions in the matters to be addressed;
- (b) Costa Rica, the Ministry of Foreign Trade (*Ministerio de Comercio Exterior*) and the National Registry (*Registro Nacional*);
- (c) El Salvador, the Ministry of Economy (*Ministerio de Economía*) in collaboration with the competent institutions in the matters to be addressed;
- (d) Honduras, the Secretariat of State in the Office of Economic Development (*Secretaría de Estado en el Despacho de Desarrollo Económico*) and the General Directorate of Intellectual Property (*Dirección General de Propiedad Intelectual*);
- (e) Nicaragua, the Ministry of Development, Industry and Trade (*Ministerio de Fomento, Industria y Comercio*), in collaboration with the competent institutions in the matters to be addressed; and

- (f) Panama, the Ministry of Commerce and Industries (*Ministerio de Comercio e Industrias*) in collaboration with the competent institutions in the matters to be addressed,

or their successors.

2. For the purposes of the effective implementation and operation of this Chapter, the functions of the Committee shall include, but are not limited to:

- (a) reviewing and monitoring the implementation and operation of this Chapter;
- (b) discussing ways to facilitate cooperation between the Parties;
- (c) exchange of information on laws, systems and other issues of mutual interest concerning intellectual property rights;
- (d) seeking to resolve disputes that may arise regarding the interpretation or application of this Chapter; and
- (e) carrying out other functions as may be assigned by the Joint Committee or agreed by the Parties.

3. Unless the Parties otherwise agree, the Committee shall meet within one year after the date of entry into force of this Agreement and annually thereafter. Meetings may be conducted in person or by any technological means available to the Parties. The Committee shall inform the Joint Commission of the results of each meeting.