

CHAPTER 13

INTELLECTUAL PROPERTY

Article 13.1

Purpose

Each Party confirms its commitment to reducing impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilisation, protection and enforcement of intellectual property rights and the need to maintain an appropriate balance between the rights of intellectual property owners and the legitimate interests of users in subject matter protected by intellectual property rights.

Article 13.2

Definitions

For the purposes of this Chapter, unless the contrary intention appears:

- (a) **circumvention device** means any device that:
 - (i) is promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
 - (ii) has only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
 - (iii) is primarily designed or produced for the purpose of enabling or facilitating the circumvention of any effective technological measure;
- (b) **circumvention service** means a service that:
 - (i) is promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
 - (ii) has only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
 - (iii) is primarily designed or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;
- (c) **copyright piracy on a commercial scale** includes:
 - (i) infringements of copyright for the purpose of commercial advantage or financial gain; and
 - (ii) distribution of infringing copies that is not for the purpose of commercial advantage or financial gain but which has a substantial prejudicial impact on the owner of copyright;

- (d) **effective technological measure** means any technology, device, or component used by the owner of copyright in a work or sound recording in connection with the exercise of their copyright rights, that in the normal course of operation prevents copyright infringement in a work or sound recording;
- (e) **industrial property** includes patents, plant varieties, utility models, industrial designs, trade marks, service marks, trade names, indications of source or appellations of origin and geographical indications;
- (f) **intellectual property rights** includes copyright and related rights; rights in trade marks, geographical indications, industrial designs, patents, and layout-designs (topographies) of integrated circuits; rights in plant varieties; and rights in undisclosed information; as defined or referred to in the TRIPS Agreement;
- (g) **national of a Party** includes, 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 of the TRIPS Agreement, as amended from time to time;
- (h) **WIPO** means the World Intellectual Property Organization; and
- (i) **work** includes a cinematograph film.

Article 13.3 **Obligations are Minimum Obligations**

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

Article 13.4 **International Agreements**

1. Each Party affirms its rights and obligations with respect to each other under the TRIPS Agreement.
2. Each Party affirms that it has ratified or acceded to the following agreements, as subsequently rectified, amended or modified:
 - (a) the *Berne Convention for the Protection of Literary and Artistic Works (1971)* (the Berne Convention);
 - (b) the *Patent Cooperation Treaty (1970)*;
 - (c) the *Paris Convention for the Protection of Industrial Property (1967)* (the Paris Convention);

- (d) the *Convention Establishing the World Intellectual Property Organization (1967)*; and
- (e) the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks (Geneva Act 1977)*.

3. Subject to the fulfilment of its necessary domestic requirements, each Party shall ratify or accede to the following agreements as soon as practicable:

- (a) the *WIPO Copyright Treaty (1996)*;
- (b) the *WIPO Performances and Phonograms Treaty (1996)*;
- (c) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989)*; and
- (d) the *Singapore Treaty on the Law of Trademarks (2006)*.

Article 13.5 National Treatment

1. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection²⁸ of such intellectual property rights, subject to the exceptions provided in those multilateral agreements concluded under the auspices of WIPO to which the Parties are, or become, contracting parties.

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.

²⁸ For the purposes of this paragraph, protection includes matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights, as well as those matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for the purposes of this paragraph, protection also includes the prohibition on circumvention of effective technological measures specified in Article 13.14.

Article 13.6

Transparency

Patent and trade mark databases will be made available on the Internet²⁹.

Article 13.7

Harmonisation

1. Where appropriate, the Parties shall work towards harmonising their industrial property measures with international norms, and participate in international forums, particularly the WIPO and the WTO, working towards reforming and further developing the international industrial property system.
2. The Parties shall work together to reduce differences between their respective industrial property measures, particularly in relation to those differences that affect complexity and costs to users and which inhibit progress toward the mutual exploitation of search and examination work.

Article 13.8

Presumptive Validity

1. Each Party shall continue to enhance their registration systems for trade marks and plant varieties through the provision of examination, opposition and cancellation³⁰ procedures which provide rights of presumptive validity while continuing to simplify and streamline its administration system for the benefit of users of the system.
2. Each Party shall continue to enhance their registration system for patents through the provision of examination and cancellation procedures which provide rights of presumptive validity while continuing to simplify and streamline its administration system for the benefit of users of the system.

Article 13.9

Trade Marks

1. Each Party shall provide high quality trade mark rights through the conduct of examination as to substance and formalities and through opposition and cancellation procedures.
2. Each Party recognises that trade marks may include signs or marks which are not visually perceptible. A Party may require that trade marks be represented graphically³¹.

²⁹ For the purposes of this Article, charging of a nominal fee does not prevent the database being sufficiently publicly available and easily accessible.

³⁰ For the purposes of this Article, a Party may treat the term "cancellation" as synonymous with "revocation".

³¹ For the purposes of this Article, graphically means a written description, drawing or combination of these as prescribed by each Party.

3. The Parties agree to exchange information on the protection of non-traditional trade marks, including signs which, either wholly or in part, are composed of a shape, a colour, a sound, or a scent, with a view to including non-traditional marks in the first general review of the Agreement.

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

Article 13.10

Geographical Indications

1. Each Party shall recognise that geographical indications may be protected through a trade mark or *sui generis* system or other legal means in accordance with its laws and regulations.

2. Each Party shall recognise and provide appropriate protection for trade mark rights where they predate other claimed rights including geographical indications.

3. In determining whether to protect a term claimed to be a geographical indication with respect to goods or services, a Party shall provide the legal means to take into account, in accordance with its legal systems and practice, whether that term is customary in common language as the common name for such goods or services in the territory of that Party.

4. Each Party shall provide an opportunity for interested persons to object to the protection of a term claimed to be a geographical indication at least on the basis that the term is customarily used in common language as the common name for the particular goods or services in the territory of that Party.

5. Where protection of a term claimed to be a geographical indication is sought in a Party, that Party shall publish particulars of the application prior to making a decision to reject or accept the application.

6. Each Party shall publish protected geographical indications.

7. Where a Party provides the means to protect a geographical indication that identifies goods other than wine and spirits against use in translation or transliteration, it shall do so only where that translation or transliteration conveys or evokes the significance of the geographical indication to which it relates in the territory of that Party.

8. The Parties agree to exchange information on:

- (a) the protection of geographical indications; and
- (b) the relationship between existing Intellectual Property Rights and later claimed rights,

with a view to including these topics in the first general review of this Agreement.

Article 13.11

Patents

1. Subject to the exceptions set out in Article 27 of the TRIPS Agreement, 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 application³².
2. Each Party shall disregard information contained in public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure:
 - (a) was made or authorised by, or derived from, the patent applicant, and
 - (b) occurs within 12 months prior to the date of filing of the application in the territory of the Party.
3. A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.
4. Nothing in this Article will limit the scope of exceptions to patentability available in each Party's laws and regulations at the time that this Agreement enters into force.

Article 13.12

Exceptions to Copyright

Each Party shall confine limitations or exceptions to the exclusive rights of copyright to certain special cases which do not conflict with a normal exploitation of a work or sound recording and do not unreasonably prejudice the legitimate interests of the owner of copyright in the work or sound recording.

Article 13.13

Effective Collective Management of Copyright

Each Party shall foster the establishment of appropriate bodies for the collective management of copyright and shall encourage such bodies to operate in a manner that is efficient, publicly transparent and accountable to their members.

Article 13.14

Effective Technological Measures

1. Each Party shall provide for civil remedies where a person knowingly, or having reasonable grounds to know:
 - (a) circumvents an effective technological measure; or

³² For the purposes of this Article, a Party may treat the terms "inventive step" and "capable of industrial application" as synonymous with the terms "non-obvious" and "useful", respectively.

- (b) manufactures, imports, distributes, offers to the public, provides, or otherwise deals in a circumvention device or circumvention service;

unless the activities described in subparagraphs (a) or (b) are authorised by the copyright owner or otherwise permitted by exceptions made in accordance with paragraph 3.

2. Each Party shall provide, at a minimum, for criminal procedures and penalties where for the purpose of commercial advantage or financial gain, a person intentionally, knowingly or recklessly:

- (a) circumvents an effective technological measure; or
- (b) manufactures, imports, distributes, offers to the public, provides, or otherwise deals in a circumvention device or circumvention service;

unless the activities described in subparagraphs (a) or (b) are authorised by the copyright owner or otherwise permitted by exceptions made in accordance with paragraph 3.

3. Each Party shall provide that any exceptions to the obligations in paragraphs 1 and 2 be confined to certain special cases which do not conflict with a normal application of an effective technological measure for the protection of a work or sound recording and do not unreasonably prejudice the legitimate interests of the owner of copyright in that work or sound recording.

Article 13.15 **Copyright Rights Management Information**

1. In order to provide adequate and effective legal remedies to protect rights management information, each Party shall provide that any person who without authority, and knowingly, or, with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright:

- (a) knowingly removes or alters any rights management information;
- (b) distributes or imports for distribution rights management information knowing that the rights management information has been altered without authority; or
- (c) distributes to the public, imports for distribution, broadcasts, communicates, or makes available to the public copies of works or sound recordings, knowing that rights management information has been removed or altered without authority,

shall be liable and subject to civil and, as appropriate, criminal remedies.

2. Each Party may provide that criminal procedures and penalties in paragraph 1 do not apply to a library³³, archive, educational institution, or public non-commercial broadcasting entity.

3. Each Party may provide that subparagraph 1(a) does not apply in relation to anything lawfully done for the sole purpose of:

- (a) law enforcement;
- (b) national security; or
- (c) performing a statutory function.

4. Rights management information means:

- (a) electronic information that identifies a work, performance, or sound recording; the author of the work, the performer of the performance, or the producer of the sound recording; or the owner of any right in the work, performance, or sound recording; or
- (b) electronic information about the terms and conditions of the use of the work, performance, or sound recording; or
- (c) any electronic numbers or codes that represent such information,

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

Article 13.16 **Service Provider Liability**

1. Each Party shall provide for a legislative scheme to limit liability of, or remedies that may be available against service providers³⁴ for infringement of copyright or related rights³⁵ that they do not control, initiate or direct and that take place through their systems or networks.

2. The scheme in paragraph 1 will only apply if a service provider meets conditions including:

³³ The Parties understand that a reference to a library may mean a non-profit library.

³⁴ Each Party may determine, in accordance with its laws and regulations, what constitutes a service provider.

³⁵ Each Party may determine, in accordance with its laws and regulations, what constitutes a related right for the purpose of this Article.

- (a) removing or disabling access to infringing material on notification from the rights owner through a procedure established by each Party; and
- (b) no financial benefit is received by the service provider for the infringing activity in circumstances where it has the right and ability to control such activity.

Article 13.17
National Government Use of Software

Each Party shall maintain appropriate measures that require its central government agencies to use only legitimate computer software in a manner authorised by law. Each Party shall encourage its respective regional and local governments to adopt similar measures.

Article 13.18
Enforcement

1. Each Party commits to implementing effective intellectual property enforcement systems with a view to eliminating trade in goods and services infringing intellectual property rights.
2. In civil and criminal proceedings involving copyright, each Party shall provide for a presumption or similar method to establish ownership and subsistence of copyright.
3. Each Party shall provide, at a minimum, for criminal procedures and penalties to be applied in cases where a person intentionally, knowingly or recklessly engages in trade mark counterfeiting or copyright piracy on a commercial scale.
4. Each Party shall apply higher criminal penalties to intellectual property offences committed by corporations than to intellectual property offences committed by individuals.
5. Each Party shall make available to intellectual property rights holders civil judicial proceedings concerning the enforcement of intellectual property rights.
6. In civil judicial proceedings under paragraph 5, each Party shall provide that its judicial authorities shall have the authority to order at least:
 - (a) provisional measures, including
 - (i) to prevent the entry into the channels of commerce in their jurisdiction of goods;
 - (ii) to preserve relevant evidence in regard to the alleged infringement;

- (b) damages³⁶;
- (c) payment to a prevailing right holder of court costs and fees and reasonable attorney's fees by the party engaged in the proscribed activity at the conclusion of the civil judicial proceeding; and
- (d) delivery up or destruction of the devices and products found to be involved in the proscribed activity.

Article 13.19
Protection of Encrypted Programme-Carrying Satellite Signals

1. Each Party shall make it a criminal offence 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 programme-carrying satellite signal without the authorisation of the lawful distributor of such signal; and
 - (b) wilfully receive and make use of, or further distribute a programme-carrying signal that originated as an encrypted programme-carrying satellite signal:
 - (i) knowing that it has been decoded without the authorisation of the lawful distributor of the signal, or
 - (ii) with intent to avoid payment of any rate or fee applicable to the provision of that signal.
2. In relation to the activities described in subparagraphs (a) and (b), a Party may provide for civil remedies for any person that holds an interest in the encrypted programme-carrying satellite signal or its content.

Article 13.20
Border Measures

1. Each Party shall ensure that the requirements necessary for a right holder to initiate procedures to suspend the release of goods suspected of being counterfeit trade mark or pirated copyright goods shall not unreasonably deter recourse to these procedures.
2. Each Party shall provide that its competent authorities have the authority to inform the right holder of the names and addresses of the consignor, the importer, and the consignee, and of the quantity of the goods in question.

³⁶ Each Party may determine what constitutes "damages" for the purposes of this Article.

3. Each Party shall provide that its competent authorities may initiate enforcement measures ex officio with respect to imported or exported goods suspected of being counterfeit trade mark or pirated copyright goods, without the need for a specific formal complaint.

4. Each Party shall treat intentional, knowing or reckless importation or exportation³⁷ of pirated copyright goods or of counterfeit trade mark goods as unlawful activities subject to criminal penalties.

5. Parties may exclude from the application of this Article the importation or exportation of small quantities of goods which are considered to be of a non-commercial nature.

Article 13.21

Cooperation on Enforcement

Subject to their respective laws, regulations, and policies, the Parties shall cooperate with a view to eliminating trade in goods infringing intellectual property rights. Such cooperation may include:

- (a) the notification of contact points for the enforcement of intellectual property rights;
- (b) the exchange, between respective agencies responsible for the enforcement of intellectual property rights, of information concerning the infringement of intellectual property rights;
- (c) policy dialogue on initiatives for the enforcement of intellectual property rights in multilateral and regional fora; and
- (d) such other activities and initiatives for the enforcement of intellectual property rights as may be mutually determined by the Parties.

Article 13.22

Other Cooperation

The Parties, through their competent agencies, shall encourage and facilitate the development of contacts and cooperation between their respective government agencies, educational institutions, organisations and other entities concerning the protection and enforcement of intellectual property rights with a view to:

- (a) strengthening their respective intellectual property administrative systems; and
- (b) stimulating the creation and development of intellectual property by nationals of each Party.

³⁷ A Party may comply with this paragraph in relation to exportation through its measures concerning distribution.

Article 13.23
Consultations

Each Party agrees to enter into technical consultations at the written request of the other Party to address any matter relating to this Chapter.