

Article 2.17: Enforcement procedures 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 Agreement, are available under its law so as to permit effective action against an act of, trademark, copyright or related rights infringement which takes place by means of the Internet, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.
2. Without prejudice to the rights, limitations, exceptions or defenses to copyright or related rights infringement available under its law, including with respect to the issue of exhaustion of rights, each Party confirms that civil remedies, as well as limitations, exceptions, or defenses with respect to the application of such remedies, are available in its legal system in cases of third party liability¹ for copyright and related rights infringement.²
3. Each Party recognize that some persons³ use the services of third parties, including online service providers,⁴ for engaging in copyright or related rights infringement. Each Party also recognizes that legal uncertainty with respect to application of intellectual property rights, limitations, exceptions, and defenses in the digital environment may present barriers to the economic growth of, and opportunities in, electronic commerce. Accordingly, in order to facilitate the continued development of an industry engaged in providing information services online while also ensuring that measures take adequate and effective action against copyright or related rights infringement are available and reasonable, each Party shall:
 - (a) provide limitations⁵ on the scope of civil remedies available against an online service provider for infringing activities that occur by:
 - (I) automatic technical processes and
 - (II) the actions of the provider's users that are not directed or initiated by that provider when the provider does not select the material, and
 - (III) the provider referring or linking users to an online locationwhen, in cases of subparagraphs (II) and (III), the provider does not have actual knowledge of the infringement and is not aware of the facts or circumstances from which infringing activity is apparent; and
 - (b) condition the application of the provisions of subparagraph (a) on meeting the following requirements:
 - (I) an online service provider adopting and reasonably implementing a

1 For greater certainty, the Parties understand that third party liability means liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids, any act of copyright or related rights infringement by another. Further, the parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.

2 *Negotiator's Note*: This provision is intended to be moved and located in the civil enforcement section.

3 For purposes of this Article, **person** means a natural person or an enterprise.

4 For purposes of this Article, **online service provider** and **provider** mean a provider of online services or network access, or the operators of facilities therefor, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification of the content of the material as sent or received.

5 For greater certainty, the Parties understand that the failure of an online service provider's conduct to qualify for a limitation of liability under its measures implementing this provision shall not bear adversely on the consideration of a defense of the service provider that the service provider's conduct is not infringing or any other defense.

policy⁶ to address the unauthorized storage or transmission of materials protected by copyright or related rights except that no Party may condition the limitations in subparagraph (a) on the online service provider's monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring; and

(II) an online service provider expeditiously removing or disabling access to material or activity, upon receipt of legally sufficient notice of alleged infringement, and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of a mistake or misidentification.

except that the provisions of (II) shall not be applied to the extent that the online service provider is acting solely as a conduit for transmissions through its system or network.

4. In implementing Article 11 of the *WIPO Copyright Treaty* and Article 18 of the *WIPO Performances and Phonograms Treaty* regarding adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms 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 civil remedies, as well as criminal penalties in appropriate cases of willful conduct that apply to:

(a) the unauthorized circumvention of an effective technological measure⁷ that controls access to a protected work, performance, or phonogram; and

(b) the manufacture, importation, or circulation of a technology, service, device, product, component, or part thereof, that is: marketed or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure.

5. Each Party shall provide that a violation of a measure implementing paragraph (4) is a separate civil or criminal offense, independent of any infringement of copyright or related rights.⁸ Further, each Party may adopt exceptions and limitations to measures implementing subparagraph (4) so long as they do not significantly impair the adequacy of legal protection of those measures or the effectiveness of legal remedies for violations of those measures.⁹

6. In implementing Article 12 of the *WIPO Copyright Treaty* and Article 19 of the *WIPO Performances and Phonograms Treaty* on providing adequate and effective legal remedies to protect rights management information, each Party shall provide for civil remedies, as well as criminal penalties in appropriate cases of willful conduct, that apply to any person performing any of the following acts knowing that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right:

6 An example of such a policy is providing for the termination in appropriate circumstances of subscriptions and accounts in the service provider's system or network of repeat infringers.

7 For the purposes of this Article, **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 protects any copyright or any rights related to copyright.

8 The obligations in paragraphs (4) and (5) are without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, in implementing paragraph (4), no Party may require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing paragraph (4).

9 *Negotiator's Note*: This provision is subject to broader government action/sovereign immunity provision elsewhere in the Agreement.

(a) to remove or alter any rights management information¹⁰ without authority; and
(b) to distribute, import for distribution, broadcast, communicate, or make available to the public, copies of the works, performances, or phonograms, knowing that rights management information has been removed or altered without authority.

7. Each Party may adopt appropriate limitations or exceptions to the requirements of subparagraphs (a) and (b) of paragraph (6).

¹⁰ For the purposes of this Article, **rights management information** means:

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