

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

Chapter Sixteen

Intellectual Property Rights

Article 16.1: General Provisions

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

International Agreements

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

- (a) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
- (b) the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;
- (c) the *WIPO Copyright Treaty* (1996); and
- (d) the *WIPO Performances and Phonograms Treaty* (1996).

3. Each Party shall ratify or accede to the following agreements by January 1, 2008, or the date of entry into force of this Agreement, whichever is later:

- (a) the *Patent Cooperation Treaty* (1970), as amended in 1979;
- (b) the *Trademark Law Treaty* (1994); and
- (c) the *International Convention for the Protection of New Varieties of Plants* (1991) (UPOV Convention).

4. Except as otherwise provided in Annex 16.1, each Party shall make all reasonable efforts to ratify or accede to the following agreements:

- (a) the *Patent Law Treaty* (2000);
- (b) the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999); and

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

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

5. Nothing in this Chapter shall be construed to prevent a Party from adopting measures necessary to prevent anticompetitive practices that may result from the abuse of the intellectual property rights set forth in this Chapter, provided that such measures are consistent with this Chapter.

6. Further to Article 1.2 (Relation to Other Agreements), the Parties affirm their existing rights and obligations under the TRIPS Agreement and intellectual property agreements concluded or administered under the auspices of the World Intellectual Property Organization (WIPO) to which they are party.

More Extensive Protection and Enforcement

7. A Party may, but shall not be obliged to, implement in its domestic law more extensive protection and enforcement of intellectual property rights than is required under this Chapter, provided that such protection and enforcement do not contravene this Chapter.

National Treatment

8. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals¹ of the other Parties treatment no less favorable than it accords to its own nationals with regard to the protection² and enjoyment of such intellectual property rights and any benefits derived from such rights.

9. A Party may derogate from paragraph 8 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 necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter and is not applied in a manner that would constitute a disguised restriction on trade.

¹ For purposes of Articles 16.1.8, 16.1.9, 16.3.1, and 16.6.4, a **national of a Party** shall also mean, in respect of the relevant right, an entity located in such Party that would meet the criteria for eligibility for protection provided for in the agreements listed in Articles 16.1.2 through 16.1.4 and the TRIPS Agreement.

² For purposes of this paragraph, “protection” includes matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for purposes of this paragraph, “protection” also includes the prohibition on circumvention of effective technological measures set out in Article 16.7.4 and the rights and obligations concerning rights management information set out in Article 16.7.5.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

10. Paragraph 8 does not apply to procedures provided in multilateral agreements to which the Parties are party concluded under the auspices of the WIPO in relation to the acquisition or maintenance of intellectual property rights.

Application of this Agreement to Existing Subject Matter and Prior Acts

11. Except as it provides otherwise, including in Article 16.7.2, this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

12. Except as otherwise provided in this Chapter, including Article 16.7.2, 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 Party where the protection is claimed.

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

Transparency

14. Further to Article 19.2 (Publication), and with the object of making the protection and enforcement of intellectual property rights transparent, each Party shall ensure that all laws, regulations, and procedures concerning the protection or enforcement of intellectual property rights shall be in writing and shall be published,³ or where publication is not practicable made publicly available, in a national language in such a manner as to enable governments and right holders to become acquainted with them.

Article 16.2: Trademarks

1. No Party shall require, as a condition of registration, that signs be visually perceptible, nor may a Party deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound or a scent.

2. Each Party shall provide that trademarks shall include collective and certification marks. Each Party shall also provide that signs that may serve, in the course of trade, as geographical indications may constitute certification or collective marks.⁴

³ For greater certainty, a Party may satisfy the requirement to publish a law, regulation, or procedure by making it available to the public on the Internet.

⁴ **Geographical indications** means indications that identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

3. In view of the obligations of Article 20 of the TRIPS Agreement, each Party shall ensure that its measures mandating the use of the term customary in common language as the common name for a good or service (“common name”) including, *inter alia*, requirements concerning the relative size, placement, or style of use of the trademark in relation to the common name, do not impair the use or effectiveness of trademarks used in relation to such good or service.⁵

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

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

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

7. In determining whether a trademark is well known, no Party shall require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services. For greater certainty, the sector of the public that normally deals with the relevant goods or services is determined according to each Party’s domestic law.

8. 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 electronic, of the reasons for a refusal to register a trademark;

attributable to its geographical origin. Any sign or combination of signs, in any form whatsoever, shall be eligible to be a geographical indication. The term “originating” in this Chapter does not have the meaning ascribed to that term in Article 1.3 (Definitions of General Application).

⁵ For greater certainty, the existence of such measures does not, *per se*, amount to impairment.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (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 petition to oppose a trademark application or to seek cancellation of a trademark after it has been registered; and
 - (d) a requirement that decisions in opposition or cancellation proceedings be reasoned and in writing.
9. Each Party shall provide:
- (a) a system for the electronic application for, and electronic processing, registration, and maintenance of, trademarks;⁶ and
 - (b) a publicly available electronic database, including an online database, of trademark applications and registrations.
10. Each Party shall provide that:
- (a) each registration or publication that concerns a trademark application or registration and that indicates goods or services shall indicate the goods or services by their names, grouped according to the classes of the classification established by the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (1979), as revised and amended (Nice Classification); and
 - (b) goods or services may not be considered as being similar to each other solely on the ground that, in any registration or publication, they 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.
11. Each Party shall provide that initial registration and each renewal of registration of a trademark shall be for a term of no less than ten years.
12. No Party may require recordation of trademark licenses to establish the validity of the license, to assert any rights in a trademark, or for other purposes.⁷

⁶ For greater certainty, such a system will be established according to each Party's domestic law.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

Article 16.3: Geographical Indications

1. If a Party provides the means to apply for protection or petition for recognition of geographical indications, through a system of protection of trademarks or otherwise, it shall accept those applications and petitions without the requirement for intercession by a Party on behalf of its nationals, and shall:

- (a) process applications or petitions, as the case may be, for geographical indications with a minimum of formalities;
- (b) make its regulations governing filing of such applications or petitions, as the case may be, readily available to the public;
- (c) provide that applications or petitions, as the case may be, for geographical indications are published for opposition, and shall provide procedures for opposing geographical indications that are the subject of applications or petitions. Each Party shall also provide procedures to cancel a registration resulting from an application or a petition; and
- (d) provide that measures governing the filing of applications or petitions for geographical indications set out clearly the procedures for these actions. Such procedures shall include contact information sufficient for applicants or petitioners, as the case may be, to obtain specific procedural guidance regarding the processing of applications and petitions.

2. Each Party shall provide that grounds for refusing protection or recognition of a geographical indication include the following:

- (a) the geographical indication is likely to cause confusion with a trademark that is the subject of good-faith pending application or registration; and
- (b) the geographical indication is likely to cause confusion with a pre-existing trademark, the rights to which have been acquired in accordance with the Party's law.

Article 16.4: Domain Names on the Internet

⁷ Nothing in this paragraph prevents a Party from requesting the presentation of evidence of a license for informational purposes.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

1. In order to address the problem of trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain (ccTLD) provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy (1999).
2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information on domain-name registrants.

Article 16.5: Copyrights

1. Further to Article 1.2 (Relation to Other Agreements), the Parties affirm their existing rights and obligations under the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention).
2. Each Party shall provide that authors⁸ have the right to authorize or prohibit⁹ all reproductions of their works, in any manner or form, permanent or temporary (including temporary storage in electronic form).
3. Each Party shall provide to authors the right to authorize the making available to the public of the original and copies¹⁰ of their works through sale or other transfer of ownership.
4. 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.
5. Each Party shall provide that, where the term of protection of a work (including a photographic work) 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

⁸ References in this Chapter to "authors" include any successors in interest.

⁹ With respect to copyrights in this Chapter, a right to authorize or prohibit, or a right to authorize, means an exclusive right.

¹⁰ The expressions "copies" and "original and copies," being subject to the right of distribution under this paragraph, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, or
- (ii) failing such authorized publication within 50 years from the creation of the work, not less than 70 years from the end of the calendar year of the creation of the work.

6. Ownership of copyright in an artistic or literary work shall vest initially in the author or authors of the work.

Article 16.6: Related Rights

1. Further to Article 1.2 (Relation to Other Agreements), the Parties affirm their existing rights and obligations under the *WIPO Performances and Phonograms Treaty* (1996).

2. Each Party shall provide that performers and producers of phonograms¹¹ have the right to authorize or prohibit¹² all reproductions of their performances¹³ and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).

3. Each Party shall provide to performers and producers of phonograms the right to authorize the making available to the public of the original and copies¹⁴ of their performances and phonograms through sale or other transfer of ownership.

4. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms who are nationals of another Party and to performances or phonograms first published or first fixed in the territory of a Party. A performance or phonogram shall be considered first published in the territory of a Party in which it is published within 30 days of its original publication.¹⁵

¹¹ References in this Chapter to “performers” and “producers of phonograms” include any successors in interest.

¹² With respect to related rights in this Chapter, a right to authorize or prohibit, or a right to authorize, means an exclusive right.

¹³ With respect to related rights in this Chapter, a “performance” refers to a performance fixed in a phonogram unless otherwise specified.

¹⁴ The expressions “copies” and “original and copies,” being subject to the right of distribution under this paragraph, refer exclusively to fixed copies that can be put into circulation as tangible objects.

¹⁵ For purposes of this Article and Article 16.7, fixation includes the finalization of the master tape or its equivalent.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

5. 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; and (b) the fixation of their unfixed performances.
6. (a) Each Party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting or any communication to the public of their performances or phonograms, by wire or wireless means, including the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.
- (b) Notwithstanding subparagraph (a) and Article 16.7.8, the application of this right to analog transmissions and free over-the-air broadcasts, and exceptions or limitations to this right for such activity, shall be a matter of each Party's law.
- (c) Any limitations to this right in respect of other noninteractive transmissions shall be in accordance with Article 16.7.8 and shall not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration.
7. Each Party shall provide that, where the term of protection of a 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 that person and 70 years after that person'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 performance or phonogram, or
- (ii) failing such authorized publication within 50 years from the creation of the performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the performance or phonogram.
8. For purposes of this Article and Article 16.7, the following definitions apply with respect to performers and producers of phonograms:
- (a) **broadcasting** means the transmission by wireless means or satellite to the public of sounds or sounds and images, or of the representations thereof, including wireless transmission of encrypted signals where the means for decrypting are

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

provided to the public by the broadcasting organization or with its consent; “broadcasting” does not include transmissions over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public;

- (b) **communication to the public** of a performance or a phonogram means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For purposes of paragraph 6, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public;
- (c) **fixation** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;
- (d) **performers** means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (e) **phonogram** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (f) **producer of a phonogram** means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and
- (g) **publication** of a performance or a phonogram means the offering of copies of the performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity.

Article 16.7: Obligations Common to Copyright and Related Rights

1. In order to ensure that no hierarchy is established between rights of authors, on the one hand, and rights of performers and producers of phonograms, on the other hand, each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required. Likewise, each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

owning rights in the phonogram, the need for the authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

2. 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 Articles 16.5 through 16.7.

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

4. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

- (i) circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram; or
- (ii) manufactures, imports, distributes, offers to the public, provides or otherwise traffics in devices, products, or components, or offers to the public or provides services, that:
 - (A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
 - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
 - (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

shall be liable and subject to the remedies set out in Article 16.11.15. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities.

- (b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects any copyright or any rights related to copyright.
- (c) In implementing subparagraph (a), no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such product does not otherwise violate any measures implementing subparagraph (a).
- (d) Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offense, independent of any infringement that might occur under the Party's law on copyright and related rights.
- (e) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the activities below and in subparagraph (f), which shall be applied to relevant measures in accordance with subparagraph (g):
 - (i) noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
 - (ii) noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance or display of a work, performance, or phonogram, and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate on-line content in a technology, product, service, or device that itself is not prohibited under the measures implementing subparagraph (a)(ii);
 - (iv) noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;
 - (v) access by a nonprofit library, archive, or educational institution to a work, performance, or phonogram, not otherwise available to it, for the sole purpose of making acquisition decisions; and
 - (vi) 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 on-line 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) Noninfringing uses of a work, performance, or phonogram, in a particular class of works, performances, or phonograms, provided that any exception or limitation adopted in reliance on this subparagraph shall be based on the existence of substantial evidence, as found in a legislative or administrative proceeding, of an actual or likely adverse impact on those noninfringing uses; and provided further that a review of such finding, conducted in an administrative or legislative proceeding, shall be completed at intervals of not more than four years to determine whether there still exists substantial evidence of an actual or likely adverse impact on those noninfringing uses.
- (g) The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraphs (e) and (f) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:
- (i) measures implementing subparagraph (a)(i) may be subject to exceptions and limitations with respect to each activity set forth in subparagraphs (e) and (f);
 - (ii) measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraphs (e)(i), (ii), (iii), and (iv); and

(iii) measures implementing subparagraph (a)(ii), as they apply to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (e)(i).

(h) Each Party may provide exceptions to any measure implementing the prohibitions referred to in subparagraph (a) for lawfully authorized investigative, protective, information security or intelligence activity carried out by government employees, agents or contractors. For the purposes of this paragraph, the term “information security” means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

5. In order to provide adequate 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 16.11.15. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

(b) To the extent a Party adopts exceptions and limitations to measures implementing subparagraph (a), such exceptions and limitations shall be confined to lawfully authorized investigative, protective, information security or intelligence activity carried out by government employees, agents, or contractors. For the purposes of this paragraph, the term “information security” means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system or computer network.

(c) **Rights management information** means:

(i) information that identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram;

(ii) information about the terms and conditions of the use of the work, performance, or phonogram; or

(iii) any numbers or codes that represent such information,

when any of these items is attached to a copy of the work, performance, or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram, to the public.

6. Each Party shall issue appropriate laws, orders, regulations, or administrative or executive decrees mandating that its agencies use computer software only as authorized by the right holder. These measures shall actively regulate the acquisition and management of software for government use.

7. The Parties recognize the important role that collective management societies with voluntary membership can play in appropriate cases by facilitating, in a transparent manner, the collection and distribution of royalties.

8. With respect to Articles 16.5 through 16.7, each Party shall confine limitations or exceptions to exclusive rights 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.

9. Notwithstanding Articles 16.7.8 and 16.6.6(b), no 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.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

10. No 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 16.8: 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 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.
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 16.9: Patents

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. For the purposes of this Article, a Party may treat the terms “inventive step” and “capable of industrial application” as being synonymous with the terms “non-obvious” and “useful,” respectively.
2. Nothing in this Chapter shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 of the TRIPS Agreement. Notwithstanding the foregoing, a Party that does not provide patent protection for plants by the date of entry into force of this Agreement shall undertake all reasonable efforts to make such patent protection available consistent with paragraph 1. Any Party that provides patent protection for plants or animals on or after the date of entry into force of this Agreement shall maintain such protection.
3. Each Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

4. Without prejudice to Article 5.A(3) of the Paris Convention, each Party shall provide that a patent may be revoked or nullified only on grounds that would have justified a refusal to grant the patent according to its laws. However, a Party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for revoking, nullifying, or holding a patent unenforceable.

5. Consistent with paragraph 3, 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 product or agricultural chemical product, that Party shall provide that any product produced under such authority shall not be made, used, sold, offered for sale, or imported in the territory of that Party other than for purposes related to generating information to meet requirements for approval to market the product once the patent expires, and if the Party permits exportation, the product shall only be exported outside the territory of that Party for purposes of meeting marketing approval requirements of that Party.

6. (a) Each Party shall provide the means to and shall, at the request of the patent owner, compensate for unreasonable delays in the issuance of the patent by restoring patent term or patent rights. Any such restoration shall confer all of the exclusive rights of a patent subject to the same limitations and exceptions applicable to the original patent. For purposes of this subparagraph, an unreasonable delay shall at least include a delay in the issuance of the patent of more than five years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application has been made, whichever is later, provided that periods attributable to actions of the patent applicant need not be included in the determination of such delays.

(b) With respect to any pharmaceutical product that is covered by a patent, each Party shall make available a restoration of the patent term or patent rights to compensate the patent owner for unreasonable curtailment of the effective patent term resulting from the marketing approval process related to the first commercial marketing of the product in that Party. Any such restoration shall confer all of the exclusive rights of a patent subject to the same limitations and exceptions applicable to the original patent.

7. 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.

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

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

shall provide that no amendment or correction shall introduce new matter into the disclosure of the invention as filed in the original application.

9. 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 carried out by a person skilled in the art, without undue experimentation, as of the filing date and may require the applicant to indicate the best mode for carrying out the invention known to the inventor as of the filing date.

10. With the aim of ensuring that the claimed invention is sufficiently described, 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.

11. Each Party shall provide that a claimed invention is industrially applicable if it has a specific, substantial, and credible utility.¹⁶

Article 16.10: Measures Related to Certain Regulated Products

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

for at least five years for pharmaceutical products and ten years for agricultural chemical products from the date of marketing approval in the territory of the Party.
- (b) If a Party requires or permits, in connection with granting marketing approval for a new pharmaceutical or new agricultural chemical product, the submission of evidence concerning the safety or efficacy of a product that was previously approved in another territory, such as evidence of prior marketing approval in the

¹⁶ For greater certainty, this paragraph is without prejudice to paragraphs 1 and 2.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

other territory, the Party shall not, without the consent of a person that previously submitted the safety or efficacy information to obtain marketing approval in another territory, authorize another to market a same or a similar product based on:

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

for at least five years for pharmaceutical products and ten years for agricultural chemical products from the date of marketing approval of the new product in the territory of the Party. In order to receive protection under this subparagraph, a Party may require that the person providing the information in the other territory seek approval in the territory of the Party within five years after obtaining marketing approval in the other territory.

- (c) For purposes of this Article, a new pharmaceutical product is one that does not contain a chemical entity that has been previously approved in the territory of the Party for use in a pharmaceutical product and a new agricultural chemical product is one that contains a chemical entity that has not been previously approved in the territory of the Party for use in an agricultural chemical product.

2. When a product is subject to a system of marketing approval in the territory of a Party pursuant to paragraph 1 and is also covered by a patent in the territory of that Party, the Party shall not alter the term of protection that it provides pursuant to paragraph 1 in the event that the patent protection terminates on a date earlier than the end of the term of protection specified in paragraph 1.

3. Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting safety or efficacy information, to rely on evidence of safety or efficacy information of a product that was previously approved, such as evidence of prior marketing approval in the territory of the Party or in another territory, that Party shall:

- (a) implement measures in its marketing approval process to prevent such other persons from marketing a product covered by a patent claiming the product or its approved method of use during the term of that patent, unless by consent or acquiescence of the patent owner;¹⁷ and

¹⁷ For greater certainty, the Parties recognize that this provision does not imply that the marketing approval authority should make patent validity or infringement determinations.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (b) provide that the patent owner shall be informed of the identity of any such other person who requests marketing approval to enter the market during the term of a patent identified to the approving authority as covering that product.

Article 16.11: Enforcement of Intellectual Property Rights

General Obligations

1. Each Party understands that procedures and remedies set forth in this Article for enforcement of intellectual property rights are established in accordance with the principles of due process that each Party recognizes and the foundations of its own legal system.
2. Each Party shall provide that final judicial decisions and administrative rulings of general applicability pertaining to the enforcement of intellectual property rights shall be in writing and shall state any relevant findings of fact and the reasoning or the legal basis on which the decisions or rulings are based. Each Party shall also provide that such decisions or rulings shall be published¹⁸ or, where publication is not practicable, otherwise made available to the public, in a national language in such a manner as to enable governments and right holders to become acquainted with them.
3. Each Party shall publicize information on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative, and criminal systems, including any statistical information that the Party may collect for such purposes.
4. This Article does not create for the Parties any obligation:
 - (a) to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general; or
 - (b) with respect to the distribution of resources for enforcement of intellectual property rights and the enforcement of law in general.

The Parties understand that a decision that a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter.

5. 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

¹⁸ A Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

person whose name is indicated in the usual manner is the right holder in the work, performance, or phonogram as designated.¹⁹ 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.

Civil and Administrative Procedures and Remedies

6. Each Party shall make available to right holders²⁰ civil judicial procedures concerning the enforcement of any intellectual property right.

7. 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; and
 - (ii) at least in the case of copyright or related rights infringement and trademark counterfeiting, the profits of the infringer that are attributable to the infringement and that are not taken into account in computing the amount of the damages referred to in clause (i); and
- (b) in determining the amount of damages for infringement of intellectual property rights, its judicial authorities shall consider, *inter alia*, the value of the infringed-on good or service, according to the suggested retail price or other legitimate measure of value submitted by the right holder.

8. In civil judicial proceedings, each Party shall, at least with respect to infringement concerning copyright or related rights and trademark counterfeiting, establish or maintain pre-established damages, which shall be available on the election of the right holder as an alternative to actual damages. Such pre-established damages shall be set out in domestic law and determined by the judicial authorities, taking into account the aims of the intellectual property

¹⁹ For greater certainty, the Parties recognize that this provision does not address the allocation of rights among the right holders.

²⁰ For purposes of this Article, “right holder” includes federations and associations as well as exclusive licensees and other duly authorized licensees having the legal standing and authority to assert such rights. “Licensee” shall include the licensee of any one or more of the exclusive intellectual property rights.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

system, in an amount sufficient to compensate the right holder for the harm caused by the infringement and constitute a deterrent to future infringements.²¹

9. 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 infringement of copyright or related rights and trademark infringement, that the prevailing party shall be awarded payment of court costs or fees and reasonable attorney's fees by the losing party.

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

11. Each Party shall provide that:

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

12. Each Party shall provide that in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to order the infringer to provide any information that the infringer possesses 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

²¹ For greater certainty, the Parties understand that the damages set forth in this paragraph do not constitute punitive damages.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

and distribution of the infringing goods or services or in their channels of distribution, and to provide this information to the right holder.²²

13. Each Party shall provide that the judicial authorities shall have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and their channels of distribution. Each Party shall provide that its judicial authorities shall have the authority to impose sanctions, in appropriate cases, on a party to a proceeding that fails to abide by valid orders issued by such authorities.

14. 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.

15. Each Party shall provide for civil remedies concerning the acts described in Articles 16.7.4 and 16.7.5. Available civil remedies shall include at least:

- (a) provisional measures, including seizure of devices and products suspected of being involved in the prohibited activity;
- (b) the opportunity for the right holder to elect between actual damages (plus any profits attributable to the prohibited activity not taken into account in computing those damages) or pre-established damages as provided in paragraph 8;
- (c) 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
- (d) destruction of devices and products found to be involved in the prohibited activity, at the discretion of the judicial authorities, as provided in subparagraphs (a) and (b) of paragraph 11.

No Party may make damages under this paragraph available against a nonprofit library, archive, educational institution, or public 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.

16. 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 the entry into the channels of

²² For greater certainty, this provision does not apply to the extent that it would conflict with constitutional, common law, or statutory privilege.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

commerce in the jurisdiction of those authorities of imported goods that involve the infringement of an intellectual property right immediately after customs clearance of such goods, or to prevent their exportation.

17. In the event that a Party's judicial or other authorities appoint technical or other experts in civil proceedings concerning the enforcement of intellectual property rights and require that the parties to the litigation bear the costs of such experts, 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.

Provisional Measures

18. Each Party shall act on requests for relief *in audita altera parte* and execute such requests expeditiously according to its rules of judicial procedure.

19. Each Party shall provide that its judicial authorities shall have the authority to require the plaintiff 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 sufficient to protect the defendant and to prevent abuse, and so as not to unreasonably deter recourse to such procedures.

Special Requirements Related to Border Measures

20. 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 goods,²³ 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.

²³ For purposes of paragraphs 20 through 25:

(a) **counterfeit trademark goods** means any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country of importation; and

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

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

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

22. Where its competent authorities have made a determination that goods are counterfeit or pirated, a Party shall grant its competent authorities 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.

23. Each Party shall provide that its competent authorities may initiate border measures *ex officio* with respect to merchandise for importation, exportation, or in transit, without the need for a formal complaint from a private party or right holder. Such measures shall be used when there is reason to believe or suspect that such merchandise is counterfeit or pirated.

24. Each Party shall provide that goods that have been determined by its competent authorities to be pirated or counterfeit shall be destroyed, pursuant to a judicial order where required, unless the right holder consents to an alternate disposition. Counterfeit trademark goods may, in appropriate cases, be donated to charity for use outside the channels of commerce, when the removal of the trademark eliminates the infringing characteristic of the good and the good is no longer identifiable with the removed trademark. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorized to permit the exportation of counterfeit or pirated goods, nor shall they be authorized to permit such goods to be subject to other customs procedures, except in exceptional circumstances.

25. When a Party establishes, in relation to border measures to obtain the enforcement of an intellectual property right, an application fee or merchandise storage fee, such fee shall not be set at an amount that unreasonably deters recourse to these measures.

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:

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (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.

Each Party shall treat willful importation or exportation of counterfeit or pirated goods as unlawful activities subject to criminal penalties to the same extent as the trafficking or distribution of such goods in domestic commerce.

27. Specifically, each Party shall provide:

- (a) remedies 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 monetary incentive of the infringer. Each Party shall encourage its judicial authorities to impose fines at levels sufficient to provide a deterrent to future infringements;²⁴
- (b) that its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offense, any assets traceable to the infringing activity,²⁵ and any documentary evidence relevant to the offense. Each Party shall provide that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order;
- (c) that its judicial authorities have the authority to order, among other measures, the forfeiture of any assets traceable to the infringing activity²⁵ and shall, except in exceptional cases, order the forfeiture and destruction of all counterfeit or pirated goods, and, at least with respect to willful copyright or related rights piracy, order the forfeiture and destruction of materials and implements that have been used in the creation of infringing goods. Each Party shall further provide that such forfeiture and destruction shall occur without compensation of any kind to the defendant; and

²⁴ For greater certainty, this provision is without prejudice to the autonomy of the judicial authorities.

²⁵ For greater certainty, each Party recognizes that such authority may be provided under its general domestic criminal law.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (d) 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 in the following cases, even absent willful trademark counterfeiting or copyright piracy:

- (a) knowing trafficking in counterfeit labels affixed or designed to be affixed to a phonogram, a copy of a computer program, documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work; and
- (b) knowing trafficking in counterfeit documentation or packaging for a computer program.

Limitations on Liability for Service Providers

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

- (a) legal incentives for service providers to cooperate with copyright²⁶ 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).²⁷
 - (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:²⁸

²⁶ For purposes of this paragraph, “copyright” shall also include related rights.

²⁷ For greater certainty, the failure of a service provider to qualify for the limitations in subparagraph (b) does not itself result in liability. Furthermore, subparagraph (b) is without prejudice to the availability of defenses to copyright infringement that are of general applicability.

²⁸ Each Party may request consultations with another Party to consider how to address under this paragraph functions of a similar nature that a Party identifies after the date of entry into force of this Agreement.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (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.
- (ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material, and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).
- (iii) Qualification by a service provider for the limitations as to each function in clauses (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv) through (vii).
- (iv) With respect to functions referred to in clause (i)(B), the limitations shall be conditioned on the service provider:
- (A) permitting access to cached material in significant part only to users of its system or network who have met conditions on user access to that material;
 - (B) complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available;
 - (C) not interfering with technology consistent with industry standards accepted in the Party's territory used at the originating site to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (D) expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.
- (v) With respect to functions referred to in clauses (i)(C) and (D), the limitations shall be conditioned on the service provider:
 - (A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;
 - (B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement in accordance with clause (ix); and
 - (C) publicly designating a representative to receive such notifications.
- (vi) Eligibility for the limitations in this subparagraph shall be conditioned on the service provider:
 - (A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and
 - (B) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.
- (vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity, except to the extent consistent with such technical measures.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic online location. If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary, provided that such other remedies are the least burdensome to the service provider among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy and whether less burdensome, comparably effective enforcement methods are available. Except for orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network, each Party shall provide that such relief shall be available only where the service provider has received notice of the court order proceedings referred to in this subparagraph and an opportunity to appear before the judicial authority.

- (ix) For purposes of the notice and take down process for the functions referred to in clauses (i)(C) and (D), each Party shall establish appropriate procedures for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.

- (x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the person making the material available on its system or network that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

the person giving the original effective notification seeks judicial relief within a reasonable time.

- (xi) Each Party shall establish an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

- (xii) For purposes of the function referred to in clause (i)(A), **service provider** means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for purposes of the functions referred to in clauses (i)(B) through (D) **service provider** means a provider or operator of facilities for online services or network access.

Article 16.12: Promotion of Innovation and Technological Development

1. The Parties recognize the importance of promoting technological innovation, disseminating technological information, and building technological capacity, including, as appropriate, through collaborative scientific research projects between or among the Parties. Accordingly, the Parties will seek and encourage opportunities for science and technology cooperation and identify areas for such cooperation and, as appropriate, engage in collaborative scientific research projects.

2. The Parties shall give priority to collaborations that advance common goals in science, technology, and innovation and support partnerships between public and private research institutions and industry. Any such collaborative activities or transfer of technology shall be based on mutually agreed terms.

3. Each Party shall designate a contact point to facilitate the development of collaborative projects from the following offices responsible for science and technology cooperation, which shall review periodically the state of collaboration through mutually agreed means of communication:

- (a) in the case of Colombia, the *Instituto Colombiano para el Desarrollo de la Ciencia y la Tecnología "Francisco José de Caldas"* (COLICIENCIAS);

- (b) in the case of Peru, *el Consejo Nacional de Ciencia, Tecnología e Innovación Tecnológica* (CONCYTEC); and

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

- (c) in the case of the United States, Office of Science and Technology Cooperation, Bureau of Oceans, and International Environmental and Scientific Affairs, U.S. Department of State;

or their successors.

Article 16.13: Final Provisions

1. Except as otherwise provided in Annex 16.1 and Article 16.1.3 and 16.1.4, each Party shall give effect to this Chapter on the date of entry into force of this Agreement.
2. A Party may delay giving effect to certain provisions of this Chapter as specified in Annex 16.1.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 8 May 2006

Annex 16.1

Peru

Peru may delay giving effect to certain provisions of this Chapter for no longer than the periods in this paragraph, beginning on the date of entry into force of this Agreement:

- (a) with respect to Articles 16.2.9, 16.9.6(a), 16.11.23, 16.11.28, and 16.11.29, one year;
- (b) with respect to Article 16.11.8, 18 months;
- (c) with respect to Articles 16.7.5(a)(ii) and 16.11.15, as it relates to enforcement of Article 16.7.5(a)(ii), 30 months; and
- (d) with respect to Articles 16.7.4(a)(ii), 16.7.4(g), 16.7.4(h), and 16.11.15, as it relates to the enforcement of Articles 16.7.4(a)(ii), 16.7.4(g), and 16.7.4(h), three years.

Colombia

1. Colombia shall ratify or accede to the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989) by January 1, 2009.

2. Colombia may delay giving effect to certain provisions of this Chapter for no longer than the periods in this paragraph, beginning on the date of entry into force of this Agreement:

- (a) with respect to Articles 16.2.9, 16.11.23, 16.11.28, and 16.11.29, one year;
- (b) with respect to Article 16.11.8, 18 months;
- (c) with respect to Article 16.9.6(a), two years;
- (d) with respect to Articles 16.7.5(a)(ii) and 16.11.15, as it relates to enforcement of Article 16.7.5(a)(ii), 30 months; and
- (e) with respect to Articles 16.7.4(a)(ii), 16.7.4(g), 16.7.4(h), and 16.11.15, as it relates to the enforcement of Articles 16.7.4(a)(ii), 16.7.4(g), and 16.7.4(h), three years.