Free Trade Agreement between the Republic of Korea and the United States of America

CHAPTER EIGHTEEN
INTELLECTUAL PROPERTY RIGHTS

ARTICLE 18.1: GENERAL PROVISIONS

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

International Agreements

2. Further to Article 1.2 (Relation to Other Agreements), the Parties affirm their existing rights and obligations with respect to each other under the TRIPS Agreement.

3. Each Party shall ratify or accede to the following agreements by the date this Agreement enters into force:
   (a) the *Patent Cooperation Treaty* (1970), as amended in 1979;
   (b) the *Paris Convention for the Protection of Industrial Property* (1967) (the Paris Convention);
   (c) *the Berne Convention for the Protection of Literary and Artistic Works* (1971) (the Berne Convention);
   (d) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
   (e) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
   (f) the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;
   (g) the *International Convention for the Protection of New Varieties of Plants* (1991);
   (h) the *Trademark Law Treaty* (1994);[1)]
   (i) the *World Intellectual Property Organization* (WIPO) *Copyright Treaty* (1996); and
   (j) the *WIPO Performances and Phonograms Treaty* (1996).

4. 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
   (c) the *Singapore Treaty on the Law of Trademarks* (2006).

More Extensive Protection and Enforcement

5. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.

National Treatment

6. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals[2)] of the other Party treatment no less favorable than it accords to its own nationals with regard to the protection[3)] and enjoyment of such intellectual property rights and any benefits derived from such rights. With respect to secondary uses of phonograms by means of analog communications, analog free over-theair radio broadcasting, and analog free over-the-air television broadcasting, however, a Party may limit the rights of performers and producers of phonograms of the other Party to the rights its persons are accorded in the territory of the other Party.

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1) A Party may satisfy the obligation in Article 18.1.3(h) by ratifying or acceding to the *Singapore Treaty on the Law of Trademarks* (2006), provided that treaty has entered into force.

2) For purposes of paragraphs 6 and 7 and Articles 18.2.14(a), and 18.6.1, a "national" of a Party shall include, in respect of the relevant right, any person (as defined in Article 1.4 (Definitions)), of that Party that would meet the criteria for eligibility for protection of that right provided for in the agreements listed in paragraph 3 and the TRIPS Agreement.

3) For purposes of paragraph 6, "protection" includes: (1) matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter; and (2) the prohibition on circumvention of effective technological measures set out in Article 18.4.7 and the rights and obligations concerning rights management information set out in Article 18.4.8.

7. A Party may derogate from paragraph 6 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and

(b) not applied in a manner that would constitute a disguised restriction on trade.

8. Paragraph 6 does not apply to procedures provided in multilateral agreements to which either Party is a party concluded under the auspices of the WIPO in relation to the acquisition or maintenance of intellectual property rights.

Application of Agreement to Existing Subject Matter and Prior Acts

9. Except as it provides otherwise, including in Article 18.4.5, this Chapter gives rise to obligations in respect of all subject matter existing at the date this Agreement enters into force 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.

10. Except as otherwise provided in this Chapter, including in Article 18.4.5, a Party shall not be required to restore protection to subject matter that on the date this Agreement enters into force has fallen into the public domain in the territory of the Party where the protection is claimed.

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

Transparency

12. Further to Article 21.1 (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 are in writing and are published,[4] or where publication is not practicable made publicly available, in its national language in such a manner as to enable governments and right holders to become acquainted with them.

ARTICLE 18.2: TRADEMARKS INCLUDING GEOGRAPHICAL INDICATIONS

1. Neither Party may require, as a condition of registration, that signs be visually perceptible, nor may either Party deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound or scent.

2. Each Party shall provide that trademarks shall include certification marks. Each Party shall also provide that geographical indications are eligible for protection as trademarks.[5]

3. 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.

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, at least for goods or services that are identical or similar to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign, including a geographical indication, for identical goods or services, a likelihood of confusion shall be presumed.

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 interests of the owner of the trademark and of third parties.

6. Neither Party may require, as a condition for determining that a mark is a wellknown mark, that the mark has been registered in the territory of that Party or in another jurisdiction. Additionally, neither Party may deny remedies or relief with respect to wellknown marks solely because of the lack of:

(a) a registration;

(b) inclusion on a list of well-known marks; or

(c) prior recognition of the mark as well-known.

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4) For greater certainty, a Party may satisfy the requirement in paragraph 12 to publish a law, regulation, or procedure by making it available to the public on the Internet.

5) For purposes of this Chapter, **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 attributable to its geographical origin. Any sign (such as words, including geographical and personal names, as well as letters, numerals, figurative elements, and colors, including single colors) or combination of signs, in any form whatsoever, shall be eligible to be a geographical indication. "Originating" in this Chapter does not have the meaning ascribed to that term in Article 1.4 (Definitions).

7. Article 6*bis* of the Paris Convention shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,[6] 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.

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

9. Each Party shall provide a system for the registration of trademarks, which shall include:

(a) a requirement to provide to the applicant a communication in writing, which may be provided electronically, of the reasons for a refusal to register a trademark;

(b) an opportunity for the applicant to respond to communications from the trademark authorities, to contest an initial refusal, and to appeal judicially a final refusal to register;

(c) an opportunity for interested parties to oppose a trademark application and to seek cancellation of a trademark after it has been registered; and

(d) a requirement that decisions in opposition and cancellation proceedings be reasoned and in writing. Written decisions may be provided electronically.

10. Each Party shall provide a:

(a) system for the electronic application for, and electronic processing, registering, and maintenance of, trademarks; and

(b) publicly available electronic database, including an online database, of trademark applications and registrations.

11. Each Party shall provide that:

(a) each registration and publication that concerns a trademark application or registration and that indicates goods or services shall indicate the goods or services by their 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.

12. 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.

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

14. 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, with respect to such applications and petitions (as relevant to the means chosen by the Party):

(a) accept those applications and petitions without requiring intercession by a Party on behalf of its nationals;

(b) process those applications and petitions with a minimum of formalities;

(c) ensure that its regulations governing filing of those applications and petitions are readily available to the public and set out clearly the procedures for these actions;

(d) make available contact information sufficient to allow the general public to obtain guidance concerning the procedures for filing applications and petitions and the processing of those applications and petitions in general; and to allow applicants, petitioners, or their representatives to ascertain the status of, and to obtain procedural guidance concerning, specific applications and petitions; and

(e) ensure that applications and petitions for geographical indications are published for opposition, and 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.

15. (a) Each Party shall provide that each of the following shall be grounds for refusing protection or recognition of, and for opposition and cancellation of, a geographical indication:

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

(i) the geographical indication is likely to cause confusion with a trademark that is the subject of a good faith pending application or registration in the Party's territory and that has a priority date that predates the protection or recognition of the geographical indication in that territory;

(ii) the geographical indication is likely to cause confusion with a trademark, the rights to which have been acquired in the Party's territory through use in good faith, that has a priority date that predates the protection or recognition of the geographical indication in that territory; and

(iii) the geographical indication is likely to cause confusion with a trademark that has become well known in the Party's territory and that has a priority date that predates the protection or recognition of the geographical indication in that territory.

(b) For purposes of subparagraph (a), the date of protection of the geographical indication in a Party's territory shall be:

(i) in the case of protection or recognition provided as a result of an application or petition, the date of the application or petition; and

(ii) in the case of protection or recognition provided through other means, the date of protection or recognition under the Party's laws.

ARTICLE 18.3: DOMAIN NAMES ON THE INTERNET

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.

2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information concerning domain-name registrants.

ARTICLE 18.4: COPYRIGHT AND RELATED RIGHTS

1. Each Party shall provide[7] that authors, performers, and producers of phonograms[8] have the right to authorize or prohibit[9] all reproductions of their works, performances,[10] and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).[11]

2. Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the making available to the public of the original and copies[12] of their works, performances, and phonograms through sale or other transfer of ownership.

3. 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 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.

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

(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and

(b) on a basis other than the life of a natural person, the term shall be:

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7) The Parties reaffirm that it is a matter for each Party's law to prescribe that works and phonograms shall not be protected by copyright unless they have been fixed in some material form.

8) "Authors," "performers," and "producers of phonograms" in this Chapter refer also to any successors in title.

9) With respect to copyrights and related rights, the "right to authorize or prohibit" for purposes of this Chapter refers to exclusive rights.

10) With respect to copyright and related rights, a **performance** for purposes of this Chapter means a performance fixed in a phonogram unless otherwise specified.

11) Each Party shall confine limitations or exceptions to the rights described in paragraph 1 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. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.

12) As used in paragraph 2, "copies" and "original and copies", being subject to the right of distribution in this paragraph, refer exclusively to fixed copies that can be put into circulation as tangible objects.

(i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram; or

(ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

5. Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to the subject matter, rights, and obligations in this Article and Articles 18.5 and 18.6.

6. Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right in a work, performance, or phonogram:

(a) may freely and separately transfer that right by contract; and

(b) by virtue of a contract, including contracts of employment underlying the creation of works, performances, and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.

7. (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) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter; 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 by that person, or by another person acting in concert with, and with the knowledge of, that person, 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,

shall be liable and subject to the remedies set out in Article 18.10.13.[13] 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. Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (e) of Article 18.10.27 as applicable to infringements, *mutatis mutandis*.

(b) In implementing subparagraph (a), neither 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 the product does not otherwise violate any measures implementing subparagraph (a).

(c) Each Party shall provide that a violation of a measure implementing this paragraph is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights.

(d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the following activities, which shall be applied to relevant measures in accordance with subparagraph (e):[14]

(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 research consisting of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;

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13) In addition, each Party shall provide that any person who, unknowingly and without reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter shall be liable and subject at least to the remedies set out in subparagraphs (a), (c), and (d) of Article 18.10.13.

14) Either Party may request consultations with the other Party to consider how to address, under subparagraph (d), activities of a similar nature that a Party identifies after the date this Agreement enters into force.

(iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing 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) noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;

(vi) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes;

(vii) 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

(viii) noninfringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms when an actual or likely adverse impact on those noninfringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence, provided that any limitation or exception adopted in reliance on this clause shall have effect for a renewable period of not more than three years from the date the proceeding concludes.

(e) The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph (d) 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 subparagraph (d).

(ii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i), (ii), (iii), (iv), and (vi).

(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 (d)(i) and (vi).

(f) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.

8. 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 18.10.13. 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. These criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (e) of Article 18.10.27 as applicable to infringements, *mutatis mutandis*.

(b) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes.

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

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

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

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

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

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

9. Each Party shall provide appropriate laws, orders, regulations, government-issued guidelines, or administrative or executive decrees providing that its central government agencies not use infringing computer software and other materials protected by copyright or related rights and only use computer software and other materials protected by copyright or related rights as authorized by the relevant license. These measures shall provide for the regulation of the acquisition and management of software and other materials for government use that are protected by copyright or related rights.

10. (a) With respect to this Article and Articles 18.5 and 18.6, 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.

(b) Notwithstanding subparagraph (a) and Article 18.6.3(b), neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.[15)]

ARTICLE 18.5: COPYRIGHT

Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis* 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.

ARTICLE 18.6: RELATED RIGHTS

1. With respect to the rights accorded under this Chapter to performers and producers of phonograms, each Party shall:

(a) accord those rights to the performers and producers of phonograms who are nationals of the other Party; and

(b) accord those rights with respect to performances and phonograms that are first published or first fixed[16)] in the territory of the other Party.[17)]

2. 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.

3. (a) Each Party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting and 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 18.4.10, 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) Each Party may adopt limitations to this right in respect of other noninteractive transmissions in accordance with Article 18.4.10, provided that the limitations do not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration.

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

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15) For purposes of subparagraph (b) and for greater certainty, retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory does not constitute retransmission on the Internet.

16) For purposes of Article 18.6, "fixation" includes the finalization of the master tape or its equivalent.

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

5. For purposes of this Article and Article 18.4, the following definitions apply with respect to performers and producers of phonograms:

(a) **broadcasting** means the transmission to the public by wireless means or satellite of sounds or sounds and images, or representations thereof, including wireless transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent; "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;

(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 right holder, and provided that copies are offered to the public in reasonable quantity.

ARTICLE 18.7: PROTECTION OF ENCRYPTED PROGRAM-CARRYING SATELLITE AND CABLE 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 or cable signal without the authorization of the lawful distributor of such signal; and

(b) willfully to receive and make use of,[18] or further distribute, a programcarrying signal that originated as an encrypted satellite or cable signal knowing that it has been decoded without the authorization of the lawful distributor of the signal, or if the signal has been decoded with the authorization of the lawful distributor of the signal, willfully to further distribute the signal for purposes of commercial advantage knowing that the signal originated as an encrypted program-carrying signal and that such further distribution is without the authorization of the lawful signal distributor.

2. Each Party shall provide for civil remedies, including compensatory damages, for any person injured by any activity described in paragraph 1, including any person that holds an interest in the encrypted programming signal or its content.

ARTICLE 18.8: 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. In addition, each Party confirms that patents shall be available for any new uses or methods of using a known product.[19]

2. Each Party may only exclude from patentability:

(a) inventions, the prevention within its territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by its law; and

(b) diagnostic, therapeutic, and surgical procedures for the treatment of humans or animals.

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.

4. Each Party shall provide that a patent may be revoked only on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for revoking a patent or holding a patent unenforceable. Where a Party provides proceedings that permit a third party to oppose the grant of a patent, the Party shall not make such proceedings available before the grant of the patent.

5. Consistent with paragraph 3, if a Party permits a third person to use the subject matter of a subsisting patent to generate information

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18) For greater certainty, "make use of" includes viewing of the signal, whether private or commercial.

19) For purposes of Article 18.8, a Party may treat the terms "inventive step" and "capable of industrial application" as synonymous with the terms "non-obvious" and "useful" respectively.

necessary to support an application for marketing approval of a pharmaceutical product, that Party shall provide that any product produced under such authority shall not be made, used, or sold in its territory other than for purposes related to generating such information to support an application for meeting marketing approval requirements of that Party, and if the Party permits exportation of such product, the Party shall provide that the product shall only be exported outside its territory for purposes of generating information to support an application for meeting marketing approval requirements of that Party.

6. (a) Each Party, at the request of the patent owner, shall adjust the term of a patent to compensate for unreasonable delays that occur in granting the patent. For purposes of this subparagraph, an unreasonable delay shall at least include a delay in the issuance of the patent of more than four 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, whichever is later. Periods attributable to actions of the patent applicant need not be included in the determination of such delays.[20)]

(b) With respect to patents covering a new pharmaceutical product[21)] that is approved for marketing in the territory of the Party and methods of making or using a new pharmaceutical product that is approved for marketing in the territory of the Party, each Party, at the request of the patent owner, shall make available an adjustment of the patent term or the term of the patent rights of a patent covering a new pharmaceutical product, its approved method of use, or a method of making the product to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process related to the first commercial use of that pharmaceutical product in the territory of that Party. Any adjustment under this subparagraph shall confer all of the exclusive rights, subject to the same limitations and exceptions, of the patent claims of the product, its method of use, or its method of manufacture in the originally issued patent as applicable to the product and the approved method of use of the product.[22)]

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.[23)]

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

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 made and used by a person skilled in the art, without undue experimentation, as of the filing date.

10. Each Party shall provide that a claimed invention:

(a) is sufficiently supported by its disclosure if the disclosure allows a person skilled in the art to extend the teaching therein to the entire scope of the claim, thereby showing that the applicant does not claim subject matter which the applicant had not recognized and described or possessed on the filing date; and

(b) is industrially applicable if it has a specific, substantial, and credible utility.

11. The Parties shall endeavor to establish a framework for cooperation between their respective patent offices as a basis for progress towards the mutual exploitation of search and examination work.

ARTICLE 18.9: 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 origination of which involves a considerable effort, the Party shall not, without the consent of a person that previously submitted such safety or efficacy information to obtain marketing approval in the territory of 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

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20) Notwithstanding Article 18.1.9, subparagraph (a) shall apply to all patent applications filed on or afterJanuary 1, 2008.

21) For greater certainty, **new pharmaceutical product** in subparagraph (b) means a product that at least contains a new chemical entity that has not been previously approved as a pharmaceutical product in the territory of the Party.

22) For purposes of subparagraph (b), **effective patent term** means the period from the date of approval of the product until the original expiration date of the patent.

23) Notwithstanding Article 18.1.9, paragraph 7 shall apply to all patent applications filed on or after January 1, 2008.

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 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 the other 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.[24)]

(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. (a) If a Party requires or permits, as a condition of granting marketing approval for a pharmaceutical product that includes a chemical entity that has been previously approved for marketing in another pharmaceutical product, the submission of new clinical information that is essential to the approval of the pharmaceutical product containing the previously approved chemical entity, other than information related to bioequivalency, the Party shall not, without the consent of a person that previously submitted such new clinical information to obtain marketing approval in the territory of the Party, authorize another to market a same or a similar product based on:

(i) the new clinical information submitted in support of the marketing approval; or

(ii) evidence of the marketing approval based on the new clinical information, for at least three years 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 pharmaceutical product of the type specified in subparagraph (a), the submission of evidence concerning new clinical information for a product that was previously approved based on that new clinical information in another territory, other than evidence of information related to bioequivalency, such as evidence of prior marketing approval based on the new clinical information, the Party shall not, without the consent of the person that previously submitted such new clinical information to obtain marketing approval in the other territory, authorize another to market a same or a similar product based on:

(i) the new clinical information submitted in support of the prior marketing approval in the other territory; or

(ii) evidence of prior marketing approval based on the new clinical information in the other territory,

for at least three years from the date of marketing approval based on the new clinical information in the territory of the Party.

(c) If a Party requires or permits, as a condition of granting marketing approval for a new use, for an agricultural chemical product that has been previously approved in the territory of the Party, the submission of safety or efficacy information, the origination of which involves a considerable effort, the Party shall not, without the consent of a person that previously submitted such safety or efficacy information to obtain marketing approval in the territory of the Party, authorize another to market a same or similar product for that use based on:

(i) the submitted safety or efficacy information; or

(ii) evidence of the marketing approval for that use,

for at least ten years from the date of the original marketing approval of the agricultural chemical product in the territory of the Party.

(d) If a Party requires or permits, in connection with granting marketing approval for a new use, for an agricultural chemical product that has been previously approved in the territory of the Party, the submission of evidence concerning the safety or efficacy of a product that was previously approved in another territory for that new use, such as evidence of prior marketing approval for that new use, the Party shall not, without the consent of the person that previously submitted the safety or efficacy information to obtain marketing approval in the other 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 for that use in the other territory; or

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24) The Parties acknowledge that, as of the date of signature of this Agreement, neither Party permits a person, not having the consent of the person that previously submitted safety or efficacy information to obtain marketing approval in another territory, to market a same or similar product in the territory of the Party on the basis of such information or evidence of prior marketing approval in such other territory.

(ii) evidence of prior marketing approval in another territory for that new use,

for at least ten years from the date of the original marketing approval granted in the territory of the Party.

3. With respect to pharmaceutical products, notwithstanding paragraphs 1 and 2, a Party may take measures to protect public health in accordance with:

(a) the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2) (the Declaration);

(b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration and in force between the Parties; and

(c) any amendment of the TRIPS Agreement to implement the Declaration that enters into force with respect to the Parties.

4. Subject to paragraph 3, when a product is subject to a system of marketing approval in the territory of a Party in accordance with paragraph 1 or 2 and is also covered by a patent in that territory, the Party may not alter the term of protection that it provides in accordance with those paragraphs in the event that the patent protection terminates on a date earlier than the end of the term of protection specified in those paragraphs.

5. 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 that information or 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) provide that the patent owner shall be notified of the identity of any such other person that requests marketing approval to enter the market during the term of a patent notified to the approving authority as covering that product or its approved method of use; and

(b) implement measures in its marketing approval process to prevent such other persons from marketing a product without the consent or acquiescence of the patent owner during the term of a patent notified to the approving authority as covering that product or its approved method of use.

ARTICLE 18.10: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

General Obligations

1. Each Party shall provide that final judicial decisions and administrative rulings of general application pertaining to the enforcement of intellectual property rights be in writing and state any relevant findings of fact and the reasoning or the legal basis on which the decisions and rulings are based. Each Party shall also provide that those decisions and rulings be published[25] or, where publication is not practicable, otherwise made available to the public, in its national language in such a manner as to enable governments and right holders to become acquainted with them.

2. 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.[26]

3. In civil, administrative, and criminal proceedings involving copyright or related rights, each Party shall provide for a presumption that, in the absence of proof to the contrary, the person whose name is indicated as the author, producer, performer, or publisher of the work, performance, or phonogram in the usual manner is the designated right holder in such work, performance, or phonogram. 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. In civil, administrative, and criminal proceedings involving trademarks, each Party shall provide for a rebuttable presumption that a registered trademark is valid. In civil and administrative proceedings involving patents, each Party shall provide for a rebuttable presumption that a patent is valid, and shall provide that each claim of a patent is presumed valid independently of the validity of the other claims.

Civil and Administrative Procedures and Remedies

4. Each Party shall make available to right holders[27] civil judicial procedures concerning the enforcement of any intellectual property right.

5. Each Party shall provide that:

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25) A Party may satisfy the publication requirement in paragraph 1 by making the decision or ruling available to the public on the Internet.

26) For greater certainty, nothing in paragraph 2 is intended to prescribe the type, format, and method of publication of the information a Party must publicize.

27) For purposes of Article 18.10, "right holder" includes a federation or an association having the legal standing and authority to assert such rights, and also includes a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property.

(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;[28] or

(ii) at least in the case of copyright or related rights infringement and trademark counterfeiting, the profits of the infringer that are attributable to the infringement, which may be presumed to be the amount of damages referred to in clause (i); and

(b) in determining damages for infringement of intellectual property rights, its judicial authorities shall consider, *inter alia*, the value of the infringed good or service, measured by the market price, the suggested retail price, or other legitimate measure of value submitted by the right holder.

6. In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright or related rights, and in cases of trademark counterfeiting, establish or maintain pre-established damages, which shall be available on the election of the right holder. Pre-established damages shall be in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.[29]

7. Each Party shall provide that its judicial authorities, except in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning copyright or related rights infringement, patent infringement, or trademark infringement, that the prevailing party shall be awarded payment by the losing party of court costs or fees and, at least in proceedings concerning copyright or related rights infringement or willful trademark counterfeiting, reasonable attorney's fees. Further, each Party shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party shall be awarded payment by the losing party of reasonable attorneys' fees.

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

9. 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.

10. Each Party shall provide that in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to order the infringer to provide, for the purpose of collecting evidence, any information that the infringer possesses or controls regarding any person or persons involved in any aspect of the infringement and regarding the means of production or distribution channel of such goods or services, including the identification of third persons involved in the production and distribution of the infringing goods or services or in their channels of distribution, and to provide this information to the right holder or the judicial authorities.

11. Each Party shall provide that its judicial authorities have the authority to:

(a) fine, detain, or imprison, in appropriate cases, a party to a civil judicial proceeding who fails to abide by valid orders issued by such authorities; and

(b) impose sanctions on parties to a civil judicial proceeding, their counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders regarding the protection of confidential information produced or exchanged in a proceeding.

12. 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.

13. In civil judicial proceedings concerning the acts described in paragraphs 7 and 8 of Article 18.4, each Party shall provide that its judicial authorities shall, at the least, have the authority to:

(a) impose provisional measures, including seizure of devices and products suspected of being involved in the prohibited activity;

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28) In the case of patent infringement, damages adequate to compensate for the infringement shall not be less than a reasonable royalty.

29) Neither Party is required to apply paragraph 6 to actions for infringement against a Party or a third party acting with the authorization or consent of a Party.

(b) provide an opportunity for the right holder to elect award of either actual damages it suffered or pre-established damages;

(c) order payment to the prevailing right holder at the conclusion of civil judicial proceedings of court costs and fees, and reasonable attorney's fees, by the party engaged in the prohibited conduct; and

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

Neither Party may make damages available under this paragraph against a nonprofit library, archives, educational institution, or public noncommercial broadcasting entity that sustains the burden of proving that it was not aware and had no reason to believe that its acts constituted a prohibited activity.

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

15. In the event that a Party's judicial or other competent authorities appoint technical or other experts in civil proceedings concerning the enforcement of intellectual property rights and require that the parties to the litigation bear the costs of such experts, the Party should seek to ensure that such costs are closely related, *inter alia*, to the quantity and nature of work to be performed and do not unreasonably deter recourse to such proceedings.

Alternative Dispute Resolution

16. Each Party may permit use of alternative dispute resolution procedures to resolve civil disputes concerning intellectual property rights.

Provisional Measures

17. Each Party shall act on requests for provisional measures *inaudita altera parte* expeditiously.

18. Each Party shall provide that its judicial authorities have the authority to require the plaintiff, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the plaintiff's right is being infringed or that such infringement is imminent, and to order the plaintiff to provide a reasonable security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse, and so as not to unreasonably deter recourse to such procedures.

Special Requirements Related to Border Measures

19. 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[30] into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods reasonably recognizable by its competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to these procedures. Each Party shall provide that the application to suspend the release of goods shall apply to all points of entry to its territory and remain applicable for a period of not less than one year from the date of application, or the period that the good is protected by copyright or that the relevant trademark registration is valid, whichever is shorter.

20. Each Party shall provide that its competent authorities shall have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit or confusingly similar trademark 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 the security or equivalent assurance shall not unreasonably deter recourse to these procedures. Each Party may provide that the 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. In no case shall an importer be permitted to post a bond or other security to obtain possession of suspected counterfeit or confusingly similar trademark goods, or of pirated copyright goods.

21. Where its competent authorities have seized goods that are counterfeit or pirated, a Party shall inform the right holder within 30 days of the seizure of the names and addresses of the consignor, importer, exporter, or consignee, and provide to the right holder

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30) For purposes of paragraphs 19 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.

a description of the merchandise, the quantity of the merchandise, and, if known, the country of origin of the merchandise.

22. Each Party shall provide that its competent authorities may initiate border measures *ex officio*[31] with respect to imported, exported, or in-transit merchandise,[32] or merchandise in free trade zones, that is suspected of being counterfeit or confusingly similar trademark goods, or pirated copyright goods.

23. Each Party shall provide that goods that have been suspended from release by its customs authorities, and that have been forfeited as pirated or counterfeit, shall be destroyed, except in exceptional circumstances. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorized, except in exceptional circumstances, to permit the exportation of counterfeit or pirated goods or to permit such goods to be subject to other customs procedures.

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.[33]

Each Party shall treat willful importation or exportation of counterfeit or pirated goods as unlawful activities subject to criminal penalties.[34]

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 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

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

32) For purposes of paragraph 22, **in-transit merchandise** means goods under "Customs transit" and goods "transshipped," as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (Kyoto Convention).

33) 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.

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

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[35] 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).[36]

(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:[37]

(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

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35) For purposes of paragraph 30, "copyright" includes related rights.

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

37) 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.

(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.

(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 in its law or in regulations for effective notifications of claimed infringement, and effective counternotifications 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 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 18.11: UNDERSTANDINGS REGARDING CERTAIN PUBLIC HEALTH MEASURES

1. The Parties affirm their commitment to the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2).

2. The Parties have reached the following understandings regarding this Chapter:

   (a) The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, and other epidemics as well as circumstances of extreme urgency or national emergency. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all.

   (b) In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the General Council of 30 August 2003 on the Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540) and the WTO General Council Chairman's statement accompanying the Decision (JOB(03)/177, WT/GC/M/82) (collectively, the "TRIPS/health solution"), this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution.

   (c) With respect to the aforementioned matters, if an amendment of the TRIPS Agreement enters into force with respect to the Parties and a Party's application of a measure in conformity with that amendment violates this Chapter, the Parties shall immediately consult in order to adapt this Chapter as appropriate in the light of the amendment.

ARTICLE 18.12: TRANSITIONAL PROVISIONS

1. Each Party shall give effect to this Chapter on the date this Agreement enters into force.

2. Notwithstanding paragraph 1, Korea shall fully implement the obligations of Article 18.4.4 within two years after the date this Agreement enters into force.

Side Letter 1. Republic of Korea to United States of America

June 30, 2007

The Honorable Susan C. Schwab

United States Trade Representative

Washington, D.C.

Dear Ambassador Schwab:

I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Article 18.10.30(b)(ix) (Enforcement of Intellectual Property Rights) of the Free Trade Agreement between our two Governments signed this day:

In meeting the obligations of Article 18.10.30(b)(ix), the United States shall apply the pertinent provisions of its law,[38] and any amendments thereto, and Korea shall adopt requirements for: (a) effective written notification to service providers with respect to materials that are claimed to be infringing, and (b) effective written counter-notification by those whose material is removed or disabled and who claim that it was disabled through mistake or misidentification, as set forth in this letter. Effective written notification means notification that substantially complies with the elements listed in section (a) of this letter, and effective written counter-notification means counter-notification that substantially complies with the elements listed in section (b) of this letter.

(a) Effective Written Notification, by a Copyright[39] Owner or Person Authorized to Act on Behalf of an Owner of an Exclusive Right, to a Service Provider's Publicly Designated Representative[40]

In order for a notification to a service provider to comply with the relevant requirements set out in Article 18.10.30(b)(ix), that notification must be a written communication, which may be provided electronically, that includes substantially the following:

1. The identity, address, telephone number, and electronic mail address of the complaining party (or its authorized agent);
2. Information reasonably sufficient to enable the service provider to identify the copyrighted work(s)[4] claimed to have been infringed;
3. Information reasonably sufficient to permit the service provider to identify and locate the material residing on a system or network controlled or operated by it or for it that is claimed to be infringing, or to be the subject of infringing activity, and that is to be removed, or access to which is to be disabled;[5]
4. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
5. A statement that the information in the notification is accurate;
6. A statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the complaining party is the holder of an exclusive right that is allegedly infringed, or is authorized to act on the owner's behalf; and
7. The signature of the person giving notification.[6]

(b) Effective Written Counter-Notification by a Subscriber[7] Whose Material was Removed or Disabled as a Result of Mistake or Misidentification of Material

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38) 17 U.S.C. Sections 512(c)(3)(A) and 512(g)(3).

39) For purposes of this letter, "copyright" includes related rights, and "works" includes the subject matter of related rights.

40) The Parties understand that a representative is publicly designated to receive notification on behalf of a service provider if the representative's name, physical and electronic address, and telephone number are posted on a publicly accessible portion of the service provider's website, and also in a register accessible to the public through the Internet, or designated in another form or manner appropriate for Korea.

4) If multiple copyrighted works at, or linked to from, a single online site on a system or network controlled or operated by or for the service provider are covered by a single notification, a representative list of such works at, or linked to from, that site may be provided.

5) In the case of notifications regarding an information location tool pursuant to paragraph (b)(i)(D) of Article 18.10.30, the information provided must be reasonably sufficient to permit the service provider to locate the reference or link residing on a system or network controlled or operated by or for it, except that in the case of a notification regarding a substantial number of references or links at a single online site residing on a system or network controlled or operated by or for the service provider, a representative list of such references or links at the site may be provided, if accompanied by information sufficient to permit the service provider to locate the references or links.

6) A signature transmitted as part of an electronic communication satisfies this requirement.

7) For purposes of this letter, "subscriber" refers to the person whose material has been removed or disabled by a service provider as a result of an effective notification described in section (a) of this letter.

In order for a counter-notification to a service provider to comply with the relevant requirements set out in Article 18.10.30(b)(ix), that counter-notification must be a written communication, which may be provided electronically, that includes substantially the following:

8. The identity, address, and telephone number of the subscriber;
9. The identity of the material that has been removed or to which access has been disabled;
10. The location at which the material appeared before it was removed or access to it was disabled;
11. A statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material;
12. A statement that the subscriber agrees to be subject to orders of any court that has jurisdiction over the place where the subscriber's address is located, or, if that address is located outside the Party's territory, any other court with jurisdiction over any place in the Party's territory where the service provider may be found, and in which a copyright infringement suit could be brought with respect to the alleged infringement;
13. A statement that the subscriber will accept service of process in any such suit; and
14. The signature of the subscriber.[8)]

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

Sincerely,

[*SGN*]

Hyun Chong Kim

8) A signature transmitted as part of an electronic communication satisfies this requirement.

Side Letter 1. United States of America to Republic of Korea

June 30, 2007

The Honorable Hyun Chong Kim

Minister for Trade

Seoul, Republic of Korea

Dear Minister Kim:

I have the honor to acknowledge receipt of your letter of this date, which reads as follows:

> I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Article 18.10.30(b)(ix) (Enforcement of Intellectual Property Rights) of the Free Trade Agreement between our two Governments signed this day:
>
> In meeting the obligations of Article 18.10.30(b)(ix), the United States shall apply the pertinent provisions of its law,[9] and any amendments thereto, and Korea shall adopt requirements for: (a) effective written notification to service providers with respect to materials that are claimed to be infringing, and (b) effective written counter-notification by those whose material is removed or disabled and who claim that it was disabled through mistake or misidentification, as set forth in this letter. Effective written notification means notification that substantially complies with the elements listed in section (a) of this letter, and effective written counter-notification means counter-notification that substantially complies with the elements listed in section (b) of this letter.
>
> (a) Effective Written Notification, by a Copyright[10] Owner or Person Authorized to Act on Behalf of an Owner of an Exclusive Right, to a Service Provider's Publicly Designated Representative[11]
>
> In order for a notification to a service provider to comply with the relevant requirements set out in Article 18.10.30(b)(ix), that notification must be a written communication, which may be provided electronically, that includes substantially the following:
>
> 1. The identity, address, telephone number, and electronic mail address of the complaining party (or its authorized agent);
> 2. Information reasonably sufficient to enable the service provider to identify the copyrighted work(s)[4] claimed to have been infringed;
> 3. Information reasonably sufficient to permit the service provider to identify and locate the material residing on a system or network controlled or operated by it or for it that is claimed to be infringing, or to be the subject of infringing activity, and that is to be removed, or access to which is to be disabled;[5]
> 4. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
> 5. A statement that the information in the notification is accurate;
> 6. A statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the complaining party is the holder of an exclusive right that is allegedly infringed, or is authorized to act on the owner's behalf; and
> 7. The signature of the person giving notification.[6]
>
> (b) Effective Written Counter-Notification by a Subscriber[7] Whose Material Was Removed or Disabled as a Result of Mistake

---

9) 17 U.S.C. Sections 512(c)(3)(A) and 512(g)(3).

10) For purposes of this letter, "copyright" includes related rights, and "works" includes the subject matter of related rights.

11) The Parties understand that a representative is publicly designated to receive notification on behalf of a service provider if the representative's name, physical and electronic address, and telephone number are posted on a publicly accessible portion of the service provider's website, and also in a register accessible to the public through the Internet, or designated in another form or manner appropriate for Korea.

4) If multiple copyrighted works at, or linked to from, a single online site on a system or network controlled or operated by or for the service provider are covered by a single notification, a representative list of such works at, or linked to from, that site may be provided.

5) In the case of notifications regarding an information location tool pursuant to paragraph (b)(i)(D) of Article 18.10.30, the information provided must be reasonably sufficient to permit the service provider to locate the reference or link residing on a system or network controlled or operated by or for it, except that in the case of a notification regarding a substantial number of references or links at a single online site residing on a system or network controlled or operated by or for the service provider, a representative list of such references or links at the site may be provided, if accompanied by information sufficient to permit the service provider to locate the references or links.

6) A signature transmitted as part of an electronic communication satisfies this requirement.

7) For purposes of this letter, "subscriber" refers to the person whose material has been removed or disabled by a service provider as a result of an effective notification described in section (a) of this letter.

or Misidentification of Material

In order for a counter-notification to a service provider to comply with the relevant requirements set out in Article 18.10.30(b)(ix), that counter-notification must be a written communication, which may be provided electronically, that includes substantially the following:

8. The identity, address, and telephone number of the subscriber;
9. The identity of the material that has been removed or to which access has been disabled;
10. The location at which the material appeared before it was removed or access to it was disabled;
11. A statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material;
12. A statement that the subscriber agrees to be subject to orders of any court that has jurisdiction over the place where the subscriber's address is located, or, if that address is located outside the Party's territory, any other court with jurisdiction over any place in the Party's territory where the service provider may be found, and in which a copyright infringement suit could be brought with respect to the alleged infringement;
13. A statement that the subscriber will accept service of process in any such suit; and
14. The signature of the subscriber.[8)]

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

I have the further honor to confirm that my Government shares this understanding and that your letter and this letter in reply shall constitute an integral part of the Free Trade Agreement.

Sincerely,

Susan C. Schwab

8) A signature transmitted as part of an electronic communication satisfies this requirement.

Side Letter 2. Republic of Korea to United States of America

June 30, 2007

The Honorable Susan C. Schwab

United States Trade Representative

Washington, D.C.

Dear Ambassador Schwab:

I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Chapter Eighteen (Intellectual Property Rights) of the Free Trade Agreement between our two Governments signed this day:

The Parties recognize the importance of preventing illegal copying and distribution of copyrighted works on university campuses and providing effective enforcement against book piracy. Therefore, consistent with Korea's May 2004 Master Plan for Intellectual Property Rights, Korea agrees to continue to increase its efforts to improve awareness of copyright infringement activities and book piracy on university campuses and reduce illegal reproduction and distribution of copyrighted works. In furtherance thereof, Korea agrees to take the following actions as soon as possible, but no later than six months after the date this Agreement enters into force:

1) continue to implement policies that work to promote the use of legitimate materials by students, lecturers, bookstores, and photocopy shops on university campuses, and develop and implement further such policies, if necessary. Within this framework, seek cooperation and information from all universities, and consider the need for follow-up action;
2) enhance training activities in the territory of Korea on book-piracy enforcement, thereby raising awareness among enforcement personnel of illegal book printing activities as well as commercial scale operations of illegal reproductions of copyrighted works;
3) enhance enforcement activities with respect to underground book piracy operations; and
4) develop and pursue public education campaigns to raise general awareness in the public sector of illegal book printing activities as well as commercial scale operations of illegal reproductions of copyrighted works.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

Sincerely,

[*SGN/*]

Hyun Chong Kim

Side Letter 2. United States of America to Republic of Korea

June 30, 2007

The Honorable Hyun Chong Kim

Minister for Trade

Seoul, Republic of Korea

Dear Minister Kim:

I have the honor to acknowledge receipt of your letter of this date, which reads as follows:

> I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Chapter Eighteen (Intellectual Property Rights) of the Free Trade Agreement between our two Governments signed this day:
>
> The Parties recognize the importance of preventing illegal copying and distribution of copyrighted works on university campuses and providing effective enforcement against book piracy. Therefore, consistent with Korea's May 2004 Master Plan for Intellectual Property Rights, Korea agrees to continue to increase its efforts to improve awareness of copyright infringement activities and book piracy on university campuses and reduce illegal reproduction and distribution of copyrighted works. In furtherance thereof, Korea agrees to take the following actions as soon as possible, but no later than six months after the date this Agreement enters into force:
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> 1) continue to implement policies that work to promote the use of legitimate materials by students, lecturers, bookstores, and photocopy shops on university campuses, and develop and implement further such policies, if necessary. Within this framework, seek cooperation and information from all universities, and consider the need for follow-up action;
> 2) enhance training activities in the territory of Korea on book-piracy enforcement, thereby raising awareness among enforcement personnel of illegal book printing activities as well as commercial scale operations of illegal reproductions of copyrighted works;
> 3) enhance enforcement activities with respect to underground book piracy operations; and
> 4) develop and pursue public education campaigns to raise general awareness in the public sector of illegal book printing activities as well as commercial scale operations of illegal reproductions of copyrighted works.
>
> I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

I have the further honor to confirm that my Government shares this understanding and that your letter and this letter in reply shall constitute an integral part of the Free Trade Agreement.

Sincerely,

Susan C. Schwab

Side Letter 3. Republic of Korea to United States of America

June 30, 2007

The Honorable Susan C. Schwab
United States Trade Representative
Washington, D.C.

Dear Ambassador Schwab:

I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Chapter Eighteen (Intellectual Property Rights) of the Free Trade Agreement between our two Governments signed this day:

The Parties agree on the objective of shutting down Internet sites that permit the unauthorized reproduction, distribution, or transmission of copyright works, of regularly assessing and actively seeking to reduce the impact of new technological means for committing online copyright piracy, and of providing generally for more effective enforcement of intellectual property rights on the Internet. Korea agrees that internet piracy of works and other subject matter protected by copyright[9] (including unauthorized reproduction and distribution of such works and other subject matter on the Internet) is a matter of priority for law enforcement of intellectual property rights. Korea also agrees on the objective of shutting down Internet sites that permit the unauthorized downloading (and other forms of piracy) of copyright works, including socalled webhard services, and providing for more effective enforcement of intellectual property rights on the Internet, including in particular with regard to peer-to-peer (P2P) services. To this end, Korea will strengthen enforcement of intellectual property rights in Korea, and work to prevent, investigate, and prosecute Internet piracy. As part of this effort, Korea will work with the private sector and with the United States and other foreign authorities.

In furtherance thereof, Korea agrees to issue as soon as possible, but no later than six months after the date the Agreement enters into force, a policy directive establishing clear jurisdiction for a division or joint investigation team to engage in effective enforcement against online piracy. This team will investigate and initiate criminal actions to address online piracy, including with respect to U.S. and other foreign works, whether ex officio or at the request of a right holder. The team will take these actions in a manner that is transparent to right holders. In addition to prosecuting direct infringers, Korea agrees to prosecute individuals and companies that profit from developing and maintaining services that effectively induce infringement.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

Sincerely,

[*SGN/*]
Hyun Chong Kim

9) For purposes of this letter, “copyright” also includes related rights.

Side Letter 3. United States of America to Republic of Korea

June 30, 2007

The Honorable Hyun Chong Kim

Minister for Trade

Seoul, Republic of Korea

Dear Minister Kim:

I have the honor to acknowledge receipt of your letter of this date, which reads as follows:

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> I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

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Sincerely,

Susan C. Schwab

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