

## COUNCIL OF THE EUROPEAN UNION

Brussels, 12 February 2010

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**RESTREINT UE** 

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### WORKING DOCUMENT

from:	General Secretariat of the Council
to:	Delegations
Subject :	ACTA negotiations
	- EU counterproposal - possible flexibility

Delegations will find attached a comparative table drawn up by the <u>Commission services</u>, containing the US and EU positions regarding the Civil enforcement and the Special requirements related to the Enforcement of Intellectual property rights in the digital environment sections of ACTA and suggesting possible flexibility margins for future negotiating rounds.

This table will constitute the basis for discussions at the meeting of the Friends of the Presidency Group on 18 February 2010.

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# **1. SECTION 1: CIVIL ENFORCEMENT**

COMMENTS/PROPOSAL		All IPR should be included in this section.	This proposal is an EU/Can/NZ proposal. It reflects TRIPS and EU acquis. <i>Needed unless this provision is moved to a proposed</i> <i>"general Article"</i> .	
EU PROPOSAL			Proposed Article 2.1.2 moved to Article 2. [EU: Those measures, procedures and 2.X Injunction - Option 1 and deterrent] and deterrent]	
US/JP PROPOSAL (latest consolidated text 18/01/10)	Article 2.1 Availability of Civil Procedures	1. Each Party shall make available to right holders [US/J: civil judicial] [Mex/NZ: or administrative] procedures concerning the enforcement of any [US/J: intellectual property right] [Sing/Can/NZ: copyrights and related rights and trademarks] [Kor: as provided for in the following individual articles in this Section].	Proposed Article 2.1.2 moved to Article 2.X Injunction - Option 1	

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	The added value compared to TRIPS and to the US/JP proposal is the possibility to apply for an injunction against intermediaries. <i>The EU considers this proposal as important as far as "intermediaries" are concerned.</i> However, this proposal is linked to the EU proposal in Article 2.5. <i>Flexibility might be found in a new wording which could embody this Article 2.X and the two first sentences of the EU proposal in 2.5.X.</i>		
Artícle 2.X Injunctions	[EU: Option 2: Each Party shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. The Parties shall also ensure that right holders are in a position to apply for an <u>injunction against</u> intermediaries whose services are used by a third party to infringe an intellectual property right.]		
Article 2.X Injunctions	Option 1: In civil judicial proceedings concerning the enforcement of [Can/NZ: copyright or related rights and trademarks] [US/J: intellectual property rights], each Party shall provide that its [US/J: judicial authorities] [NZ: competent authorities] shall have the authority to issue an order to a party to desist from an infringement, including an order to prevent infringing goods from entering into the channels of commerce [US/Mas/Kor/Mor/NZ: and to prevent their exportation]. <sup>1</sup>	[CAN: Need to address statutory limitations]	

[<sup>1</sup> Kor: A Party may comply with its obligation relating to exportation of infringing goods through its provisions concerning distribution or transfer.]

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Article 2.2 Damages	Article 2.2 Damages	
1. Each Party shall provide that:	1. Each Party shall provide that:	In general the EU comments in this article are important. Little flexibility for the negotiation.
(a) in civil judicial proceedings, [US/J: its judicial authorities] [Mex/NZ: or competent authorities] [EU/NZ: on		This bracket might be withdrawn.
application of unc{EO. injuct party}{NZ:right holder}] shall have the authority to order the infringer [EU/NZ: who browingly or with reasonable	reasonable grounds to know, engaged in infringing activity] of intellectual property	the minimum harmonisation exits for negligence and bad faith/intentional infringement. Good faith is, in some MS taken into account as a reason for not
grounds to know, engaged in infringing activity] of [Can/Sing/NZ: copyright or related rights and trademarks] [US/J:		granting damages (patent) or for low pre-established damages. However, in other MS good or bad faith are irrelevant to establish damages.
intellectual property rights] to pay the right holder		It is the reason why the EU proposed to make this distinction and to add a §3 for the infringement in "good faith".
(i) damages adequate to compensate for the [EU: actual] injury the right holder has suffered as a result of the infringement <sup>2</sup> ; or [EU: or]	<ul> <li>(i) damages adequate to compensate for the [EU: actual] injury the right holder has suffered as a result of the infringement<sup>3</sup>; or [EU: delete "or"]</li> </ul>	<i>Important proposal.</i> The EU sticks on the concept that damage compensates all the prejudice but only the prejudice. Neither "punitive damage" nor "future prejudice" is acceptable.
[ <sup>2</sup> US/Mor: In the case of patent infringement, damage: [Sing/Aus/EU/Can/NZ: Delete US/MOR footnote]	ent, damages adequate to compensate for the infr 0 <i>R footnote]</i>	<sup>[2</sup> US/Mor: In the case of patent infringement, damages adequate to compensate for the infringement shall not be less than a reasonable royalty.] [Sing/Aus/EU/Can/NZ: Delete US/MOR footnote]

[<sup>3</sup> US/Mor: In the case of patent infringement, damages adequate to compensate for the infringement shall not be less than a reasonable royalty.] **[Sing/Aus/EU: Delete Option US footnote].** 

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<ul> <li>(ii) [US/Mor/Aus/Kor/Sing: at least in the case of copyright or related rights infringement and trademark counterfeiting,][MX: in the case of IPR infringements] [MX: in the case of IPR infringements] the profits of the infringement, which may be presumed to be the amount of damages referred to in clause (i)[Aus/Sing/NZ/EU: which may be presumed to be the amount of damages referred to in clause (i)[Aus/Sing/NZ/EU: which may be presumed to be the amount of damages and move (ii) into paragraph 2.2.1(b)—Please clarify]</li> </ul>	<ul> <li>(ii) [US/Mor/Aus/Kor/Sing: 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 [Aus/Sing/EU: Delete of "which may be presumed to be the amount of damages referred to in clause.]</li> <li>[EU: delete (ii) and move (ii) into paragraph 2.2.1(b)</li> </ul>	Important for the EU to move (ii) into paragraph 2.2.1.b as it is criteria for evaluating damages.
[(iii) Can/NZ: For greater certainty, a Party may limit or exclude damages in certain special cases.]		
(b) in determining the amount of damages for [Can/Sing/NZ: copyright or related rights infringement][MX: IPR] infringement [US/J: of intellectual property rights] [Can/Sing: and trademark	(b) in determining the amount of damages for infringement of intellectual property rights, its judicial authorities shall consider, <i>inter alia</i> [EU: the lost profits], the value of the infringed good or service, measured by	Important to add the two following criteria: "lost profits" and
countertetting], its [US/J:judicial][NZ: competent] authorities [US/J: shall][Aus/Can/NZ:may] consider, <i>inter</i> <i>alia</i> , [Can/NZ: any legitimate measure of value that may be submitted by the right	the market price, the suggested retail price, or other legitimate measure of value submitted by the right holder, [EU: the profits of the infringer that are attributable to the infringement].	"profits of the infringer that are attributable to the infringement" (criteria taken from article 2.2.1.a (ii)).
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holder, including] [EU/Can/NZ: the lost profits], the value of the infringed good or service, measured by the market price, [Can: or] the suggested retail price [NZ: suggested retail price], or other legitimate measure of value submitted by the right holder [Can/NZ: or other legitimate measure of value submitted by the right holder], [EU: the profits of the infringer that are attributable to the infringement].		
[MX: Please specify the way in which the amount of the damage, particularly the scope of the "legitimate measure"] {Editorial comment: Please clarify this statement}		
<ol> <li>At least with respect to works, phonograms, and performances protected by copyright or related rights, and in cases of trademark counterfeiting, in civil judicial proceedings, [EU/Can: As an alternative to paragraph 1,] each Party [US/J: shall][EU/Can/NZ: may] establish or maintain a system that provides [Sing/NZ: for]:</li> <li>(a) pre-established damages; or [Sing: a system that provides for]</li> </ol>	<ol> <li>At least with respect to works, phonograms, and performances protected by copyright or related rights, and in cases of trademark counterfeiting, in civil judicial proceedings, [EU/Can: As an alternative to paragraph 1,] each Party shall [EU/Can: may] establish or maintain a system that provides:</li> <li>(a) pre-established damages; or</li> </ol>	Important to keep this paragraph optional.
	(b) presumptions for determining the amount	

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b) presumptions for determining the amount of damages <sup>4</sup> sufficient [US/Can: to constitute a deterrent to future infringements and] to compensate [US: fully] the right holder for the harm caused by the infringement. <sup>5</sup>	of damages <sup>6</sup> sufficient [US/Can: to constitute a deterrent to future infringements and] to compensate [US/Can: fully] the right holder for the harm caused by the infringement. <sup>7</sup>	Footnote on "lump sum": Flexibility - if the inclusion of the verb "may" is important, the EU may re-consider its example, added under (iii).
3. Each Party shall provide that the right holders shall have the right to choose the system in paragraph 2 as an alternative to the damages in paragraph 1. <i>[UIS: will propose editorial changes at upcoming round to clarify the language] [Aus/Mex/NZ: Delete paragraph 3.]</i>	3. [EU: Where the infringer did not knowingly, or with reasonable grounds knows, engage in infringing activity, each Party may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.]	It is important to keep this paragraph to guaranty the coherence of the EU proposal even if this proposal is only optional.
<sup>4</sup> Such measures [US/Sing/Can/EU/NZ: may] include the p holder's intellectual property right and actually assigned been sold by the right holder if there had not been the act elements such as at least the amount of royalties or fees v intellectual property right in question].	buch measures [US/Sing/Can/EU/NZ: may] include the presumption that the amount of damages is (i) the quantity of the goods infringing holder's intellectual property right and actually assigned to third persons, multiplied by the amount of profit per unit of goods which woul been sold by the right holder if there had not been the act of infringement or (ii) a reasonable royalty [EU: or (iii) a lump sum on the basis elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question].	Such measures [US/Sing/Can/EU/NZ: may] include the presumption that the amount of damages is (i) the quantity of the goods infringing the right holder's intellectual property right and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement or (ii) a reasonable royalty [EU: or (iii) a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question].
[ <sup>5</sup> US/Mor: No Party is required to apply p consent of the Party.]	aragraph 2 to actions for infringement against a P	[ <sup>5</sup> US/Mor: No Party is required to apply paragraph 2 to actions for infringement against a Party or a third party acting with the authorization or consent of the Party.]
<sup>6</sup> Such measures [Option J: shall][US/Sing/C infringing the right holder's intellectual pr which would have been sold by the right h the basis of elements such as at least the ar the intellectual property right in question].	/Can/EU: may] include the presumption that the a property right and actually assigned to third perso it holder if there had not been the act of infringeme amount of royalties or fees which would have be a].	Such measures [Option J: shall][US/Sing/Can/EU: may] include the presumption that the amount of damages is (i) the quantity of the goods infringing the right holder's intellectual property right and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement or (ii) a reasonable royalty [EU: or (iii) a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question].
[ <sup>7</sup> US/Mor: Neither Party is required to app consent of the Party.]	oly paragraph 2 to actions for infringement agains	[ <sup>7</sup> US/Mor: Neither Party is required to apply paragraph 2 to actions for infringement against a Party or a third party acting with the authorization or consent of the Party.]
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Important to confirm that "Legal cost" and "Attorney fees" should follow the same principal as for damages. They should be "reasonable and proportionate". Flexibility: the final wording could be adapted	
4. Each Party shall provide that its judicial authorities, except in exceptional circumstances, [EU: unless equity does not allow this], shall have the authority to order, at the conclusion of civil judicial proceedings [US/J : concerning copyright or related rights infringement, or trademark infringement] [EU: eoncerning eopyright or related rights infringement, patent infringement, or trademark infringement, or trademark infringement, that the prevailing party [US/J: shall] be awarded payment by the losing party [US/J: shall] be awarded payment by the losing party [US/J: judicial] authorities, [EU: unless equity does not allow this], [US/Can/Aus/Mor: {US/J: shall] also provide that its [US/J: judicial] authorities, [EU: unless equity does not allow this], [US/Can/Aus/Mor: {US/J: shall have the authority to order, [J/Can/Aus/Mor: at least } in proceedings concerning party of [US/J: reasonable][NZ: appropriate attorney's fees. [US/Aus/Mor: Further, each Party shall have the authority to order, [J/Can/Aus/Mor: Further, each Party shall have the authority to order, [J/Can/Aus/Mor: Further, each Party shall have the authority to order, [J/Can/Aus/Mor: in appropriate cases], that the prevailing party of [US/J: reasonable][NZ: appropriate] attorney's fees. [US/Aus/Mor: Further, each Party shall have the authority to order, [J/Can/Aus/NZ: in appropriate cases], that the prevailing party of [US/J: reasonable][NZ: appropriate] attorney's fees. [US/Aus/Mor: Further, each Party shall have the authority to order, [J/Can/Aus/NZ: in appropriate cases], that the prevailing party of [US/J: reasonable][NZ: appropriate] attorney's fees. [US/Aus/Mor: Further, each Party shall have the authority to order, [J/Can/Aus/NZ: in appropriate cases], that the prevailing party of [US/J: reasonable][NZ: appropriate] attorney's fees. [US/Aus/Mor: Further, each Party shall provide that its judicial authorities, at least in exceptional	
4. Each Party shall provide that its judicial [NZ: competent] authorities, except in exceptional circumstances, [EU: unless equity does not allow this], shall have the authority to order, at the conclusion of civil judicial proceedings [US/J : concerning copyright or related rights infringement, patent infringement, (Can/NZ: patent infringement, f.Can/NZ: patent infringement, f.Can/NZ: patent infringement, infringement] [EU: eoncerning patent infringement] (Can/NZ: legal] be awarded payment by the losing party of [NZ: appropriate ] court [{EU: reasonable and proportionate}EU/CAN/NZ: legal] costs or fees. Each Party [US/J: judicial] [NZ: competent] authorites, [US/Can/Mor: {US/J: judicial] [NZ: competent] authorites, [US/Can/Mor: {US/J: shall] [Mor: may] also provide that its [US/J: judicial] [NZ: competent] authorites, [US/Can/Mor: {US/Aus/Mor: at least } in proceedings concerning copyright or related rights infringement or willful trademark counterfeiting,] shall have the authority to order, [J/Can/Aus/NZ: in	

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proceedings concerning patent infringement, order, at the conclusion of civil judicial <u>reasonable attorneys' fees.</u> appropriate cases][MX: in appropriate | eases], that the prevailing party be awarded payment by the losing party of appropriate] attorney's fees<sup>8</sup>. [US/Aus/Mor: Further, circumstances, shall have the authority to order, at the conclusion of civil judicial patent infringement, that the prevailing party shall be awarded payment by the losing each Party shall provide that its judicial least in exceptional fees should be left to the discretion of the have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party shall be awarded payment party of reasonable attorneys' fees.][Mor: judge who determine the reasonable level of these fees|[EU: Further, each Party <u>shall provide that its judicial authorities,</u> at least in exceptional circumstances, shall by the losing party of reasonable concerning reasonable][NZ: at attorneys' fees. proceedings authorities, [US/J:

payment by the losing party of reasonable shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of eivil judicial proceedings concerning patent be awarded payment by the losing party of that the prevailing party shall be awarded attorneys' fees.] [EU: Further, each Party infringement, that the prevailing party shall

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[8 Kor: For greater certainty, the term "reasonable attorney's fees" is not intended to require a higher amount than the amount of "appropriate attorney's fees" under the TRIPS Article 45.2.]

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	Important (scope) Wide support. Important as it could be a pre-condition for destruction	Destruction of materials and implements is a TRIPS + provision Important to set limits.	LK/mg
Article 2.3 Other Remedies	<ol> <li>with respect to goods that have been found to be [J/EU/MX: infringing an intellectual property right], each Party shall provide that in civil judicial proceedings, at the right holder's request, [J/Aus/EU/Can/MX/Kor/NZ: its judicial authorities shall have the authority to order that] such goods shall be [US/J: destroyed], [EU/Can/NZ: recalled or definitively removed from the channel of commerce,] except in exceptional circumstances, without compensation of any sort.</li> </ol>	<ol> <li>Each Party shall further provide that its judicial authorities shall have the authority to order that materials and implements [J/Can/EU: the predominant use of which has been] [US/Aus/NZ: that have been used] [EU: that have been used] in the manufacture or creation of [J/MX/EU: infringing] goods shall be, without compensation of any sort, [US/EU/MX: promptly] [US/J: destroyed] or, [US/EU/MX/NZ: in exceptional</li> </ol>	DGCI
Article 2.3 Other Remedies	1. [US: At least] [Can: At least]with respect to goods that have been found to be [US/Aus/Can/Sing/Kor/NZ: pirated or counterfeit] [J/EU/MX: infringing an intellectual property right], each Party shall provide that in civil judicial proceedings, at the right holder's request, [J/Aus/EU/Can/MX/Kor/NZ: its judicial{NZ:competent} authorities shall have the authority to order that] such goods shall be [NZ: forfeited to the right holder] [US/J: destroyed], [EU/Can/NZ: recalled or definitively removed from the channel of commerce,] except in exceptional circumstances, [Can: except in exceptional circumstances,]without compensation of any sort.	2. Each Party shall further provide that its judicial authorities shall have the authority to order that materials and implements [J/Can/EU: the predominant use of which has been] [US/Aus/NZ: that have been used] [EU: that have been used] in the manufacture or creation of [J/MX/EU: infringing {MX: of IP}] [US/Aus/Can/Sing: pirated or counterfeit] goods [NZ : infringing copyright or	6437/10

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Already in TRIPS Article 46 (third sentence).         Possible flexibility in the EU position.		Important to preserve this "without prejudice" provision	Important to limit the type of information that can be requested	
the judicial authorities} {NZ: Each Party shall further provide that its judicial authority in ordering these measures} EU/Can/NZ: shall take into account the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interest of third parties.]	Article 2.4 Information related to Infringement	[EU: Without prejudice to other statutory provisions which, in particular, govern the protection of confidentiality of information sources or the processing of personal data,] Each Party shall provide that in civil judicial proceedings concerning the	enforcement of [US/J: intellectual property rights], its judicial authorities shall have the authority upon a justified request of the right holder, to order the infringer to provide, for the purpose of collecting evidence, any information [EU: information on the origin and distribution network of the infringing goods or services] [J: in the form as prescribed in its applicable laws and regulations] that the	infringer possesses or controls, [J/Can/EU/MX: where appropriate,] to the right holder or to the judicial authorities. Such information may include information regarding any person or persons involved in
	Article 2.4 Information related to Infringement	[EU: Without prejudice to other statutory provisions which, in particular, govern the protection of confidentiality of information sources or the processing of personal data,] Each Party shall provide that in civil judicial proceedings	concerning the enforcement of [US/J: intellectual property rights][Can: copyright or related rights and trademarks], its judicial authorities shall have the authority upon a justified request of the right holder, to order the infringer to provide, [US/J: for the purpose of collecting evidence] [EU: for the purpose of collecting evidence] [Mor: within the	framework of measures of inquiry or investigation], any [Can: relevant] information [EU: information on the origin and distribution network of the infringing goods or services on a commercial

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This proposal is linked to the EU proposal in Article	[X. EU: Each Party shall provide that its	X. EU: Each Party shall provide that
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	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.	scale] [J: in the form as prescribed in its applicable laws and regulations] that the infringer possesses or controls, [J/Can/EU/MX: where appropriate,] to the right holder or to the judicial authorities. Such information may include information 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. [Can: For greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege.] [Aus/NZ: Supports deletion of this Article.] [MX: It should be considered to have flexibility concerning administrative remedies, as stipulated in Article 199 bis 1.]

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	Important to keep a wide scope No particular opposition to proposal as it is "at least"	LK/mg
	2. [EU: 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 or other taking into custody of suspected infringing goods, materials, and implements relevant to the act of infringement. [US/Aus/Can/NZ: and, at least for trademark counterfeiting, documentary evidence relevant to the infringement ][Sing: used to accomplish the prohibited activity ].	DG CI RESTREINT UE
OPTION 2 [1. J: Each Party shall ensure that, where proceedings for provisional measures are conducted <i>imaudita altera parte</i> , the {J: judicial} {MX: competent} authorities shall expeditiously make a decision on the request for provisional measures.] OPTION 3 [1. Can/Aus/Kor/NZ: Each Party's authorities shall act on requests for {Can/Aus: relief} {Kor/NZ: provisional measures} <i>imaudita altera</i> <i>parte</i> {Can: without undue delay} {Kor/Aus/NZ: expeditiously} in accordance with the Party's judicial rules.]	2. [US/J/NZ/MX: In civil {US/J: judicial} {NZ: or administrative} proceedings {MX: or administrative remedies} concerning copyright or related rights infringement and trademark counterfeiting {NZ: infringement}], [EU: 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 [Can/NZ:, in appropriate cases,] the seizure or other taking into custody of suspected infringing goods, materials, and implements relevant to the act of	6437/10 ANNEX

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		3. Each Party shall provide that its [US/J: 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 [EU/Can: ,ensuring compensation for any prejudice suffered when the measure is revoked or lapses due to any reason,] and to prevent abuse, [US/J: and so as not to umreasonably deter recourse to such procedures]	
infringement [US/Aus/Can/NZ: and, at least for trademark counterfeiting, documentary evidence relevant to the infringement ][Sing: used to accomplish the prohibited activity ].	[MX: Clarify that "custody" in provision is intended to prevent an infringement and preserve evidence. ]	3. Each Party shall provide that its [US/J: judicial][MX: competent] 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 [EU/Can:,ensuring compensation for any prejudice suffered when the measure is revoked or lapses due to any reason,] and to prevent abuse, [US/J: and so as not to unreasonably deter recourse to such procedures] [Can: and so as mot to unreasonably deter recourse to such procedures].	

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	Already exist in TRIPS Possible flexibility			
	[4. EU/Can: Each Party shall ensure thatthe provisional measures referred to inparagraphs 1, 2 and 3 are revoked orotherwise cease to have effect, upon request	of the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority, either within a reasonable period to be determined by the judicial authority if the laws of a Party so permit or	days or 31 calendar days.]	[NZ: Detete this paragraph.]
[NZ: Delete this paragraph.]				

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2. SECTION 4: SPECIAL MEASURES RELATED TO TECHNOLOGICAL ENFORCEMENT MEANS AND THE INTERNET

COMMENTS/PROPOSAL	EU supports the JP comment to come back to the title of the Section and of the Article after the completion of the substantive discussion.	<i>Important (scope)</i> <i>Important:</i> It should cover offline and online, which is the "digital world". Footnote on "deterrent": <i>Flexibility: This footnote is not</i>
EU PROPOSAL		1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Agreement, are available under its law so as to permit effective action against an act of [J/EU: intellectual property rights] infringement which takes place [EU: in the digital environment], including [US: expeditious remedies] to prevent [US/EU: infringement and remedies which constitute a deterrent {EU: <sup>10</sup> } to further infringement]
US/JP PROPOSAL (latest consolidated text 18/01/10)	[US/AUS : ARTICLE [2.17] {MX: 2.18}: ENFORCEMENT PROCEDURES IN THE DIGITAL ENVIRONMENT [CAN: Expressed concern with disparity between section title and scope of content of section] [J: The title should be decided after the completion of the substantive discussion.]	1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Agreement, are available under its law so as to permit effective action against an act of [US: trademark {AUS: infringement}, copyright or related rights][J/EU: intellectual property rights] infringement which takes place [US: by means of the Internet][EU: in the digital environment]

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61 EN Important but the EU suggests to move this provision into the proposed general introductory Article. <sup>10</sup> [EU: For the purpose of this section, the term deterrent is to be understood in accordance with Parties legal system.] <sup>9</sup> [EU: For the purpose of this section, the term deterent is to be understood in accordance with Parties legal system.] LK/mg necessary. [EU: see identical comment on the draft suggestion is to move these provisions into [EU: Those measures, procedures and 'Chapter 1, Section A which applies to the whole Agreement. Direct reference to TRIPS might also clarify the scope of these Chapter 2, Section 1 "Civil Enforcement" and remedies shall also be fair and proportionate.] **RESTREINT UE** Section 3 "Criminal Enforcement". DGCI obligations ] which constitute a deterent {EU:<sup>9</sup>} to expeditious US/EU: infringement and remedies further infringement][MX: or deter such procedures and remedies shall also be fair CH: Switzerland understands that in of the TRIPS Agreement and that, [CAN: Seeks clarification of the scope of This holds for all instances of "related rights" in this [J: Japan supports overall concept of to prevent Para. 1 the terms "expeditious remedies" measures considered qualifying as "expeditious "related rights" (should be consistent Paragraph 1. However, it should be noted that infringement of intellectual property rights other than trademark, copyright or refers to the language used in Article 41 law are infringements.] [EU: Those measures, injunctions) and Civil remedies" under this provision.] under national remedies][MX: measures] accordingly, provisional (preliminary/interlocutory Criminal Enforcement Chapters). US: and proportionate.] including with both available section.] 6437/10

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		Important: This paragraph establishes the principal of 1/3 Party Liability. Definition of TPL in the footnote (14): Important to
<b>RESTREINT UE</b>		2. Without prejudice to the rights, limitations, exceptions, or defenses to [EU: intellectual property rights] infringement available under its law, including with respect
	related rights on the Internet is also a serious problem. Thus, infringement which takes place by means of the Internet should not be limited to that of trademark and copyright or related rights.] [EU: see identical comment on the draft Chapter 2, Section 1 "Civil Enforcement". A and Section 3 "Criminal Enforcement". A suggestion is to move these provisions into 'Chapter 1, Section A which applies to the whole Agreement. Direct reference to TRIPS might also clarify the scope of these obligations ]	<ol> <li>Without prejudice to the rights, limitations, exceptions, or defenses to [{J: patent, industrial design, trademark and}{US: copyright or related</li> </ol>

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[J: The first sentence of Footnote (1) is basically acceptable. The second sentence refers to "three-step test" and Japan understands this rule is important, however, the reference is not appropriate because	[CAN: Footnote changes meaning of substance in text. Canada seeks clarification of the second part. Sentence beginning "Further," Is redundant with respect to substance in text.]	available in its legal system in cases of third party liability <sup>12</sup> for [{J: patent,
[CAN: Footnote changes meaning of substance in text. Canada seeks clarification of the second part. Sentence beginning "Further" Is redundant with respect to substance in text.]		<sup>11</sup> [J: For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>12</sup> For greater certainty, the Parties understand that third party liability [{US: means} {AUS/NZ: may include} liability for any person who authorizes for a direct financial benefit, {US: induces through or by conduct directed to promoting} {CH: induces an} infringement, or knowingly and materially aids any act of {US: copyright or related rights} {1: eopyright or related rights} infringement by another.] [EU: refer to the concept of holding other persons other than the actual infringer liable for their involvement in the infringement.] [US: Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the {EU: service or of the product or in the case if copyright of the} work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, {US: including fair use, fair dealing, or their equivalents} ][J: Further, the Parties also understand that the application of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, {US: including fair use, fair dealing, or their equivalents} } libility may include considerations or knowners []J: Further, the Parties also understand that the application of third party liability may include consideration of exclusive rights that are confined to certain special cases that do not conflict with a normal explositions to exclusive rights that are confined to relate the fair with a normal explosition of the requivalents i []J: Further, the Parties also understand that the application of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.]
<ul> <li>including fair use, fair dealing, or their equivalents. ]</li> <li>[CH: Further clarification is requested regarding the practical difference between the two cases of inducement referred to in this FN with "induces through or by conduct"? Case examples would be appreciated. Alternatively, Switzerland proposes [as reflected above] to delete this part and to refer to cases of inducement without any further clarification.]</li> <li>[CAN: Footnote changes meaning of substance in text. Canada seeks clarification of the second part. Sentence beginning "Further" Is redundant with respect to substance in text.</li> </ul>	Including fair use, fair dealing, or their equivalents. ] [CH: Further clarification is requested regarding the practical difference between the two cases of inducement referred to in this FN with "induces through or by conduct"? Case examples would be appreciated. Alternatively, Switzerland proposes [as reflected above] to delete this part and to unfair to account without any further along fraction.	<sup>11</sup> [J: For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>12</sup> For greater certainty, the Parties understand that third party liability [(US: means){AUS/NZ: may include} liability for any person who authorizes for a direct financial benefit, {US: induces through or by conduct directed to promoting) {CH: induces an} infringement, or knowingly and materially aids any act of {US: copyright or related rights} infingement by another.] [EU: refer to the concept of holding other persons other than the actual infringer liable for their involvement in the infringement.] [US: Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the {EU: service or of the product or in the case if copyright of the} work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, {US: including fair use, fair dealing, or their equivalents.] [J: Further, the Parties also understand that equivalents.] {EU: including fair use, fair dealing, or their equivalents.] [J: Further, the Parties also understand that party is a set that dealing, or their equivalents.] [J: Further, the Parties also understand that he application of third party interests of the right holder, {US: including fair use, fair dealing, or their equivalents.] [J: Further, the Parties also understand that the application of third party interests of the right holder, {US: including fair use, fair dealing, or their equivalents.] [J: Further, the Parties also understand that the application of third party is that the application of third party is the application of their equivalents.] [J: Further, the Parties also understand that the application of third party is the application of their equivalents.] [J: Further, the Parties also understand that there is the application o
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phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, {US: including fair use, fair dealing, or their equivalents) ][J: Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] [CH: Further clarification of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] [CH: Further clarification is requested regarding the practical difference between the two cases of inducement referred to in this FN with "induces through or by conduct"? Case examples would be appreciated. Alternatively, Switzerland proposes [as reflected above] to delete this part and to refer to cases of inducement without any further clarification.] [CAN: Footnote changes meaning of substance in text. Canada seeks clarification of the second part. Sentence beginning "Further" Is redundant with respect to substance in text.]	phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, {US: including fair use, fair dealing, or their equivalents} ][J: Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents. ] [CH: Further clarification is requested regarding the partice between the two cases of inducement referred to in this FN with "induces through or by conduct"? Case examples would be appreciated. Alternatively, Switzerland proposes [as reflected above] to delete this part and to the the more of inducement referred to in this FN with "induces the normal of the theorem of inducement of the appreciated. Alternatively, Switzerland proposes [as reflected above] to delete this part and to the the normal of the theorem of the speciated.	<sup>11</sup> [J: For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>12</sup> For greater certainty, the Parties understand that third party liability [{US: means}{AUS/NZ: may include} liability for any person who authorizes for a direct financial benefit, {US: induces through or by conduct directed to promoting} {CH: induces an} infringement, or knowingly and materially aids any act of {US: copyright or related rights} infringement by another.] [EU: refer to the concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement in the infringement by another.] [EU: refer to the concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement link for their involvement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement link in the actual to the concept of bolding other neurons other than the actual infringement in the infringement [NIS: Euclide concept of bolding other neurons other than the actual infringement link in the infringement [NIS].
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well as limitations, exceptions, or defenses with respect to the application of such (US: mendeles)[MX: actions], are available in its legal system in cases of third party liability <sup>12</sup> for [{1: patent, ]. For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] of such (US: medical party liability [1: patent, ]. For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] of a direct financial benefit, (US: induces through or by conduct directed to promoting) (CH: induces an) infinigement, or knowingly and materially aids any act of (US: copyright or related rights) (1: epitelet effect to promoting) (CH: induces an) infinigement, or knowingly and materially aids any act of (US: copyright or related rights) (1: epithelite effect to promoting) (CH: induces an) infinigement, party liability any include consideration of the [EU: service or of the product or in the case if copyright of the) work, performance or phologram, and do not unreasonably prejudice the legitmate interses of the right holder, (US: induces and and around ensigned that the application of the (EU: service or of the product or in the case if copyright of the) work, performance or phonogram, and do not unreasonably prejudice the legitmate interses of the right holder, inhilty may include consideration of the (EU: service environs the Parties also understand that the application of the vork, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, inhilty may include consideration of the conception of the case if copyright of the j work, performance around line flair use, fair dealing, or their equivalents.) [EU: Further clarification is requested regarding the practical difference between the two cases of inducement referred to in this FN with "induces through or by conduct"? Case examples would be appreciated. Alternatively, Switzerland proposes [as reflected above] to delete this	well as limitations, exceptions, or of such [US: remedics][MX: actions], are of such [US: remedics][MX: actions], are available in its legal system in cases of third party liability. <sup>2</sup> for [{1}: patent, For greater certainty, the Parties understand that third party liability [(US: means){AUSNZ: may include}) liability for any person who authorizes for a direct financial benefit, {US: induces through or by conduct directed to promoting} (CH: induces an) infringement, or knowingly and materially aids any act of {US: orpyright or related rights} {1}: experiment by another, 1[EU: refer to the concept of materially aids any act of {US: induces through or related rights} {1}: expristed or exclusive rights that are confined to materially aids any act of {US: induces through or related rights} {1}: expristed or protoning} (CH: induces an) infringement.] [US: Further, the polling other persons other than the actual infringer liable for their involvement in the infringement.] [US: Further, the Parties also understand that the application of three persons other than the exploitation of the [EU: service or of the product or in the case if copyright of the) work, performance or phonogram, and do not comflict with a normal exploitation of the [EU: service or of the product or in the case if copyright of the) work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] [1: Further, the Parties also understand special cases that do not conflict with a normal exploitation of the regulations to exclusive rights that are conflicted to eratin special dealing, or their equivalents or the eratin special cases that do not conflict. With another legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] [CH: Further clarification is requested regarding the parcical difference between the two cases of inducement referred to in this FN with "induces through or by condues" Oceasing. Althous	
(1031: evil remedies (1: <sup>1</sup> ) [10X: cases of third party liability for [EU: definition, exceptions, or defenses with respect to the application of such [US: medies (1: <sup>1</sup> ), [10X: cases of third party liability is [EU: definition, exceptions, or defenses with respect to the application of such [US: medies [10X: actions], as intellectual property rights] infingement]. <sup>15</sup> and [1US: medies[10X: actions], as intellectual property rights] infingement]. <sup>16</sup> are initiations. exceptions, or defenses with respect to the application of such [US: medies[10X: actions], as intellectual property rights] infingement]. <sup>15</sup> are available in its legal system in cases of third party liability (1US: means) {AUSNZ: may include) liability for any person who authorizes for genetic effantion; the Parties understand that third party liability (1US: means) {AUSNZ: may include) liability for any person who authorizes for a direct financial benefit, {US: induces through or by conduct directed to promoting} (CH: induces an) infingement, or knowingly and matching other persons other than the actual infinger liable for the (EU: service or of the products or inter condition of third party liability may include consideration of exceptions or limitenous to exclusive rights that are confined to certain special cases that do not unreasonably prejudice the legitimate interests of the right shall are confined to ertain special cases that do not unreasonably prejudice the legitimate interests of the right shall are confined to ertain special cases that do not unreasonably prejudice the legitimate interests of the right are further clarification is requested regarding the requirements of the second part. Sinch ding fair use, fire reguindents, includes indexted or present or phonogram, and do not unreasonably prejudice the legitimate interests of the right shaller. The control of the vould be appreciated. Alternatively, Switzerland proposes [as reflected above] to define, induces areas and any include [astrues, fire reast, fire regins are interest o	(USN: civil or pendies (1): <sup>1</sup> /JIMX: actions), are seen synthemed and party lightly findingement]. <sup>15</sup> and ministrative, civil or penal actions], are seen of the application of such [USS: access of third party lightly] infingement]. <sup>15</sup> is initiations, exceptions, or defenses with respect to the application of such [US: mendies][MX: actions], are available in its legal system in cases of third party liability. <sup>15</sup> for [US: mendies][MX: actions], are available in its legal system in cases of third party liability [US: means) {AUSNZ: may include planty liability. <sup>15</sup> for the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of thesel <sup>11</sup> [1: For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of thesel <sup>12</sup> For greater certainty, the Parties understand that third party liability [(US: means) {AUSNZ: may include) liability for any person who authorizes for a greater certainty, the Parties understand that third party liability may include consideration of exceptions or linkingement.] [US: Further, the Parties understand that the application of thus parties interests of the right holder, (US: means) {AUSNZ: may include for their othe concept of holding other persons other than the actual infingement of the owningly and materially aids any act of (US: copyright or related rights) {US: means} {AUSNZ: may include for the exceptions or intimutors to exclusive right holder, the parties also understand that the application of the youth, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] {EU: including fair use, fair dealing, or their equivalents.] {EU: including fair use, fair dealing, or their equivalents.] {EU: Further, the Parties also understand that the application of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, inclu	intellectual property rights] infringement]. <sup>15</sup>
exhaustion of rights, each Patry US. With respect to the application of such US. <i>The EU supports the negotator's note to locate this</i> for final provide for] remedies [1,1'] intermedies [1,1'] intermedie	confirms that [CIF: shall provide for] remedies], are available in its legal system in <i>provision in the civil enforcement section</i> . [US1: civil remedies (1: <sup>1</sup> )] JIMC: cases of third party liability <sup>15</sup> for [EU: and provision in the civil enforcement section. [US1: civil remedies] (1: <sup>1</sup> ) JIMC: cases of third party liability <sup>16</sup> for [EU: and provision in the civil enforcement section. well as limitations, exceptions, or detenses with respect to the application of such [US: remedies] MC: actions], as intellectual property rights] infringement]. <sup>15</sup> administrative, civil or penal actions], as intellectual property rights] infringement]. <sup>16</sup> administrative, civil or penal actions], as intellectual property rights] infringement]. <sup>15</sup> at called a stack [US: remedies] MC: actions], as intellectual property rights] infringement]. <sup>16</sup> third party liability <sup>12</sup> for [15: partnet, [10]: for the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>11</sup> For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>11</sup> For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>11</sup> For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] <sup>12</sup> For greater certainty, the Parties understand that third party liability [(US: means) {AUSNZ: may include} liability for any person who authorizes for a direct financial benefit, {US: induces through or by conduct directed to promoting (CH: induces an) infringement, or knowingly and matching other persons ontor than the actual infringer liability may include consideration of exceptions or line involventing (AI involventing fair use, fair dealing, or the conseption of third party liability may include consideration of exceptions or encluser rights that are confined to certain special eases that do not urreasentile fibricus in the rest in optic or [10	with respect to the application of such [US: remedies], are available in its legal system in cases of third party liability <sup>14</sup> for [EU: intellectual property rights] infringement]. <sup>15</sup>
Intringenting with respect to the issue of wells issue and 1000000, or defenses exbansion of rights, each Party [US]. With respect to the sapilication of such [US]. For EU supports the negotator's note to locate this exbansion of rights, each Party [US] with respect to the issue of well as limitations, exceptions, or defenses of third party liability <sup>17</sup> for [US]. For the purposes of this paragraph, with respect to the application of such [US]. For the purposes of this paragraph, well as limitations, exceptions, or defenses with respect to the application of each [US]. For the purposes of this paragraph, well as limitations, exceptions, or defenses with respect to the application of each [US]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, shall mean both damages and injunctions or either one of these [1]. For the purposes of this paragraph, "civil remedies, [US], not the remeties paragraph with any and and an antion remeting party liability [US], means] (AUS). The purposes of the counter of the volt, performance or purpose of the polater involvement in the infingement by another liability and index mething functions of the equilation of the volt, performance or phonogram	<sup>11</sup> For the purposes of this paragraph, "sivil respect to the application of such [US: The EU supports the negottator's note to locate this confirms that [CE: shall provide bot] remedies], are available in its legal system in <i>provision in the civil enforcement section</i> , administrative, civil or penal actions], as including the respect to the application of such [US: remedies] (1 <sup>11</sup> ) [JUX: cases of third party liability <sup>14</sup> for [EU: administrative, civil or penal actions], as intellectual property rights] infingement]. <sup>15</sup> administrative, civil or penal actions, are available in its legal system in <i>provision in the civil enforcement section</i> , well as limitations, exceptions, or defenses with respect to the application of such [US: remedies] methods are available in its legal system in cases of third party liability [US: means] (AUS: MIX: and an advise and injunctions or either one of these] [ <sup>12</sup> For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] [ <sup>13</sup> For greater certamy, the Parties understand that the application of third party liability [US: means] (AUS: MIX: may include a partical advise and injunctions or either one of these] [ <sup>13</sup> For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] [ <sup>14</sup> For the purposes of this paragraph, "civil remedies" shall mean both damages and injunctions or either one of these] [ <sup>15</sup> For the purposes of the right by (IS: means) [AUS: induces through or by conduct directed to promoting [ (CH: induces and inductions of the spontation of the party liability for any person who authorizes for a direct financial benefit, (US: induces through or by conduct directed to promoting [ (CH: induces and inductions of the application of the party liability may include consideration of the (FU): service or of the product on the cases of for equivalents. [ [ 10: Further clarification of third party liability may include ensembly prejudice the application of the spo	with respect to the application of such [US: remedies], are available in its legal system in cases of third party liability <sup>14</sup> for [EU: intellectual property rights] infringement]. <sup>15</sup>
[rights]][EU: intellectual property rights] to the issue of exhaustion of rights, each Party preserve a neutral wording of the definition. intringious with respect to the size of exhaustion of such [USN: evin transles], as including with respect to the issue of with respect to the size of the last monoide for a single in the argonications, are application of such [USN: evin transles], as including with respect to the size of the last monoide for a single in the argonications, are application of such [USN: evin transles]. The EU supports the negotiator's note to locate this confirms that [CH: hall provide for] remedies, are available in its hall provide for] remedies, are available in its hall provide for] remedies, are available in its hall provide for the application of such [USN: evolutions, exceptions, or defenses with respect to the application are available in its head state. A suite application of such [USN: removing and the argonications, are available in its head state. The application of such [USN: removing in the criteria provide for the paragraph. "divid party liability." for [USN: removing in the criteria provide in the set of the paragraph. "divid party liability." for [USN: removing in the criteria provide for the involution of the set of the paragraph. "divid party liability." for [USN: removing in the criteria provide for the involution of the set of the paragraph. The paragraph are related rights [USN: removing and indimension of the set of the paragraph. "dividences and infinetune interest of the right holder, the particle of provide the legitide to exclusive right holder, the legitide or the set of the legitide or the set of the legitide or the set of the legitide oremover of the legitide or the set of the legitide or	rights)[EU: intellectual property rights]       to the issue of exhaustion of rights, each Party <i>preserve a neutral wording of the definition.</i> rinding with respect to the size of with respect to the application of such [US:       intil respect to the size of with respect to the application of such [US: <i>The EU supports the negotiator's note to locate this indiators, so the definition.</i> rinding with respect to the size of with respect to the application of such [US:       intellectual projectly rights] infringement]. <sup>15</sup> <i>The EU supports the negotiator's note to locate this and mistrative, civil or penal actions</i> ], an intellectual property rights] infringement]. <sup>15</sup> readministrative, civil or penal actions], as acceptions, or defenses with respect to the application of stack [US:: remedies], are available in its legal system in aces of third party liability <sup>4</sup> . for [EU: mathematication of stack [US:: remedies], and instations. Succeptions, and denses of third party liability [US:: many cloaded in the civil or paragraph. "civil remedies" shall mean both damages and injunctions or either one of these] <sup>10</sup> For the purposes of this paragraph. "civil remedies" shall mean both damages and injunctions or either one of these] <sup>11</sup> For the purposes of this paragraph. "civil remedies" shall mean both damages and injunctions or either one of these] <sup>11</sup> For the purposes of this paragraph. "civil remedies" shall mean both damages and injunctions or either one of these] <sup>12</sup> For the purposes of this paragraph. "civil party liability [US: monthing [CH: induces and infunctions or either one of these]	to the issue of exhaustion of rights, each Party [US: confirms that] [US/J: civil remedies ], as well as limitations, exceptions, or defenses with respect to the application of such [US: remedies], are available in its legal system in cases of third party liability <sup>14</sup> for [EU: intellectual property rights] infringement]. <sup>15</sup>

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<b>RESTREINT UE</b>	trademark and}{US: elated rights}][EU: property rights]	supports Paragraph 2 onfirm or propose the are available" will d if a Party at least e either damages or other words, a Party is make both damages available. of rights to patent, m and trademark by liso a serious problem, ess a reference to these	reference to a specific legislation of a specific country such as "fair use" is inappropriate in this context.] <sup>13</sup> Negotiator's Note: This provision is intended to be moved and located in the civil enforcement section. [AUS: reserves it position on this negotiator's note and the placement of the current 2.17.1 until the civil and digital enforcement sections of Chapter Two are nearing completion.] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement section] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement section] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement section] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement section] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement section] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement section] <sup>14</sup> For greater certainty, the Parties understand that the parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the {EU: service or of the product or in the case if copyright of the} work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, {US: including fair use, fair dealing, or their equivalents.} {EU: ineluding fair use, fair dealing, or their equivalents.} <sup>15</sup> Negotiator's Note: This provision is intended to be moved and located in the civil enforcement section. [AUS: reserves it position on this negotiator's note and the placement of the current 2.17.1 until the civil and digital enforcement section. [AUS: reserves it position on this negotiator's note and the placement of the current 2.17.1 until the civil and digital enforcement section.] [EU: supports footnote 23 to move and locate paragraph 2 in the civil enforcement	DG CI RESTREINT UE LK/mg 22 EN
	industrial design, tradema copyright or related intellectual property infringement. <sup>13</sup>	<ul> <li>[J: Japan basically supports Paragraph 2 but would like to confirm or propose the matters below:</li> <li>"civil remediesare available" will be implemented if a Party at least makes available either damages or injunctions. In other words, a Party is not obliged to make both damages and injunctions available.</li> <li>Infringement of rights to patent, industrial design and trademark by third parties is also a serious problem, so Japan proposes a reference to these rights.</li> </ul>	reference to a specific leg reference to a specific leg negotiator's Note: This p negotiator's note and the [EU: supports footnote 23 to [EU: supports footnote 23 to liable for their involveme consideration of exceptic of the {EU: service or of legitimate interests of the equivalents}] <sup>15</sup> Negotiator's Note: This p negotiator's note and the [EU: supports footnote 23 to	6437/10 ANNEX

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	Footnote 19: Clarification of the notion of person to embody "legal person". <i>Important</i> Footnote 20: it is OK for the EU. Scope: <i>Important</i>	<sup>16</sup> For purposes of this Article, person means a natural person or [US: an enterprise][CH/J/EU: a legal person]. [MX: Person is already defined in Article 1 as a "natural person or juridical person" so this definition is not necessary here] <sup>17</sup> For purposes of this Article, online service provider and provider mean a provider of online services or network access, or the operators of facilities therefore, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or
	3. [OPTION 2: EU Each Party recognize that some persons <sup>19</sup> use the services of third parties, including online service providers, <sup>20</sup> for engaging in copyright or related rights	<sup>16</sup> For purposes of this Article, person means a natural person or [US: an enterprise][CH/J/EU: a legal person]. [MX: Person is already defined in Article 1 as a "natural person or juridical person" so this definition is not ne <sup>17</sup> For purposes of this Article, online service provider and provider mean a provider of online services or netw therefore, and includes an entity offering the transmission, routing, or providing of connections for digital o
- If this paragraph is to be moved to the Civil Enforcement Section, the question on where this provision should be located in the Civil Enforcement Section should be carefully considered since the original US proposal refers to copyright or related rights while the Civil Enforcement Section basically does not limit its scope. ]	3. OPTION 1 [US Each Party recognize that some persons <sup>16</sup> use the services of third parties, including online service providers, <sup>17</sup> for engaging in copyright or	<sup>16</sup> For purposes of this Article, person mean [MX: Person is already defined in Article 1 <sup>17</sup> For purposes of this Article, online servic therefore, and includes an entity offering

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related rights infringement. Each Party also recognizes that legal uncertainty with respect to application of {US: intellectual property right] infringement. with respect to application of {US: intellectual property nights} {AUS: copyright and related rights}, limitations, exceptions, and defenses in the digital environment may present barriers to the economic growth of, and opportunities in, electronic commerce. Accordingly, in order to facilitate the continued	Deletion of the second and third sentences of Article 2.17.3: <i>important</i> . The EU proposal for the entire Paragraph 3 is now
	considered as a second option between the US option 1 and the JP option 3. Very little flexibility
aterial of the user ".] of " <i>online service</i> er.] r this footnote is	's choosing, without modification to the content of the material as sent or received. <i>provider</i> " includes a person who hosts material on websites or other electronic retrieval acceptable.]
<sup>18</sup> [EU: The activities covered in paragraph 3(a)(i) cover the mere conduit and the activities covered in paragraph 3(a)(ii) cover respectively caching and hosting in accordance with parties legal systems.] <sup>19</sup> For purposes of this Article, person means a natural person or [US: an enterprise] [CH/J/EU: a legal person]. <sup>20</sup> For purposes of this Article, online service provider and provider mean a provider of online services or network access, or the operators of faciliti therefore, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.	e mere conduit and the activities covered in paragraph 3(a)(ii) cover respectively caching on or [US: an enterprise] [CH/J/EU: a legal person]. provider mean a provider of online services or network access, or the operators of facilities on, routing, or providing of connections for digital online communications, between or 's choosing, without modification to the content of the material as sent or received.

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		[EU: delete and move the second and third sentences to Chapter 1 Section A.]
		[J: It is worth considering moving 1 <sup>st</sup> and 2 <sup>nd</sup> sentences of paragraph 3 to the preamble of the Agreement or a political declaration to be made on announcing ACTA.]
		words "in order to facilitate the continued development of an industry engaging in providing information services online" provide an interpretive gloss on Article 2.17.3 which appears to go beyond the general aim of ACTA to provide a framework for the enforcement of intellectual property rights.]
		[NZ: The second and third sentences of Article 2.17.3 use preambular language which would be more appropriate in the agreement's initial provisions.
		granted by the current national legislation (and actually as it is today provided in the Swiss legislation). The proposed alternative wording thus enables Parties to provide for such limitations, without obliging them to do so.]
		for limitations of liability for ISP could reduce the substantive level of protection

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<ul> <li>(a) provide limitations<sup>21</sup> on the [US: scope of civil remedies available against an][EU: on the liability of] online service provider[EU:s] for infringing activities that occur by</li> </ul>	<ul> <li>(a) In this respect] each Party [US: shall [EU:<sup>22</sup>] provide limitations<sup>23</sup> [EU: on the liability of] online service provider [EU: s] for infringing activities that occur by</li> </ul>	Footnote 22 and 23: <i>Important</i>
<ul><li>(i) automatic technical processes, [US: and][EU: or]</li><li>[MX: Define automatic technical processes]</li></ul>	<ul> <li>(i) automatic technical processes, [US: automatic technical processes, [EU: or]</li> <li>and][EU: or]</li> <li>[MX: Define automatic technical processes]</li> </ul>	
(ii) the actions of the provider's users that are [US: not directed or] [EU: not directed] initiated [EU: nor modified] by that provider and when the provider does not select the material, [US: and][EU: or]	(ii) the actions of the provider's users that are not initiated [EU: nor modified] by that provider and when the provider does not select the material, [EU: or]	Important
<ul><li>(iii)[US: the provider referring or linking users to an online location,]</li><li>[EU: the storage of information provided by the recipient of the service or at the request of the recipient of the service,]</li></ul>	(iii) [EU: the storage of information provided by the recipient of the service or at the request of the recipient of the service,]	New wording important. Very little flexibility in the wording
<ul> <li><sup>21</sup> For greater certainty, the Parties understand that the failur measures implementing this provision shall not bear adve [US: service][J: service] provider's conduct is not infring <sup>22</sup>[ EU: The activities covered in paragraph 3(a)(i) cover the</li> </ul>	<sup>7</sup> or greater certainty, the Parties understand that the failure of an online service provider's measures implementing this provision shall not bear adversely upon the consideration of [US: service][J: <del>service</del> ] provider's conduct is not infringing or any other defense. EU: The activities covered in paragraph 3(a)(i) cover the mere conduit and the activities of the act	<sup>21</sup> For greater certainty, the Parties understand that the failure of an online service provider's conduct to qualify for a limitation of liability under its measures implementing this provision shall not bear adversely upon the consideration of a defense by the [US: service provider][J: provider] that the [US: service][J: service] provider's conduct is not infringing or any other defense. <sup>22</sup> [EU: The activities covered in paragraph 3(a)(i) cover the mere conduit and the activities covered in paragraph 3(a)(ii) cover respectively caching

<sup>23</sup> For greater certainty, the Parties understand that [these limitations are not intended to harmonize the liability of online service provider, but exclude liability in certain situations. Thus] the failure of an online service provider's conduct to qualify for a limitation of liability under its measures implementing this provision shall not bear adversely upon the and hosting in accordance with partics legal systems.]

consideration of a defense by the service provider that the service provider's conduct is not infringing or any other defense

	Important. No flexibility.		
when, in cases of subparagraphs (ii) and (iii), the provider does not have actual knowledge of the infringement and is not aware of facts or circumstances from which infringing activity is apparent; and	[EU: when exercising the activities as stipulated in paragraph 3(a) (ii) and/or (iii) the online service providers act expeditiously, in accordance with applicable law, to remove or disable access to infringing material or infringing activity upon obtaining actual knowledge of the infringement or the fact that the information at the initial source has been removed or disabled.]		
when, in cases of subparagraphs (ii) and (iii), the provider does not have actual knowledge of the infringement and is not aware of facts or circumstances from which infringing activity is apparent; and	[EU: when exercising the activities as stipulated in paragraph 3(a)(ii) and/or (iii) the online service providers act expeditiously, in accordance with applicable law, to remove or disable access to infringing material or infringing activity upon obtaining actual knowledge of the infringement or the fact that the information at the initial source has been removed or disabled.]	[NZ: re: Paragraph (a)(iii): We understand this provision covers information location tools such as search engines. It is not clear how the provision or use of information location tools breaches copyright, or why third party liability should arise for the provision of such tools. We would welcome further explanation on the need to provide such a safe harbour.]	

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possibility for a judicial or administrative authority, in accordance with the Parties legal system, requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility of the parties establishing procedures governing the removal or disabling of access to information When providers are acting accordance with this paragraph 3, the Parties shall not impose a general monitoring requirement.]	(b) condition the application of the	the (b) Paragraph 3(a) shall not affect the	Important. No flexibility.	<b></b>
address the unauthorized storage determines on prevent an infingement, nor dressonably implementing a policy address the unauthorized storage of estimated and the structure provider to prevent an unifingement, nor address the unauthorized storage of estimation of materials protected by pyright or related rights [DS: except that no Party may condition the initiations in subparagraph (a) on the mitations in subparagraph (b) on the mitations in subparagraph (a) on the mitations in subparagraph (a) on the mitations in subparagraph (b) on the mitations in subparagraph (a) on the mitations in subparagraph (b) on the mitations in subparagraph (b) on the mitations in subparagraph (b) on the mitations in subparagraph (c) on the mitation definitions of a continuous definitions of a condition of a motioning steric beavier provider "monitoring its provider steric provider function of a motioning steric provider steric provider (f) section function of a motioning steric provider (f) section function (f) section function (f) section funct			s s	
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<sup>[</sup>J: The present legislation of Japan does not require an ISP to adopt and implement a "policy," so Japan is now examining how to adjust Footnote (6) service provider's system or network of repeat infringers. to Japanese legislation or vice versa. ]

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The JP option 3 is an alternative and a complement to option 1 (US) and to option 2 (EU).		OPTION 3 [J: c) if a Party does not adopt the measures under subparagraphs (a) and (b), such Party shall ensure that civil remedies to compensate for damages are available against an online service
		[CAN: Relationship is unclear between 2.17.2 (third party liability) and 2.17.3 (ISP limitation on liability). Seek clarification if paragraph 3 structure premised on infringement of ISPs.]
		except that the provisions of (ii) shall not be applied to the extent that the online service provider is acting solely as a conduit for transmissions through its system or network.]
		of regard sufficient region and an order from a competent authority] and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of mistake or misidentification.
		<ul> <li>(ii) an online service provider expeditiously removing or disabling access to material or [US: activity][MX: alleged infringement], upon receipt [US:</li> </ul>
		indicating that infringing activity is occurring".]

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	3 quater. Each Party shall promote the
	<i>3 ter.</i> Each Party shall enable right holders, who have given effective notification to an online service provider of materials that they claim with valid reasons to be infringing their copyright or related rights, to expeditiously obtain from that provider information on the identity of the relevant subscriber.
	3 <i>bis.</i> Each Party shall not impose general obligation on online service providers to regularly monitor its service or affirmatively seek facts indicating infringing activity on a daily basis in order to claim the application of the provision on limitations described in paragraph 3(a) or (b).
	(ii) the provider knows or there is a reasonable ground to know that the infringement is occurring.
	(i) it is technically possible to take measures for preventing the infringement, and
	provider who does not take appropriate measures such as removing or disabling access to material or activity to prevent copyright or related rights infringement initiated by its users only when:

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development or mutually supportive relationships between online service providers and right holders to deal effectively with patent, industrial design, trademark and copyright or related rights infringement which takes place by means of the Internet, including the encouragement of establishing guidelines for the actions which should be taken.]]		
[J: The current paragraph 3 proposed by the US is not consist	US is not consistent with Japanese legislation. Pro	ent with Japanese legislation. Provisional texts shown here are still under examination.
Further, the ISP Act of Japan provides the limitation on the civil damages only. That is, the ISP Act mentions nothing injunction order should be issued on case by case basis.	limitation on the scope of the ISPs' liability under nentions nothing about availability of the injuncti ' case basis.	scope of the ISPs' liability under certain circumstances but the Act limits the scope of about availability of the injunction against an ISP and the courts decide whether the
The ISP Act of Japan does not categorize ISPs into "conduit under the following conditions: (a) it is technically impossible for an ISP to take measures fo (b) an ISP does not know and does not have a reasonable gro	The ISP Act of Japan does not categorize ISPs into "conduit," "hosting," "caching" or others. In addition, under the following conditions: (a) it is technically impossible for an ISP to take measures for preventing the transmission of information; or (b) an ISP does not know and does not have a reasonable ground to know that infringing activity is occurring.	t," "hosting," "caching" or others. In addition, the Act denies civil liabilities for ISPs or preventing the transmission of information; or ound to know that infringing activity is occurring.
Meeting the conditions described in subparagraphs (b)(i)and and reasonably implementing a policy or removing materia condition (a) or (b) above is met. Therefore, there is a differe	Meeting the conditions described in subparagraphs (b)(i)and (b)(ii) of US proposal are not required under the ISP Act of Japan. However, and reasonably implementing a policy or removing material upon receipt of notice may be taken into consideration when courts decide condition (a) or (b) above is met. Therefore, there is a difference between the structure of the present ACTA draft and the ISP Act of Japan.	Meeting the conditions described in subparagraphs (b)(i) and (b)(ii) of US proposal are not required under the ISP Act of Japan. However, adopting and reasonably implementing a policy or removing material upon receipt of notice may be taken into consideration when courts decide whether condition (a) or (b) above is met. Therefore, there is a difference between the structure of the present ACTA draft and the ISP Act of Japan.
Thus, Japan indicates a revision to paragrap ACTA draft and the ISP Act of Japan.	oh 3. The blue sentences are added or modified by	Thus, Japan indicates a revision to paragraph 3. The blue sentences are added or modified by Japan to show clearly the difference between present ACTA draft and the ISP Act of Japan.
Japan would like to clarify whether providi provided in the present ACTA text, will be r	Japan would like to clarify whether providing stricter conditions for the limitations of ISP in the Party' provided in the present ACTA text, will be regarded as a proper implementation of this paragraph or not.	Japan would like to clarify whether providing stricter conditions for the limitations of ISP in the Party's national law, compared to the conditions provided in the present ACTA text, will be regarded as a proper implementation of this paragraph or not.]
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Important. otherwise not consistent with the EU legislation.	Footnote (27), the EU proposes to add a footnote to clarify and limit the notion of wilful conduct. The text is aligned to Art; 6.1; CISD.	
y shall provide] <u>adequate legal</u> ainst the circumvention of ological measures that are used performers or producers of t connection with the exercise and that restrict unauthorized	acts in respect of their works, performances, and phonograms, [EU: Part <del>y shall provide for</del> eivil remedies, as well as eriminal penalties] in appropriate cases of wilful conduct [EU: <sup>27</sup> ] , that apply to:	
<ul> <li>4. OPTION 1</li> <li>4. OPTION 1</li> <li>[US: In implementing Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty regarding]</li> <li>[CAN/J/EU: In implementing Article 11 of the WIPO Copyright Treaty and Streety and Streety and Streety and Streety and Streety and Streety S</li></ul>	Article 18 of the <i>MIPO Performances</i> and <i>Phonograms Treaty</i> regarding] [AUS: In order to provide][EU: Each Party shall provide] adequate legal protection [US: and effective legal remedies][EU: and effective legal remedies] against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms [CH: or any other copyright owner or owner of an exclusive	

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[EU: each Party shall provide for civil remedies, as well as criminal penalties] in appropriate cases of willful conduct [EU: <sup>25</sup> ], that apply to: (a) the unauthorized circumvention of an effective technological measure <sup>26</sup> [US: that controls access to a protected work, performance, or phonogram] [EU: that controls access to a protected work, performance, or phonogram]; and (b) the manufacture, importation, or circu	<ul> <li>(a) the unauthorized circumvention of an effective technological measure<sup>28</sup> [US: that controls access to a protected work, performance, or phonogram] [EU: that controls access to a protected work, performance, or phonogram]; and</li> <li>(b) the manufacture, importation, or circulation of a technology, service, device,</li> </ul>	Footnote (28): the EU proposes to precise the definition of an effective TPM according to the EU acquis.
<ul> <li><sup>25</sup> [EU: For the purpose of this Article, willful conduct means actual kno of circumventing any effective technological measure.]</li> <li><sup>26</sup> For the purposes of this Article, effective technological measure mean operation, [US: controls access to a protected work, performance, pho controlled by the right holders through application of an access contro of their works, performances or phonograms, or a copy control mech.</li> <li>[J: Japan needs to consider further whether footnote [31] is acceptable.]</li> <li><sup>28</sup> For the purpose of this Article, willful conduct means actual knc of circumventing any effective technological measure.]</li> <li><sup>29</sup> [EU: For the purpose of this Article, willful conduct means actual knc of circumventing any effective technological measure.]</li> <li><sup>29</sup> [EU: For the purposes of this Article, willful conduct means actual knc of circumventing any effective technological measure.]</li> <li><sup>29</sup> [EU: For the purposes of this Article, willful conduct means actual knc of circumventing any effective technological measure.]</li> <li><sup>29</sup> [EU: For the purposes of this Article, officitive technological measure.]</li> <li><sup>20</sup> for the purposes of this Article, officitive technological measure.]</li> <li><sup>21</sup> [EU: For the purposes of this Article, officitive technological measure.]</li> <li><sup>23</sup> For the purposes of this Article, officitive technological measure.]</li> </ul>	EU: For the purpose of this Article, willful conduct means actual knowledge or reasonable grounds to know that he o of circumventing any effective technological measure.] For the purposes of this Article, effective technological measure means any technology, device, or component that, in operation, [US: controls access to a protected work, performance, phonogram, or protects any copyright or any rights controlled by the right holders through application of an access control or protection process such as encryption, scra of their works, performances or phonograms, or a copy control mechanism, which achieves the protection objective.] Japan needs to consider further whether footnote [31] is acceptable.] EU: For the purpose of this Article, willful conduct means actual knowledge or reasonable grounds to know that he of circumventing any effective technological measure.] FO: the purposes of this Article, effective technological measure means any technology, device, or component that, in operation, [US: controls access to a protected work, performance, phonogram, which achieves the protection objective.] FO: For the purposes of this Article, wilfful conduct means actual knowledge or reasonable grounds to know that he of the purposes of this Article, effective technological measure.] FO: the purposes of this Article, effective technological measure means any technology, device, or component that, in operation, [US: controls access to a protected work, performance, phonogram, or protects any copyright or any rights controlled by the right holders through application of an access control or protection process such as encryption, scrater their works, performances or phonograms, or a copy control mechanism, which achieves the protection objective.] appan needs to consider further whether footnote [31] is acceptable.]	r she is pursuing the objecti the normal course of its related to copyrights.][EU: mbling, or other transformat r she is pursuing the objecti the normal course of its related to copyrights.][EU: mbling, or other transformat
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product, component, or part thereof, that is: marketed or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure.	[EU: 4.2 Each Party may provide for measures which would safeguard the benefit of certain exceptions and limitations to copyright and related rights, in accordance with its legislation.]				
circulation of a technology, service, device, product, component, or part thereof, that is: marketed or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure	[EU: 4.2 Each Party may provide for measures which would safeguard the benefit of certain exceptions and limitations to copyright and related rights, in accordance with its legislation.]	[CH: Swiss proposal reflects a desire by Switzerland to apply para 4 to derivative rights.]	4. OPTION 2 [J:	Each Party shall provide for civil remedies that apply to:	(a) the importation, assignment, delivery of (i) a device (including a machine incorporating such device) or, (ii) data storage media or a machine on which a program having sole function of circumventing an effective technological measure is stored; or

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		[J: Japan understands that the WIPO treaties do not require the Parties to implement the restriction on circumvention of access control. Thus, making reference to the WIPO treaties is inappropriate. The Copyright Act and the Unfair Competition Prevention Act of Japan restrict circumvention of effective technological measures under certain conditions (The Copyright Act does not restrict circumvention of access control.)	ion of a technology for circumvention of access control, or circumvention of access control, ion of access control, and or any related acts, such as manufacturing of or trafficking in devices for circumvention of	Therefore, Japan is now examining how to fix the difference between its legislation and present ACTA draft, with due regard to maintaining a balance between the rights of authors and the larger public interest, e.g. education, research, and cannot provide definitive comments on Paragraph 4 at this time. Japan reserves the right to make further comments on Paragraph 4.	s which adopt a restriction on circumvention of access control, the concrete example and of harm by circumvention of access control, how effective the legal remedy against the harm, number of litigation cases, what kind of major actions were ceased in terms of		LK/mg 35 EN
		es do not require the Parties to impleme ppropriate. tion Prevention Act of Japan restrict circ ict circumvention of access control.).		fix the difference between its legislation e larger public interest, e.g. education, rest further comments on Paragraph 4.	<u>.</u>		DG CI RESTREINT UE
	(b) the provision through an electric telecommunication line, of a program having sole function of circumventing an effective technological measure. ]	[J: Japan understands that the WIPO treaties do not require the Parties to imp making reference to the WIPO treaties is inappropriate. The Copyright Act and the Unfair Competition Prevention Act of Japan restric conditions (The Copyright Act does not restrict circumvention of access control.)	<ul> <li>However, these Laws do NOT provide:</li> <li>a restriction on circumvention of access control itself,</li> <li>a restriction on manufacture, importation and circulation of a technology for circ a restriction on importation or circulation of services for circumvention of access</li> <li>a restriction on manufacture of devices for circumvention of access control, and</li> <li>criminal penalties for circumvention of access control or any related acts, such at</li> </ul>	Therefore, Japan is now examining how to fix the difference between its leg balance between the rights of authors and the larger public interest, e.g. educat at this time. Japan reserves the right to make further comments on Paragraph 4.	Japan would like to know from the US or other countrie data and background of the legislation. That is, amount circumvention of access control was (e.g. shrinkage of copyright protection perspective.). ]		6437/10 ANNEX

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[5. Each Party shall provide [US: that a ] [EU: adequate legal protection against a ] violation of a measure implementing paragraph (4) [US: is a separate civil or criminal offense,] [EU: is a separate civil or criminal offense,] [EU: is a separate civil or criminal offense,] [independent of any infringement of copyright or related rights <sup>29</sup> Further [US, each Party may	<ul> <li>[5. Each Party shall provide [US: that a ] [EU: adequate legal protection against a ] violation of a measure implementing paragraph (4) [US: is a separate civil or criminal offense,] [EU: is a separate civil or criminal offense,] independent of any infringement of copyright or related rights.<sup>31</sup> Further, [ [EU: each Party may provide for measures which would</li> </ul>	<ul> <li>The EU considers this paragraph useless because:</li> <li>the first sentence is not necessary as we have adequate legal protection in paragraph 4 and</li> <li>the second sentence is merged into the second sentence is merged into the second sentence is merged into the second the new paragraph 4.2.</li> <li>However, the EU have made some comments in case of the function of the second sentence of the second secon</li></ul>
adopt exceptions and limitations to measures implementing {US: subparagraph (4)}{J: paragraph 4} so	and limitations to copyright and related rights, in accordance with its legislation.] <sup>32</sup>	or. Including comments on the rootnote (32) regarding interoperability.
<sup>29</sup> [US: The] [EU: In accordance with the applicable national legislation, the] ob prejudice to the rights, limitations, exceptions, or defenses to copyright or rela no Party may][EU: paragraph (4) does not imply any obligation to] require the a consumer electronics, telecommunications, or computing product provide fo product does not otherwise violate any measures implementing paragraph (4). ICAN: clarification of relationship of exceptions to access control measures.]	pplicable national legislation, the] obligations in p ions, or defenses to copyright or related rights inf t imply any obligation to] require that the design ons, or computing product provide for a response t easures implementing paragraph (4).	<sup>29</sup> [US: The] [EU: In accordance with the applicable national legislation, the] obligations in paragraphs (4) and (5) [US: are][EU: may be] without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, [US: in implementing paragraph (4), no Party may][EU: paragraph (4) does not imply any obligation 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 paragraph (4).
[J: Japan reserves its position on Footnote Japan does not mandate devices to respo	Japan reserves its position on Footnote (8) because the acceptability of this Footnote depe Japan does not mandate devices to respond to any particular technological measure. ]	[J: Japan reserves its position on Footnote (8) because the acceptability of this Footnote depends on the scope of Paragraph 4. The current legislation of Japan does not mandate devices to respond to any particular technological measure.]
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nificantly impairotection of thoseiveness of legal[EU: delete paragraph 5 because the firstons of thosesentence is not necessary as we haveurty may provideadequate legal protection in paragraph 4 andadequate legal protection in paragraph 4 andthe second sentence is merged into the secondexceptionsandsentence of the new paragraph 4.2]		by authors in exercise of their d provides only is and limitations ption from any minal prosecution	oyright as well as uch measures.] efer to "adequate	<sup>30</sup> Negotiator's Note: This provision is subject to broader government action/sovereign immunity provision elsewhere in the Agreement. <sup>31</sup> [US: The] [EU: In accordance with the applicable national legislation, the]obligations in paragraphs (4) and (5) [US: are][EU: may be] without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, [US: in implementing paragraph (4), no Party may][EU: paragraph (4) does not imply any obligation 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 paragraph (4).	DG C I LK/mg 37
long as they do not significantly impair the adequacy of legal protection of those measures or the effectiveness of legal remedies for violations of those measures.][EU: each Party may provide for measures which would safeguard the benefit of certain exceptions and	s to copyright and rel in accordance with 1. <sup>30</sup> izerland understands that Pa require any party to ACT/ specific exceptions s to such measures. Since th	measures are unsed by authors in "connection with the exercise of their copyrights", Switzerland provides only for one set of exceptions and limitations that provide an exemption from any liability arising from criminal prosecution	or civil action under copyright as well as under the protection of such measures.] [NZ: The paragraphs refer to "adequate load motection" as well as remedies	<ul> <li><sup>30</sup> Negotiator's Note: This provision is subject to broader</li> <li><sup>31</sup>[US: The] [EU: In accordance with the applicable natio without prejudice to the rights, limitations, exceptions implementing paragraph (4), no Party may][EU: para selection of parts and components for, a consumer electro technological measure, so long as the product does not ot technological measure, so long as the product does not ot solutator's Note: This provision is subject to broader go</li> </ul>	6437/10

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			[EU: delete paragraph 5 because the first
			like to examine those phrases in connection with Paragraph 4. ]
			d sentence, especially the phra ving "so long as" since we wo
			Japan reserves its position on the
			measures are separate from and independent of each other
			copyright or related rights and the circumvention of effective technological
			that the liability for the infringement of
			[J: Japan accepts the concept of the first
			right given to copyright owners.]
			because access control is not an exclusive
			we do not support protection against
			protected by copyright. In particular,
			being mandated against circumvention of
			New Zealand does not support protection
			by copyright owners and the trafficking
			technological protection measures used
			paper only refers to parties providing "remedies against circumvention of
			In particular, we note that the discussion
			rights and the ACTA discussion paper.
			3
			which is inconsistent the objective of

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sentence is not necessary as we have adequate legal protection in paragraph 4 and the second sentence is merged into the second sentence of the new paragraph 4.2]		
<u> </u>	6. [EU: In implementing Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO Performances and Phonograms Treaty	Important. otherwise not consistent with the EU legislation.
Treaty on providing] [CAN: In employed the WIPO reference of the WIPO reference of the Treaty and Article 10 of the interviewed to the provise of the provis	on providing adequate and effective legal remedies to protect rights management information] each Party shall provide [EU:	
		Clarification of the notion of wilful conduct in the
	that apply to any person performing any of the following acts knowing that it will induce, enable. facilitate. or conceal an infringement	footnote (35) according to the EU legislation and WIPO (Art; 12 WPT and Art; 19 WPPT)
	of any copyright or related right:	
	(a) to remove or alter any [AUS/J/EU: electronic] right management information <sup>36</sup>	
	(b) to distribute, import for distribution,	
	broadcast, communicate, or make available to the public. copies of works, performances, or	
	phonograms, knowing that [AUS/J/EU: electronic] rights management information	
<sup>33</sup> [EU: For the nurnose of this Article, willful	l conduct means knowingly performing withou	<sup>33</sup> [EU]: For the purpose of this Article, willful conduct means knowingly performing without authority any of the following acts listed under
subparagraph 6 (a) or (b), if such person kn	nows or has reasonable grounds to know that b	subparagraph 6 (a) or (b), if such person knows or has reasonable grounds to know that by so doing he is inducing, enabling, facilitating, or

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The EU suggests merging paragraph 7 into a sub- paragraph 2.	<ul> <li>concealing an infingement of any copyright or any rights related to copyright.]</li> <li>For purposes of this Article, [1: electronic] rights management information means:</li> <li>(a) information that identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram; or</li> <li>(b) information about the terms and conditions of the work, performance, or phonogram; or</li> <li>(c) any numbers or codes that represent such information.</li> <li>(c) any numbers or codes that represent such information.</li> <li>(c) any numbers or codes that represent such information.</li> <li>(c) any numbers or codes that represent such information.</li> <li>(e) EU: For the purpose of this Article, willful conduct means knowingly performing without authority any of the following acts listed under available of a work, performance, or phonogram to the work, the performance, or phonogram.</li> <li>(a) information that identifies a work, performance, or phonogram.</li> <li>(b) information that identifies a work, performance, or phonogram of the performance, or the producer of the phonogram, or the owner of any right in the work, performance, or phonogram.</li> <li>(b) information that identifies a work, performance, or phonogram.</li> <li>(c) any numbers or codes that represent such information.</li> <li>(d) information that identifies a work, performance, or phonogram.</li> <li>(e) information about the terms and conditions of the use of the work, performance, or phonogram.</li> <li>(f) information that identifies a work, performance, or phonogram.</li> <li>(e) information about the terms and conditions of the work, performance, or phonogram.</li> <li>(f) information about the terms and conditions of the work, performance, or phonogram.</li> <li>(f) information about the terms and conditions of the work, performance, or phonogram.</li> </ul>	LK/mg 40 EN
has been removed or altered without authority. [EU: 6.2 Each Party may adopt appropriate exceptions to the requirements of Th subparagraphs (a) and (b)] pa	<ul> <li><sup>34</sup> For purposes of this Article, [1: electronic] rights related to copyright.]</li> <li><sup>35</sup> For purposes of this Article, [1: electronic] rights management information means: <ul> <li>(a) information that identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the produce phonogram; or the owner of any right in the work, performance, or phonogram;</li> <li>(b) information about the terms and conditions of the use of the work, performance, or phonogram; or</li> <li>(b) information about the terms and conditions of the use of the work, performance, or phonogram; or</li> <li>(c) any numbers or codes that represent such information.</li> <li><sup>36</sup> For the purpose of this Article, willful conduct means knowingly performing without authority any of the following acts listed under available of a work, performance, or phonogram to the public.</li> <li><sup>37</sup> [EU: For the purpose of this Article, willful conduct means knowingly performing without authority any of the following acts listed under available of a work, performance, or phonogram to the public.</li> <li><sup>36</sup> For purposes of this Article, juilful conduct means knowingly performing without authority any of the performance, or phonogram to the public.</li> <li><sup>36</sup> For purposes of this Article, juilful conduct means knowingly performing without authority any of the performance, or the produce subparagraph 6 (a) or (b), if such person knows or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating, or concesting an infingement of any opyright or any right related to copyright.</li> <li><sup>36</sup> For purposes of this Article, [J: electronic] rights management information means: <ul> <li>(b) information that identifies a work, performance, or phonogram;</li> <li>(b) information about the terms and conditions of the work, performance, or phonogram; or the portice phonogram; or the work, performance, or phonogram; or the work, performance, or phonogram;</li> <li>(b) information ab</li></ul></li></ul></li></ul>	DG CI RESTREINT UE
conduct, that apply to any person performing any of the following acts knowing [J: or with respect to civil remedies having reasonable grounds to know] that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right [J: covered by the treaties above]: (a) to remove or alter any [AUS/J/EU: electronic] right management information <sup>34</sup>	<ul> <li><sup>34</sup> For purposes of this Article, [J: electronic] rights management information means: (a) information that identifies a work, performance, or phonogram; the author of t phonogram; or the owner of any right in the work, performance, or phonogram; (b) information about the terms and conditions of the use of the work, performance (c) any numbers or codes that represent such information.</li> <li><sup>35</sup> [EU: For the purpose of this Article, willful conduct means knowingly performing subparagraph 6 (a) or (b), if such person knows or has reasonable grounds to know subparagraph 6 (a) or (b), if such person knows or has reasonable grounds to know infingement of any rights management information means: (a) information that identifies a work, performance, or phonogram to the public.</li> <li><sup>36</sup> For purposes of this Article, [J: electronic] rights management information means: (a) information that identifies a work, performance, or phonogram; the author of the phonogram; or the owner of any right in the work, performance, or phonogram; the author of the phonogram; or the owner of any right in the work, performance, or phonogram; the author of the phonogram; or the owner of any right in the work, performance, or phonogram; the author of the phonogram; or the owner of any right in the work, performance, or phonogram; (b) information about the terms and conditions of the use of the work, performance (c) any numbers or codes that represent such information.</li> </ul>	6437/10 ANNEX

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			will ment" Thus
			remedies having reasonable grounds to throw that will induce
			knowing, or with respect to civil
			performing any of the following acts
			remedies against any person knowingly
			stipulate "Contracting Parties shall
			of the WCT and Article 19 of the WPPT
			altering. It should be noted that Article 12
			electronic KJML, and outer acts with the
			remedies against removing or altering
			RMI to prov
			Contracting party's obligations
			wind transies evolution the transies
			[J: The word "electronic" should be inserted before "rights management
			requirements of subparagraphs (a) and
			Each Party may ac
			removed or altered without authority.
			that [AUS/J/EU: electronic]rights
			ses, or phonograms, ki
			available to the public [J: without] authority] conjes of works.
			broadcast, communicate, or make
			(b) to distribute, import for distribution,

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			[J: The brackets in paragraph 7 intends to confirm that exceptions to the requirements regarding electronic RMI are permissible but they should not impair the adequacy of the restrictions stipulated in paragraph 6.]
			[NZ: New Zealand does not support the protection of RMIs extending to information that identifies a performance, the performer of the performance, the owner of any right in the performance, or the producer of a phonogram.]
		[EU: merge paragraph 7 with paragraph 6, in the same line as we did for paragraphs 4 and 5.]	limitations or exceptions to the requirements of subparagraphs (a) and (b) of paragraph (6) [J: so long as they do not significantly impair the adequacy of legal protection or effectiveness of legal remedies against the acts of provided in that paragraph.]
			The word "without authority" should be inserted as it is in the WCT and the WPPT.]
			expression of this provision should be examined again in civil remedies context.

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U: merge in the s agraphs 4	
[EU: merge paragraph 7 with paragraph 6, in the same line as we did for paragraphs 4 and 5.]	

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