

The Trans-Pacific Partnership Agreement

CHAPTER 18 INTELLECTUAL PROPERTY

Section H: Copyright and Related Rights

Article 18.62: Related Rights

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms: to the performers and producers of phonograms that are nationals⁶⁸ of another Party; and to performances or phonograms first published or first fixed⁶⁹ in the territory of another Party.⁷⁰ A performance or phonogram shall be considered first published in the territory of a Party if it is published in the territory of that Party within 30 days of its original publication.
2. Each Party shall provide to performers the exclusive right to authorise or prohibit:
 - (a) the broadcasting and communication to the public of their unfixed performances, unless 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 exclusive right to authorise or prohibit the broadcasting or any communication to the public of their performances or phonograms, by wire or wireless means,^{71, 72} and the making available to the public of those performances or phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

⁶⁸ For the purposes of determining criteria for eligibility under this Article, with respect to performers, a Party may treat “nationals” as those who would meet the criteria for eligibility under Article 3 of the WPPT.

⁶⁹ For the purposes of this Article, fixation means the finalisation of the master tape or its equivalent.

⁷⁰ For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both. For greater certainty, consistent with Article 18.8 (National Treatment), each Party shall accord to performances and phonograms first published or first fixed in the territory of another Party treatment no less favourable than it accords to performances or phonograms first published or first fixed in its own territory.

⁷¹ With respect to broadcasting and communication to the public, a Party may satisfy the obligation by applying Article 15(1) and Article 15(4) of the WPPT and may also apply Article 15(2) of the WPPT, provided that it is done in a manner consistent with that Party’s obligations under Article 18.8 (National Treatment).

⁷² For greater certainty, the obligation under this paragraph does not include broadcasting or communication to the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audio-visual work.

- (b) Notwithstanding subparagraph (a) and Article 18.65 (Limitations and Exceptions), the application of the right referred to in subparagraph (a) to analog transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for those activities, is a matter of each Party's law.⁷³

Article 18.63: Term of Protection for Copyright and Related Rights

Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:⁷⁴

- (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;⁷⁵ and
- (b) on a basis other than the life of a natural person, the term shall be:
- (i) not less than 70 years from the end of the calendar year of the first authorised publication⁷⁶ of the work, performance or phonogram; or
 - (ii) failing such authorised 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.⁷⁷

Article 18.68: Technological Protection Measures (TPMs)⁸²

1. 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 unauthorised acts in respect of their works, performances, and

⁷³ For the purposes of this subparagraph the Parties understand that a Party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that these retransmissions are lawfully permitted by that Party's government communications authority; any entity engaging in these retransmissions complies with the relevant rules, orders or regulations of that authority; and these retransmissions do not include those delivered and accessed over the Internet. For greater certainty this footnote does not limit a Party's ability to avail itself of this subparagraph.

⁷⁴ For greater certainty, in implementing this Article, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of a work, performance or phonogram during its term of protection, consistent with Article 18.65 (Limitations and Exceptions) and that Party's international obligations.

⁷⁵ The Parties understand that if a Party provides its nationals a term of copyright protection that exceeds life of the author plus 70 years, nothing in this Article or Article 18.8 (National Treatment) shall preclude that Party from applying Article 7(8) of the Berne Convention with respect to the term in excess of the term provided in this subparagraph of protection for works of another Party.

⁷⁶ For greater certainty, for the purposes of subparagraph (b), if a Party's law provides for the calculation of term from fixation rather than from the first authorised publication, that Party may continue to calculate the term from fixation.

⁷⁷ For greater certainty, a Party may calculate a term of protection for an anonymous or pseudonymous work or a work of joint authorship in accordance with Article 7(3) or Article 7bis of the Berne Convention, provided that the Party implements the corresponding numerical term of protection required under this Article.

⁸² Nothing in this Agreement requires a Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the only purpose of which is to control market segmentation for legitimate physical copies of a cinematographic film, and is not otherwise a violation of its law.

phonograms, each Party shall provide that any person that:

- (a) knowingly, or having reasonable grounds to know,⁸³ circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram;⁸⁴ or
- (b) manufactures, imports, distributes,⁸⁵ offers for sale or rental to the public, or otherwise provides devices, products, or components, or offers to the public or provides services, that:
 - (i) are promoted, advertised, or otherwise marketed by that person⁸⁶ for the purpose of circumventing any effective technological measure;
 - (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure;⁸⁷ or
 - (iii) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

is liable and subject to the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies).

Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully⁸⁸ and for the purposes of commercial advantage or financial gain⁸⁹ in any of the above activities.⁹⁰

A Party may provide that the criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public noncommercial broadcasting entity. A Party may also provide that the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies) do not apply to any of the same entities provided that the above activities are carried out in good faith without knowledge that the conduct is prohibited.

⁸³ For the purposes of this subparagraph, a Party may provide that reasonable grounds to know may be demonstrated through reasonable

⁸⁴ For greater certainty, no Party is required to impose civil or criminal liability under this subparagraph for a person that circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, performance or phonogram, but does not control access to such that work, performance or phonogram.

⁸⁵ A Party may provide that the obligations described in this subparagraph with respect to manufacturing, importation, and distribution apply only in cases in which those activities are undertaken for sale or rental, or if those activities prejudice the interests of the right holder of the copyright or related right.

⁸⁶ The Parties understand that this provision still applies in cases in which the person promotes, advertises, or markets through the services of a third person.

⁸⁷ A Party may comply with this paragraph if the conduct referred to in this subparagraph does not have a commercially significant purpose or use other than to circumvent an effective technological measure.

⁸⁸ For greater certainty, for purposes of this Article and Article 18.69 (RMI), wilfulness contains a knowledge element.

⁸⁹ For greater certainty, for purposes of this Article, Article 18.69 (RMI) and Article 18.77 (Criminal Procedures and Penalties), the Parties understand that a Party may treat “financial gain” as “commercial purposes”.

⁹⁰ For greater certainty, no Party is required to impose liability under this Article and Article 18.69 (RMI) for actions taken by that Party or a third person acting with the authorisation or consent of that Party.

2. In implementing paragraph 1, no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, provided that the product does not otherwise violate a measure implementing paragraph 1.
3. Each Party shall provide that a violation of a measure implementing this Article is independent of any infringement that might occur under the Party's law on copyright and related rights.⁹¹
4. With regard to measures implementing paragraph 1:
 - (a) a Party may provide certain limitations and exceptions to the measures implementing paragraph 1(a) or paragraph 1(b) in order to enable non-infringing uses if there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party's law;⁹²
 - (b) any limitations or exceptions to a measure that implements paragraph 1(b) shall be permitted only to enable the legitimate use of a limitation or exception permissible under this Article by its intended beneficiaries⁹³ and does not authorise the making available of devices, products, components, or services beyond those intended beneficiaries;⁹⁴ and
 - (c) a Party shall not, by providing limitations and exceptions under paragraph 4(a) and paragraph 4(b), undermine the adequacy of that Party's legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures, that authors, performers, or producers of phonograms use in connection with the exercise of their rights, or that restrict unauthorised acts in respect of their works, performances or

⁹¹ For greater certainty, a Party is not required to treat the criminal act of circumvention set forth in paragraph 1(a) as an independent violation, where the Party criminally penalises such acts through other means.

⁹² For greater certainty, nothing in this provision requires a Party to make a new determination via the legislative, regulatory, or administrative process with respect to limitations and exceptions to the legal protection of effective technological measures: (i) previously established pursuant to trade agreements in force between two or more Parties; or (ii) previously implemented by the Parties, provided that such limitations and exceptions are otherwise consistent with this paragraph.

⁹³ For greater certainty, a Party may provide an exception to paragraph 1(b) without providing a corresponding exception to paragraph 1(a), provided that the exception to paragraph 1(b) is limited to enabling a legitimate use that is within the scope of limitations or exceptions to paragraph 1(a) as provided under this subparagraph.

⁹⁴ For the purposes of interpreting paragraph 4(b) only, paragraph 1(a) should be read to apply to all effective technological measures as defined in paragraph 5, *mutatis mutandis*.

phonograms, as provided for in this Chapter.

5. **Effective technological measure means** any effective⁹⁵ technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or related rights related to a work, performance or phonogram.

Section I: Enforcement

Article 18.77: Criminal Procedures and Penalties

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. In respect of wilful copyright or related rights piracy, “on a commercial scale” includes at least:
 - (a) acts carried out for commercial advantage or financial gain; and
 - (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.^{126, 127}
2. Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties.¹²⁸
3. Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation¹²⁹ and domestic use, in the course of trade and on a commercial scale, of a label or packaging:¹³⁰
 - (a) to which a trademark has been applied without authorisation that is identical to, or cannot be distinguished from, a trademark registered in its territory; and
 - (b) that is intended to be used in the course of trade on goods or in relation to services that are identical to goods or services for which that trademark is registered.

⁹⁵ For greater certainty, a technological measure that can, in a usual case, be circumvented accidentally is not an “effective” technological measure.

¹²⁶ The Parties understand that a Party may comply with subparagraph (b) by addressing such significant acts under its criminal procedures and penalties for non-authorized uses of protected works, performances and phonograms in its law.

¹²⁷ A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.

¹²⁸ The Parties understand that a Party may comply with its obligation under this paragraph by providing that distribution or sale of counterfeit trademark goods or pirated copyright goods on a commercial scale is an unlawful activity subject to criminal penalties. Furthermore, criminal procedures and penalties as specified in paragraphs 1, 2 and 3 are applicable in any free trade zones in a Party.

¹²⁹ A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.

¹³⁰ A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to be applied to attempts to commit a trademark offence.

4. Recognising the need to address the unauthorised copying¹³¹ of a cinematographic work from a performance in a movie theatre that causes significant harm to a right holder in the market for that work, and recognising the need to deter such harm, each Party shall adopt or maintain measures, which shall at a minimum include, but need not be limited to, appropriate criminal procedures and penalties.
5. With respect to the offences for which this Article requires a Party to provide for criminal procedures and penalties, each Party shall ensure that criminal liability for aiding and abetting is available under its law.
6. With respect to the offences described in paragraphs 1 through 5, each Party shall provide the following:
- (a) Penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistent with the level of penalties applied for crimes of a corresponding gravity.¹³²
 - (b) Its judicial authorities have the authority, in determining penalties, to account for the seriousness of the circumstances, which may include circumstances that involve threats to, or effects on, health or safety.¹³³
 - (c) Its judicial or other competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence and assets derived from, or obtained through the alleged infringing activity. If a Party requires identification of items subject to seizure as a prerequisite for issuing a judicial order referred to in this subparagraph, that Party shall not require the items to be described in greater detail than necessary to identify them for the purpose of seizure.
 - (d) Its judicial authorities have the authority to order the forfeiture, at least for serious offences, of any assets derived from or obtained through the infringing activity.
 - (e) Its judicial authorities have the authority to order the forfeiture or destruction of:
 - (i) all counterfeit trademark goods or pirated copyright goods;
 - (ii) materials and implements that have been predominantly used in the creation of pirated copyright goods or counterfeit trademark goods; and
 - (iii) any other labels or packaging to which a counterfeit trademark has been

¹³¹ For the purposes of this Article, a Party may treat the term “copying” as synonymous with reproduction.

¹³² The Parties understand that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

¹³³ A Party may also account for such circumstances through a separate criminal offence.

applied and that have been used in the commission of the offence.

In cases in which counterfeit trademark goods and pirated copyright goods are not destroyed, the judicial or other competent authorities shall ensure that, except in exceptional circumstances, those goods are disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall further provide that forfeiture or destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant.

(f) Its judicial or other competent authorities have the authority to release or, in the alternative, provide access to, goods, material, implements, and other evidence held by the relevant authority to a right holder for civil¹³⁴ infringement proceedings.

(g) Its competent authorities may act upon their own initiative to initiate legal action without the need for a formal complaint by a third person or right holder.¹³⁵

7. With respect to the offences described in paragraphs 1 through 5, a Party may provide that its judicial authorities have the authority to order the seizure or forfeiture of assets, or alternatively, a fine, the value of which corresponds to the assets derived from, or obtained directly or indirectly through, the infringing activity.

Article 18.79: Protection of Encrypted Program-Carrying Satellite and Cable Signals

1. Each Party shall make it a criminal offence to:

(a) manufacture, assemble, modify,¹³⁹ import, export, sell, lease or otherwise distribute a tangible or intangible device or system knowing or having reason to know¹⁴⁰ that the device or system meets at least one of the following conditions:

- (i) it is intended to be used to assist;
- (ii) it is primarily of assistance; or
- (iii) its principal function is solely to assist,

in decoding an encrypted program-carrying satellite signal without the authorisation of the lawful distributor¹⁴¹ of such signal;¹⁴² and

¹³⁴ A Party may also provide this authority in connection with administrative infringement proceedings.

¹³⁵ With regard to copyright and related rights piracy provided for under paragraph 1, a Party may limit application of this subparagraph to the cases in which there is an impact on the right holder's ability to exploit the work, performance or phonogram in the market.

¹³⁹ For greater certainty, a Party may treat "assemble" and "modify" as incorporated in "manufacture".

¹⁴⁰ For the purposes of this paragraph, a Party may provide that "having reason to know" may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act, as part of the Party's "knowledge" requirements. A Party may treat "having reason to know" as meaning "wilful negligence".

¹⁴¹ With regard to the criminal offences and penalties in paragraph 1 and paragraph 3, a Party may require a demonstration of intent to avoid payment to the lawful distributor, or a demonstration of intent to otherwise secure a pecuniary benefit to which the recipient is not entitled.

- (b) with respect to an encrypted program-carrying satellite signal, wilfully:
- (i) receive¹⁴³ such a signal; or
 - (ii) further distribute¹⁴⁴ such signal,
- knowing that it has been decoded without the authorisation of the lawful distributor of the signal.
2. Each Party shall provide for civil remedies for a person that holds an interest in an encrypted program-carrying satellite signal or its content and that is injured by an activity described in paragraph 1.
3. Each Party shall provide for criminal penalties or civil remedies¹⁴⁵ for wilfully:
- (a) manufacturing or distributing equipment knowing that the equipment is intended to be used in the unauthorised reception of any encrypted program-carrying cable signal; and
 - (b) receiving, or assisting another to receive,¹⁴⁶ an encrypted program-carrying cable signal without authorisation of the lawful distributor of the signal.

¹⁴² The obligation regarding export may be met by making it a criminal offence to possess and distribute a device or system described in this paragraph. For the purposes of this Article, a Party may provide that a “lawful distributor” means a person that has the lawful right in that Party’s territory to distribute the encrypted program-carrying signal and authorise its decoding.

¹⁴³ For greater certainty and for the purposes of paragraph 1(b) and paragraph 3(b), a Party may provide that wilful receipt of an encrypted program-carrying satellite or cable signal means receipt and use of the signal, or means receipt and decoding of the signal.

¹⁴⁴ For greater certainty, a Party may interpret “further distribute” as “retransmit to the public”.

¹⁴⁵ If a Party provides for civil remedies, it may require a demonstration of injury.

¹⁴⁶ A Party may comply with its obligation in respect of “assisting another to receive” by providing for criminal penalties to be available against a person wilfully publishing any information in order to enable or assist another person to receive a signal without authorisation of the lawful distributor of the signal.

18 章

智慧財產

H 節：著作權及相關權利

第 18.62 條：相關權利

1. 各締約方對屬另一締約方國民⁶⁸之表演人及錄音物製作人，以及於另一締約方領土內首次公開發行或固著⁶⁹之表演或錄音物，應賦予本章規定之與表演人及錄音物製作人相關之權利。⁷⁰表演或錄音物於原始公開發行之 30 日內，於締約一方領土內公開發行者，視為於該締約方領土內首次公開發行。
2. 各締約方應賦予表演人專有授權或禁止下列行為之權利：
 - (a) 向公眾傳播或廣播未經固著之表演，但已播送之表演，不適用之；及
 - (b) 固著其未經固著之表演。
3. (a) 各締約方應賦予表演人及錄音物製作人專有授權或禁止他人以有線或無線之方式^{71,72}廣播或向公眾傳播其表演或錄音物，以及向公眾提供其表演或錄音物，使公眾得於各自選定之地點及時間接收。
 - (b) 縱有第(a)款及第 18.65 條（限制及例外）之規定，

⁶⁸ 為決定是否適用本條之目的，就本條所稱之表演人，締約一方得依 WPPT 第 3 條規定認定「國民」之適用範圍。

⁶⁹ 為本條之目的，「固著」指母帶或其相當物品之完成。

⁷⁰ 為臻明確，本項所稱之締約一方領土內首次公開發行或固著之表演或錄音物，締約一方得適用首次發行或首次固著之標準，亦或兩者均採之。為臻明確，並與第 18.8 條（國民待遇）一致，各締約方就於另一締約方領土內首次公開發行或固著之表演及錄音物，應賦予不低於其境內首次公開發行或固著之表演及錄音物享有之待遇。

⁷¹ 對於廣播及向公眾傳播，締約一方於符合第 18.8 條（國民待遇）規定義務之前提下，得以適用 WPPT 第 15 (1)及(4)條（得同時適用第 15(2)條）之方式履行本條所定義務。

⁷² 為臻明確，本項所定義務不包含附隨於電影或其他視聽著作之聲音或聲音之表現物經固著於錄音物，以無線或有線方式之廣播或向公眾傳播者。

第(a)款所指權利於類比傳輸、非互動式無線廣播之適用，及就該等活動其權利之限制與例外，由各締約方法律定之。⁷³

第 18.63 條：著作權及相關權利之保護期間

各締約方應規定，著作、表演或錄音物之保護期間依下列方式計算：⁷⁴

(a) 以自然人之生存期間為基準者，保護期間至少存續至著作人終身及其死亡後 70 年⁷⁵；及

(b) 非以自然人之生存期間為基準者：

(i) 至少存續至著作、表演或錄音物首次授權公開發行⁷⁶之當年度末日起 70 年；或

(ii) 著作、表演或錄音物自創作起 25 年內未授權公開發行者，其保護期間應至少存續至自創作之當年之末日起 70 年。⁷⁷

第 18.68 條：科技保護措施 (TPMs)⁸²

1. 對於著作人、表演人及錄音物製作人為行使其權利並限制對其著作、表演及錄音物未經授權之利用所使用之有效科技保護措施，各締約方為防止規避該措施之行為而提供足夠法律保護及有效之法律救濟，應使符合下列要件之人負相關

⁷³ 為本款之目的，全體締約方瞭解締約一方得基於其通訊主管機關之許可提供非互動式、無線廣播等之再傳達，且再傳達之主體應遵循該機關之相關法令、指示及規則；惟此等再傳達不包含以網路方式傳遞取得者。為臻明確，本註解並不限制締約一方就本款之適用。

⁷⁴ 為臻明確，本條並不限制締約一方履行本條所定義務時，得於符合第 18.65 條（限制及例外）及其國際義務之前提下，就在保護期間內合法利用及利用著作、表演或錄音物之情形予以明確化。

⁷⁵ 全體締約方瞭解，如締約一方對於其國民之著作提供之保護期間超過著作人終身加 70 年者，本條或第 18.8 條（國民待遇）規定，不排除該締約方就另一締約方之著作保護於超過本款之保護期間，適用伯恩公約第 7.8 條。

⁷⁶ 為臻明確，為第(b)款之目的，若締約一方之法律依固著日而非授權公開發行日起算保護期間者，得繼續維持自固著之日起算保護期間。

⁷⁷ 為臻明確，締約一方得依伯恩公約第 7(3)條或第 7 條之 1 就不具名或別名著作或共同著作給予保護，惟保護期間應符合本條之要求。

⁸² 本協定並未要求締約一方禁止下列設備之進口或國內銷售：該設備並未能使特定科技措施有效，且唯一目的在於控制合法影片或電腦程式重製物之市場分配之設備，且未違反其法律者。

責任並受第 18.74 條（民事及行政程序及救濟）規定之救濟規範：

- (a) 明知或可得而知⁸³，未經授權而規避任何限制進入受保護之著作、表演、錄音物之有效科技措施；⁸⁴ 或
- (b) 製造、輸入、散布、⁸⁵ 向公眾提供銷售或出租，或向公眾提供下列設備、產品、零件、向公眾為下列要約、或提供下列服務者：
 - (i) 為規避任何有效科技措施之目的而促銷、廣告或行銷者；⁸⁶
 - (ii) 除規避有效科技措施外，僅具有限之商業重要目的或用途；⁸⁷ 或
 - (iii) 主要為規避任何有效科技措施之目的，而設計、製造或執行者。

各締約方應對故意⁸⁸ 且為商業利益或財務利得⁸⁹ 之目的而從事上開行為者⁹⁰，訂定刑事程序並科以刑責。

締約一方得規定非營利圖書館、博物館、檔案保存機構、教育機構或公有非營利性廣播機構不適用該刑事程序及刑責。締約一方亦得規定第 18.74 條（民事及行政程序與救濟）之救濟，不適用於該等機構出於善意、且不知該等行為係被

⁸³ 為本款之目的，締約一方得規定，就判斷是否構成可得而知時，得依合理證據，且考量與該違法行為有關之事實與情狀後，判斷之。

⁸⁴ 為臻明確，本款並未要求締約方針對規避保護著作、表演或錄音物等著作權或相關權利專屬權之科技措施之行為，但該措施並未限制著作、表演或錄音物之進入者，追究其民事或刑事責任。

⁸⁵ 締約一方得規定，本款所定有關製造、輸入與散布之義務，僅適用於為銷售或出租目的進行之行為，或致著作權或相關權利之權利人權益受有損害之行為。

⁸⁶ 全體締約方瞭解，本條規定亦適用於透過第三人提供之服務而進行促銷、廣告或行銷之情形。

⁸⁷ 倘本款所稱之行為，除規避有效科技措施以外，並無商業重要目的或用途時，締約一方亦屬符合本項規定。

⁸⁸ 為臻明確，本條及第 18.69 條（權利管理資訊）所稱「故意」包含明知之要件。

⁸⁹ 為臻明確，全體締約方瞭解，締約一方得將本條、第 18.69 條（權利管理資訊）及第 18.77.1 條（刑事程序與刑罰）所稱之「財務利得」視為「商業目的」。

⁹⁰ 為臻明確，締約方並未被要求依本條及第 18.69 條（權利管理資訊）規定追究，對該締約方或由第三人經締約方之同意或授權下所為行為之責任。

禁止所為之上開行為。

2. 於履行第 1 項規定時，締約方並無義務要求消費電子用品、通訊設備或電腦產品之設計或其零件之選擇與設計，對特定之科技措施有所因應，但以該等產品不違反第 1 項之要求為限。

3. 各締約方應規定就實施本條規定之措施之違反，係獨立於該締約方就著作權及相關權利之法律規範中任何侵權行為以外。⁹¹

4. 有關第 1 項規定之執行：

(a) 締約一方得就執行第 1(a)項或第 1(b)項之措施，訂定特定之限制及例外規定，若該等措施經該締約方之立法、法規或行政程序認定，確實或可能對於非侵權利用行為產生負面效果，而其中必須適度考量該等程序中所提示之證據，包括權利人是否已採取適當且有效之措施，使受益人得依該締約方之法律，享有著作權及相關權利之限制及例外；⁹²

(b) 任何執行第 1(b)項規定之措施之限制及例外，僅得為促成潛在受益人合法利用本條所允許之限制及例外⁹³，且並未授權將器材、產品、零件或服務提供予潛在受益人以外之人；⁹⁴ 及

(c) 締約一方不得透過規定第 4(a)項及第 4(b)項之限制及例外，減損該締約方保護有效科技措施之法律架構

⁹¹ 為臻明確，締約一方就第 1(a)款之規避行為以其他方式科以刑罰者，無需就第 1(a)款所定行為另訂獨立之處罰規定。

⁹² 為臻明確，本條不要求締約一方需藉由立法、法規發布或行政程序，就下列有效科技措施之法律保護之限制及例外，作成新的認定：(i)依二個以上締約方間已生效之貿易協定所訂定者；(ii)全體締約方先前已經施行者，但以該等限制及例外符合本項要求為條件。

⁹³ 為臻明確，締約一方得在不對第 1(a)款制定相應例外之情況下，對第 1(b)款制定例外，但以對第 1(b)項允許之例外係限於增進合法利用，且亦落入本款規定之對第 1(a)項允許之限制及例外規定範圍內者為條件。

⁹⁴ 僅為解釋第 4(b)款之目的，第 1(a)款應被解釋為準用於第 5 項定義下之所有有效科技措施。

適當性、或減損防止規避措施行為之法律救濟之有效性，而該措施係如本章所定，由著作人、表演人及錄音物製作人用以行使其權利或限制對其著作、表演或錄音物未經授權之利用行為所設。

5. **有效科技措施**指任何有效¹之科技、設備或零件，而在其通常操作中得控制對受保護之著作、表演、錄音物之取得，或保護對著作、表演或得錄音物之著作權及相關權利者。

第 18.77 條：刑事程序與刑罰

1. 各締約方應至少就具有商業規模之故意商標仿冒、侵害著作權或相關權利案件，訂定刑事程序及刑罰。就故意侵害著作權或相關權利，具有商業規模應至少包括：

- (a) 為商業利益或財務利得所為之行為；及
- (b) 雖非為商業利益或財務利得所為，但對著作權人或相關權利人與市場相關之利益造成實質不利影響之重大行為。^{126,127}

2. 各締約方應將故意輸入或輸出商標仿冒或著作盜版物且具有商業規模之行為視為違法並應科以刑事責任。¹²⁸

3. 各締約方對於故意輸入¹²⁹及國內使用以下標籤或包裝於商業交易管道、且具商業規模時，應訂定刑事程序及刑罰：

130

- (a) 附有與締約方領土內註冊商標相同或無法區別之商標，而未經授權者；及

¹ 為臻明確，於通常情況下可能意外被規避之科技措施，並非「有效」之科技措施。

¹²⁶ 全體締約方瞭解，締約一方得依其法律之刑事程序及刑責規範利用未經授權而受保護之著作、表演及錄音物之行為，以符合第(b)款規定。

¹²⁷ 締約一方得規定得將侵權物數量與價值，納入判斷是否對著作權人或相關權利人與市場相關之利益造成實質不利影響之考量。

¹²⁸ 全體締約方瞭解，締約一方得透過規定散布或銷售商標仿冒、著作權盜版物為違法行為並科以刑責之方式，履行本項之義務。並且，第 1 項至第 3 項之刑責適用於締約一方之任何自由貿易區。

¹²⁹ 締約一方得以與散布相關之措施，履行關於輸入之標籤或包裝義務。

¹³⁰ 締約一方得透過對於侵害商標權行為之未遂犯規定刑事程序及刑罰，以符合本項義務。

(b) 意圖於貨品交易過程中使用或與服務相關，而該貨品或服務係與已註冊商標相同者。

4. 因肯認有必要處理在向公眾開放之電影放映場所所為之未經授權重製¹³¹行為，而該行為對權利人就其著作之市場造成顯著之損害，並肯認遏止該損害之必要損害，各締約方應採行或維持措施，而其中至少應包括但不限於訂定適當之刑事程序及刑罰。

5. 就本條要求締約一方規定刑事程序及刑罰之違法行為，各締約方應確保其法律之處罰範圍包括幫助犯及教唆犯。

6. 對於第 1 項至第 5 項所述之違法行為，各締約方應訂定下列規定：

(a) 包括有期徒刑及足以嚇阻未來侵權行為之罰金，¹³²且刑罰之輕重與犯行相當。

(b) 其司法機關有權依情節之輕重審酌刑罰，其中包括對於健康或安全構成之威脅或影響。¹³³

(c) 其司法或其他主管機關有權命令扣押，對於疑似商標仿冒品或著作權盜版物、被控違法行為所使用之任何相關之材料及工具、其他犯罪相關之書證及由侵權行為而產生或獲得之資產。若締約一方以扣押物之辨識作為核發本項命令之前提，該締約方對該物要求描述之詳盡程度不得超越為扣押之目的特定物品所必要之程度。

(d) 至少於重大侵權行為，司法機關有權命令沒收由該侵權行為而產生或獲得之資產。

(e) 司法機關有權命令沒收或銷毀下列之物：

(i) 所有商標仿冒品或著作權盜版物；

¹³¹ 為達本條之目的，締約一方得將「拷貝」與「重製」視為同義。

¹³² 全體締約方瞭解締約一方並其無義務同時併科以罰金與有期徒刑。

¹³³ 締約一方亦得就本款情形單獨訂定刑事犯罪態樣。

(ii) 主要供製造商標仿冒品或著作權盜版物所用之材料或工具；及

(iii) 任何其他標籤或包裝上使用仿冒商標並用於該違法行為。

於未銷毀商標仿冒品及著作權盜版物之情形下，司法或其他主管機關應確保除特殊情況外，該等貨品應於商業交易管道以外處理，以避免對權利人造成任何損害。締約一方應進一步規定，依本款及第(c)款所為之沒收或銷毀，對侵權人無須給予任何形式之補償。

(f) 其司法或其他主管機關有權揭露，或於民事¹³⁴侵權程序中，提供權利人取得相關主管機關持有之貨品、材料、工具或其他證據之管道。

(g) 其主管機關得依職權發動相關法律程序，無須經第三人或權利人正式提起告訴¹³⁵。

7. 關於第 1 項至第 5 項所規定之違法行為，締約一方得規定其司法機關有權命令扣押或沒收資產，或相當於直接或間接由侵權行為所獲得之資產價值之罰款。

第 18.79 條：載有節目之鎖碼衛星及有線訊號之保護

1. 各締約方應規定下列行為構成刑事犯罪：

(a) 製造、組合、修改¹³⁹、輸入、輸出、銷售、出租、或以其他方式散布一有形或無形之設備或系統，且明知或可得而知¹⁴⁰該等設備或系統符合至少下列要件之一者：

¹³⁴ 締約一方亦得於行政侵權程序中訂定此權限。

¹³⁵ 就第 1 項規定之著作權及相關權利，締約一方得將本項之適用限縮於影響權利人於市場上利用其著作、表演或錄音物之能力之情形。

¹³⁹ 為臻明確，締約一方得將「製造」視為包含「組合」及「修改」。

¹⁴⁰ 為本項之目的，締約一方得規定「可得而知」，可由合理證據證明，且將與被控侵權行為相關之事實及情形納入考量，作為該締約方「知」之要件。締約一方得將「可得而知」視為「有意的過失」。

- (i) 其目的係用於協助；
- (ii) 其主要係用於協助；或
- (iii) 其唯一主要功能係協助；

在未經該訊號之合法散布權人¹⁴¹之授權下，將載有節目之鎖碼衛星訊號¹⁴²予以解碼；及

(b) 就載有節目之鎖碼衛星訊號，在明知系爭訊號在未經合法散布權人之授權下已被解碼，而故意：

- (i) 接收¹⁴³該等訊號；或
- (ii) 進一步散布¹⁴⁴該等訊號。

2. 各締約方對於就載有節目之鎖碼衛星訊號或內容享有利益，且因第1項所述行為而受有損害之人，應規定民事救濟。

3. 各締約方應對出於故意之下列行為，科以刑罰或民事救濟：¹⁴⁵

(a) 明知該項設備係用於未經授權而接收載有節目之鎖碼有線訊號，而製造或散布該項設備；及

(b) 接收或協助他人接收¹⁴⁶未經該訊號合法散布權人授權之載有節目之鎖碼有線訊號。

¹⁴¹ 關於第1項及第3項之刑事犯罪行為及處罰，締約一方得要求須證明具有「迴避向合法散布權人支付報酬」之意圖或另具有「獲取其無權取得之財產上利益」之意圖。

¹⁴² 締約方得將持有或散布本項規定之設備或系統，科以刑責之方式，符合本項有關輸出之義務。為本條之目的，締約一方得規定，「合法散布權人」係指於該締約方領土內對於載有節目之經鎖碼訊號散布及授權解碼，享有合法權限者。

¹⁴³ 為臻明確且為第1(b)項及第3(b)項之目的，締約一方得規定，故意接收載有節目之經鎖碼衛星或有線訊號，係指接收並使用訊號、或接收並解碼訊號。

¹⁴⁴ 為臻明確，締約一方得將「進一步散布」解釋為「向公眾再傳達」。

¹⁴⁵ 如締約一方提供民事救濟，得要求須證明其損害。

¹⁴⁶ 為符合本款「協助他人接收」之義務，締約一方得規定，對故意發布資訊以促成或協助他人接收未經訊號合法散布權人授權之訊號之行為人科以刑責。