

{Section G: Copyright and Related Rights}

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See also, in a separate document, Addendum XV on Internet Service Providers, and the extensive provisions in Section H on enforcement.

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{Section G: Copyright and Related Rights}

Article QQ.G.1: {Copyright and Related Rights/Right of Reproduction}

Each Party shall provide [143] that authors, performers, and producers of phonograms [144] have the right [145] to authorize or prohibit all reproductions of their works, performances [146], and phonograms in any manner or form, including in electronic form.

Article QQ.G.2 {Copyright/Right of Communication to the Public}

Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. [147]

Article QQ.G.4 {Right of Distribution}

Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the making available of the original and copies [148] of their works, performances, and phonograms through sale or other transfer of ownership. [149,150]

[143] The Parties reaffirm that it is a matter for each Party’s law to prescribe that works in general or any specified categories of works, performances, and phonograms shall not be protected by copyright or related rights unless they have been fixed in some material form.

[144] References to “authors, performers, and producers of phonograms” refer also to any successors in interest.

[145] With respect to copyrights and related rights in this Chapter, the “right to authorize or prohibit” and the “right to authorize” refer to exclusive rights.

[146] With respect to this Chapter, a “performance” means a performance fixed in a phonogram unless otherwise specified.

[147] It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Chapter or the Berne Convention. It is further understood that nothing in this article precludes a Party from applying Article 11*bis*(2) of the Berne Convention.

[148] The expressions “copies” and “original and copies” subject to the right of distribution in this paragraph refer exclusively to fixed copies that can be into circulation as tangible objects.

[149] ~~Nothing in this Agreement shall affect a Party’s right to determine the conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of their works, performances, or phonograms with the authorization of the author, performer, or producer.~~

[150] ~~Negotiator’s Note: AU’s support for this provision may be contingent on how the exhaustion issue is dealt with in General Provisions.~~

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Article QQ.G.5: {No Hierarchy}

Each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer is also required. Likewise, each party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

Article QQ.G.14: {Related Rights}

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms who are nationals [CA propose: [151]] of another Party and to performances or phonograms first published or first fixed in the territory of another Party. [CA propose: [152]] A performance or phonogram shall be considered first publication in the territory of a Party in which it is published within 30 days of its original publication.[153]
2. Each Party shall provide to performers the right to authorize or prohibit:
 - (a) broadcasting and communication to the public of their unfixed performances, except where the performance is already a broad performance; and
 - (b) fixation of their unfixed performances.

[CA oppose:

3. (a) Each party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting or any communication to the

[151] [CA propose: For the purposes of determining points of attachment under this Article, with respect to performers, a party may treat “nationals” as those who would meet the criteria for eligibility under the WPPT Article 3.]

[152] For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both. [CA propose: For greater certainty, consistent with QQ.A.9, it is understood that Parties shall accord to performances and ~~sound recordings~~ phonograms first published or first fixed in the territory of another Party, treatment no less favourable than it accords to performances or ~~sound recordings~~ phonograms first published or first fixed in its own territory.]

[153] For purposes of this Article, fixation means the finalization of the master tape or its equivalent.

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public of their performances or phonograms, by wire or wireless means [154] [~~155~~][156], and the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(b) Notwithstanding subparagraph (a) and Article [QQ.G.16] [*three step test*], the application of this right to analog transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for such activities, shall be a matter of each Party's law.][CA propose: [157]]

[CA propose: Alt 3. Each Party shall provide to performers and producers of phonograms the rights to authorize or prohibit:

1. the broadcasting or any communication to the public of their performances or phonograms; and
2. the making available to the public, by wire or wireless means, of their performances and phonograms in such a way that members of the public may access them from a place and a time individually chosen by them.

Where, upon the date of signature of this Agreement, the right in subparagraph (a) has not been implemented by a Party, the requirement may be satisfied by providing a right to a single equitable remuneration for the direct or indirect use of phonograms published [158] for commercial purposes for broadcasting or for any communication to the public.[159]]

[154] With respect to broadcasting and communication to the public, a Party may satisfy the obligation by applying Article 15(1) and 15(4) of the WPPT and may also apply Article 15(2) of the WPPT, as long as it is done in a manner consistent with that Party's obligations under Article QQ.A.7 (National Treatment).

[156] For greater certainty, the obligation under Article QQ.G.14.3 does not include broadcasting or communication by the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audiovisual work.

[157] [CA propose: For the purposes of this Article, it is understood that a party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that such retransmissions are [AU propose: permitted under a Party's law or] lawfully permitted by that Party's government communications authority; any entity engaging in such retransmissions complies with the relevant rules, orders or regulations of that authority; and such retransmission do not include those delivered and accessed over the Internet..]

[158] The term published in this paragraph includes phonograms that are made available in accordance with Article 15(4) of the WPPT.

[159] Where a Party has availed itself of the option contained in Article 15(3) of the WPPT, the obligation contained in [QQ.A.7 - national treatment] does not apply to the extent that a Party makes use of a reservation taken under that Article.

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Article QQ.G.15: For purposes of this [Article QQ.G.1 and Article QQ.G.3 - 11-article to be verified on scrub], the following definitions apply with respect to performers and producers of phonograms:

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

Article QQ.G.6: Each shall provide that, where the term of protection of a work including a photographic work), performance, or phonogram is to be calculated [160]:

[160] For greater certainty, in implementing QQ.G.6, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of works, performances and phonograms during their terms of protection, consistent with QQ.G.16 and that Party’s international obligations.

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- (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and [50][70][100] years after the author's death; and
- (b) on a basis other than the life of a natural person, the term shall be:
- (i) not less than [50][70][75][95] years from the end of the calendar year of the first authorized publication [161] of the work, performance, or phonogram, or
- (ii) failing such authorized publication within [25][50] years from the creation of the work, performance, or phonogram, not less than [50][70][100][120] years from the end of the calendar year of the creation of the work, performance, or phonogram. [162]

[JP propose: Notwithstanding Article QQ.A.7.1, a Party may limit the term provided to authors of another Party to the term provided to authors under the legislation of the other Party.

Alt: Nothing in this agreement shall prevent a Party from taking measures necessary for it to maintain the measures covered by Article 7(8) of the Berne Convention that have been introduced with regard to a non-Party to this Agreement.]

Article.GG.8: {Berne 18}

Each Party shall apply Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (1971) Berne Convention) and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to works, performances, and phonograms, and the rights in and protections afforded to that subject matter as required by Section G. [163]

[161] For greater certainty, for the purposes of Article QQ.G.6(b)(i) and (ii), where a party's law provides for the calculation of term from fixation rather than from the first authorized publication, that Party may continue to calculate term from fixation.

[162] For greater certainty, a party may calculate a term of protection for an anonymous or pseudonymous work or a work of joint authorship in accordance with Article 7(3) or *7bis* of the Berne Convention, provided that the Party implements the corresponding numerical term of protection required under Article QQ.G.6.]

[163] Negotiator's Note: MY agrees but reserves the right to revisit where there are changes to certain positions on substantive obligations in the Copyright Section, if required.

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Article QQ.G.16: {Limitations and Exceptions}

(a) With respect to Section G, each party shall confine limitations or exceptions to exclusive right to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.

(b) Article QQ.G.16(a) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

Article.GG.Y {Limitations and Exceptions}

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, *inter alia* by means of limitations or exceptions that are consistent with Article QQ.G.16.1, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled. [164][165]

Article QQ.G.ZZ: {Internet Retransmission}

[US/SG/PE propose: CL/VN/MY/NZ/MX/CA/BN/JP oppose: No Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal [SG oppose: and, if any, of the signal].[166]][167]

[164] As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (June 27, 2013). The Parties recognize that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

[165] For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article QQ.G.16.3.

[166] For purposes of this Article and for greater certainty, retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory does not constitute retransmission on the Internet.

[167] Negotiators' note: PE is considering the use of the work "emissions" in addition to "signals" as an alternative.

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[ALTERNATE: [168]]

FN attached to QQ.G.2 : A Party may not limit this right in order to provide for a compulsory remuneration regime in cases where an over the air signal containing an audiovisual work is transmitted on the internet.]

Article QQ.G.9: [Contractual Transfers]

Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right [169] in a work, performance, or phonogram:

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

(b) by virtue of a contract, including contracts of employment underlying the creation of works, performances, and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.[170]

Article QQ.G.10 {Technological Protection Measures}[171][172]

(a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms,[173] each Party shall provide that any person who:

[168] Negotiator's note: If this alternative is used, it is understood that there may be changes required in this language.

[169] For greater certainty, this provision does not affect the exercise of moral rights.

[170] Nothing in this Article affects a Party's ability to establish: (i) which specific contracts underlying the creation of works or phonograms shall, in the absence of a written agreement, result in a transfer of economic rights by operation of law; and (ii) reasonable limits to protect the interests of the original right holders, taking into account the legitimate interests of the transferees.

[171] Nothing in this agreement shall require any Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the sole purpose of which is to control market segmentation of legitimate physical copies of cinematographic film, and is not otherwise a violation of law.

[172] Negotiator's Note: NZ/CA/MY/VN's agreement to this article is subject to securing sufficient flexibility to adopt exceptions and limitations to the prohibition on circumvention for non-infringing uses.

[173] {NZ propose: For greater certainty, nothing shall prevent a Party from limiting 'unauthorized acts in respect of their works, performances, and phonograms' to infringing acts, where appropriate, subject to any other [remedies/liability] available under the Party's law.}

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(i) knowingly, or having reasonable grounds to know,[174] circumvents without authority or any effective technological measure that controls access to a protected work,[175] performance, or phonogram;[176] or

(ii) manufactures, imports, distributes[177], offers for sale or rental to the public or otherwise provide devices, products, or components, or offers to the public or provides services, that:

(A) are promoted, advertised, or otherwise marketed by that person[178] for the purpose of circumventing any effective technological measure,

(B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure,

(C) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

shall be liable and subject to the remedies set out in [Article QQ.H.4.17(Civil Judicial Proceedings relating to TPMs and RMIs)[180]].

Each Party [~~US/CA/SG/NZ/MX/PE/AU/BN/JP/CL/MY propose: shall~~] [~~VN propose: may~~] provide for criminal [~~VN propose: or alternatively, administrative~~] procedures and penalties to be applied where any person is found to have engaged willfully[181] and for the purposes of commercial advantage or financial gain[182] in any of the above above activities.[183] [VN propose: [184] [6]

[174] A Party may provide that reasonable grounds to know may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.

[175] For greater certainty, in this Chapter, cinematographic works and computer programs are included in the term “work”.
Chair’s note: Ultimate placement of this FN to be determined based on when the word “works” first appears in this Chapter as this is a cross-section issues.

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

[177] A Party may provide that the obligations described in paragraph (ii) with respect to manufacturing, importation, and distribution apply only where such activities are undertaken for sale or rental, or where such activities prejudice the interests of the right holder of the copyright or related right.

[178] It is understood that this provision still applies where the person promotes, advertises, or markets through the services of a third party.

[179] A Party may comply with this paragraph if the conduct referred to in (ii) does not have a commercially significant purpose or use other than to circumvent any effective technological measure.

[180] Negotiator’s Note: Parties’ position on this reference is pending resolution of the discussion on QQ.H.4.17 (Civil Judicial Proceedings relating to TPMs and RMIs). .

[181] For greater certainty, for purposes of Articles QQ.G.10 and QQ.G.13, it is understood that willfulness contains a knowledge element.

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Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public non-commercial broadcasting entity. A Party may also provide that the remedies set out in Article QQ.H.4.17 (Civil Judicial Proceedings relating TPMs and RMIs) do not apply to those same entities provided that the above activities are carried out in good faith without knowledge that the conduct is prohibited.

(b) In implementing subparagraph (a), no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing subparagraph (a).

(c) Each Party shall provide that a violation of a measure implementing this paragraph is independent of any infringement that might occur under the Party's law on copyright and related rights. [185]

(d) (i) Each Party may provide certain exceptions and limitations to the measures implementing subparagraphs (a)(i) and (ii) in order to enable non-infringing uses where there is an actual or likely adverse impact of those measures on non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rightsholders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party's law.[186]

[182] For greater certainty, for purposes of Articles QQ.G.10, QQ.G.13 and QQ.H.7.1, it is understood that a Party may treat "financial gain" as "commercial purposes in its law.

[183] For purposes of greater certainty, no Party is required to impose liability under Articles [QQ.G.10(TPMs)] and [QQ.G.13 (RMIs)] for actions taken by that Party of a third party acting with the authorization or consent of that Party.

[184] Negotiator's note: VN propose as part of enforcement package: A Party may comply with the obligation under this paragraph by providing criminal procedures and penalties to be applied to activities against TPM in computer systems or digital devices as well as preparations or attempts to commit a copyright offence, provided that any other activities refer to in this paragraph shall be subject to administrative procedures and penalties as referred to in FN {to the title of Article QQ.H.7}.

[185] [For greater certainty, a Party is not required to treat the criminal act of circumvention set forth in subparagraph (a)(i) as an independent violation, where the Party criminally penalizes such acts through other means.

[186] For greater certainty, nothing in this provision requires Parties to make a new determination via the legislative, regulatory, or administrative process with respect to exceptions and limitations to the legal protection of effective technological measures: i) previously established pursuant to trade agreements in force between Parties; or ii) previously implemented by the Parties, provided that such exceptions and limitations are otherwise consistent with Article QQ.G.10(d).

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(ii) Any exceptions and limitations to the measures implementing subparagraph (a)(ii) shall be permitted solely to enable the legitimate use of an exception or limitation permissible under Article QQ.G.10 (TPMs) by its intended beneficiaries [187] and shall not authorize the making available of devices, products, components, or services beyond such intended beneficiaries. [188]

(iii) By providing exceptions and limitations under paragraph d(i) and (ii) a Party shall not undermine the adequacy of that Party's legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures, that authors, performers, or producers of phonograms used in connection with the exercise of their rights, or that restrict unauthorized acts in respect of their works, performances or phonograms, as provided for in this Chapter.

(e) "Effective technological measure" means any effective [189] technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or related rights related to a work, performance or phonogram.

Article QQ.G.13: {Copyright and Related Rights / Rights Management Information}

In order to provide adequate and effective legal remedies to protect rights management information: [190]

(a) each Party shall provide that any person who without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of the copyright or related right of authors, performers, or producers of phonograms,

(i) knowingly [191] removes or alters any rights management information;

[187] For greater certainty, a Party may provide an exception to a(ii) without providing a corresponding exception to a(i), provided that the exception to a(ii) is limited to enabling a legitimate use that is within the scope of exceptions or limitations to a(i) as provided under d(i).

[188] For the purposes of interpreting subparagraph d(ii) only, subparagraph a(i) should be read to apply to all effective technological measures as defined in paragraph (e), mutatis mutandis. Negotiator's note: agreement ad referendum on this footnote; further technical work required.

[189] For greater certainty, it is understood that a technological measure that can, in a usual case, be circumvented accidentally is not an "effective" technological measure.

[190] Each Party may comply with the obligations in this Article by providing legal protection only to electronic rights management information.

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[US/BN/SG/NZ/PE/CL/JP/AU/MX/MY propose: CA/VN/JP oppose: (ii) knowingly distributes or imports for distribution rights management information knowing that the rights management information has been altered without authority [CA propose:[192]];] or

(iii) knowingly distributed, imports for distribution, broadcasts, communicates or makes available to the public copies of works, performances, or phonograms, knowing that rights management information has been removed or altered without authority,

shall be liable and subject to the remedies set out in [Article QQ.H.4(17)].[193]

Each [7] Party [US/SG/MX/NZ/PE/JP/BN/AU/CL/MY propose: shall] [~~VN/CA~~ propose: may] provide for criminal [~~VN: or alternatively, administrative~~] procedures and penalties to be applied where any person is found to have engaged willfully and for purposes of commercial advantage or financial gain in any of the above activities.[VN propose:[194]]

Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public noncommercial broadcasting entity.[195]

(b) For greater certainty, nothing prevents a Party from excluding lawfully authorized activities carried out for the purpose of law enforcement, essential security interests or other related governmental purposes, such

[191] Each Party may extend the protections afforded by this paragraph to circumstances in which a person engages without knowledge in the acts in subparagraph (i), (ii) and (iii), and to other related rights holders.

[192][CA propose: A Party may meet its obligation under paragraph (a)(ii), where it provides effective protection for either original compilations or moral rights, provided that the acts described in paragraph (a)(ii) are treated either as infringements of copyright in such original compilations or as infringements or moral rights.] CA: Text has been worked out between CA/US/JP. US: Still working on JP/CA on redrafting the footnote. One option is to leave it and say JP/US/CA is to revert with amended language.

[193]Negotiator's Note: CL's position on this reference is pending resolution of the discussion on QQ.H.4(17).

[194]Negotiator's Note: [VN propose as part of enforcement package: A Party may comply with the obligation under this paragraph by providing criminal procedures and penalties to be applied to activities against TPM in computer systems or digital devices as well as preparations or attempts to commit a copyright offence, provided that any other activities referred to in this paragraph shall be subject to administrative procedures and penalties as referred to in FN {to the title of Article QQ.H.7}.]

[195] For greater certainty, a Party may treat a broadcasting entity established without a profit-making purpose under its law as a public non-commercial broadcasting entity.

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as performance of a statutory functions, from measures implementing subparagraph (a).

- (c) “Rights management information” means:
- (i) information that identifies a work, performance, or phonogram, the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance or phonogram;
 - (ii) information about the terms and conditions of the use of the work, performance, or phonogram; or
 - (iii) any numbers or codes that represent such information,

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

Article QQ.G.18: {Collective Management}

The Parties recognize the important role collective management societies for copyright and related rights in collecting and distributing royalties^[196] based on practices that are fair, efficient, transparent and accountable, and which may include appropriate record keeping and reporting mechanisms.

[196]For greater certainty, royalties may include equitable remuneration.