

44

24. 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.

25. Each Party shall provide the other Party, on mutually agreed terms, with technical advice on the enforcement of border measures concerning intellectual property rights, and the Parties shall promote bilateral and regional cooperation on these matters.

*Criminal Procedures and Remedies*

26. 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.<sup>33</sup>

Each Party shall treat willful importation or exportation of counterfeit or pirated goods as unlawful activities subject to criminal penalties.<sup>34</sup>

27. Further to paragraph 26, each Party shall provide:

- (a) penalties that include sentences of imprisonment as well as monetary fines sufficient to provide a deterrent to future infringements, consistent with a policy of removing the infringer's monetary incentive. Each Party shall further encourage judicial authorities to impose those penalties at levels sufficient to provide a deterrent to future infringements, including the imposition of actual terms of imprisonment when criminal infringement occurs for purposes of 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 documentary evidence relevant to the offense, and any assets traceable to the infringing activity. Each Party shall provide that such orders need not individually

---

<sup>33</sup> For purposes of paragraph 26 and Articles 18.4.7(a), 18.4.8(a), and 18.10.27 and for greater certainty, "financial gain" includes the receipt or expectation of anything of value.

<sup>34</sup> A Party may comply with the obligation in paragraph 26 in relation to exportation of pirated goods through its measures concerning distribution.

identify the items that are subject to seizure, 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;
- (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 and/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, 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 these materials from the destruction order to facilitate the preservation of evidence on notice by the right holder that it wishes to bring a civil or administrative case for damages; and
- (f) 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. Each Party shall also provide for criminal procedures and penalties to be applied, even absent willful trademark counterfeiting or copyright piracy, at least in cases of knowing trafficking in:

- (a) counterfeit labels or illicit labels affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany: a phonogram, a copy of a computer program or other literary work, a copy of a motion picture or other audiovisual work, or documentation or packaging for such items; and
- (b) counterfeit documentation or packaging for items of the type described in subparagraph (a).

29. Each Party shall also provide for criminal procedures 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 the motion picture or other audiovisual

work, or any part thereof, from a performance of the motion picture or other audiovisual work in a public motion picture exhibition facility.

*Liability for Service Providers and Limitations*

30. 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 copyright<sup>35</sup> 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).<sup>36</sup>
  - (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:<sup>37</sup>
    - (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;
    - (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.

---

<sup>35</sup> For purposes of paragraph 30, "copyright" includes related rights.

<sup>36</sup> Subparagraph (b) is without prejudice to the availability of defenses to copyright infringement that are of general applicability.

<sup>37</sup> Either Party may request consultations with the other Party to consider how to address under subparagraph (b) functions of a similar nature that a Party identifies after the date this Agreement enters into force.