

**CHECKLIST OF ISSUES ON ENFORCEMENT<sup>1</sup>**

Replies by Guatemala

**Civil and administrative procedures and remedies**

- (a) Civil judicial procedures and remedies

**1. Specify the courts which have jurisdiction over IPR infringement cases.**

Under Article 181 of the Industrial Property Law, the civil courts are competent to hear civil actions brought under the terms of the Law.

Again, under Article 133 of the Law on Copyright and Related Rights, civil actions are brought under oral proceedings as established in the Code of Civil and Commercial Procedure, the general provisions of which establish the jurisdiction of the civil courts for this type of proceeding.

Appeals against decisions on first instance lie with the Chambers of the Court of Appeals or with the Civil Courts of First Instance in cases where a decision has first been handed down by a magistrates' court competent to deal with the amount involved. In this regard, magistrates' courts have jurisdiction in cases involving an amount of not more than 30,000 quetzales in the Municipality of Guatemala including the Capital of the Republic; in the remaining municipalities, the amount is established as 25,000 quetzales and 10,000 quetzales, as determined in this respect by the Supreme Court of Justice.

**2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the court by the right holder?**

Standing

Anyone who is an intellectual property right holder has standing to bring civil actions to assert his rights.

It should be stated that, under Article 179 of the Industrial Property Law, except where otherwise expressly or contractually stipulated, an exclusive licensee of an industrial property right has standing to bring legal action established in that Law, in order to protect his rights as such. In the case of a non-exclusive licensee, if the licence contract does not authorize him to take judicial action, he may initiate the relevant proceedings only if he establishes that he has requested the right holder to initiate them and more than two months have elapsed between the date of the request without them

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<sup>1</sup> Document IP/C/5.

having been brought. Nevertheless, before this period expires, the licensee may request and obtain the protective orders established in the Law. The holder of the right infringed may at any time appear in person in the proceeding initiated by the licensee.

Again, pursuant to Article 180 of the Industrial Property Law, in the case of co-holders of a right, any of the co-holders has standing to bring court action for an infringement, without the need for the consent of the other co-holders, except where otherwise agreed between them.

The Industrial Property Law also stipulates in Article 204 that anyone who deems that he is affected may request the competent authority to ascertain and declare the unlawful character of an alleged act of unfair competition. In this respect, under the Article, anyone, the person directly affected and, also, any association or organization representative of any professional, business or consumer sector, provided the members' interests are affected, may bring direct action for an act of unfair competition. To bring such an action it is not essential to establish the fact of being the holder of an industrial property right, and, consequently, the plaintiff is only required to prove the existence of the act of unfair competition by the defendant.

As for copyright and related rights, while there are no express provisions equivalent to those in the Industrial Property Law, some provisions do implicitly recognize the standing of authors, their successors in title or related holders. Such is the case with Article 20 of the Law on Copyright and Related Rights, whereby the death of the author, entails transmittal to his heirs of the moral rights of paternity and integrity recognized in Article 19(a) and (b) and also in Article 21 of the Law, which assigns to the right holder or anyone expressly authorized by him (licensee) the use of the economic or financial rights recognized in that Article, which obviously includes the ability to bring civil actions.

Furthermore, under Article 115(a) of the Law on Copyright and Related Rights, collective management companies, among others, are entitled to act on behalf of their members with the country's judicial and administrative authorities in all matters relating to the members' general and particular interests, except where members themselves decide to bring an action for infringement of their rights.

It is important to mention that the Code of Civil and Commercial Procedure, which is applicable to civil proceedings pertaining to intellectual property, includes Article 51, whereby anyone seeking to enforce a right or requesting assistance, may do so in the courts in the manner described in the Code. The second paragraph of the Article adds that, for the purpose of making a claim or counterclaim, it is essential to have an interest therein.

### Representation

Under Article 7 of the Industrial Property Law, when the plaintiff or industrial property right holder has his domicile or registered address abroad, he shall be represented by an agent domiciled in Guatemala, who shall be an active qualified attorney; an agent must have sufficient authority to represent the principal in any matter and in any action relating to the acquisition, preservation and protection of the rights governed by this Law. To this end, he must be vested with the special authority of legal agents, pursuant to the terms of the Judicial Organization Law. If the agent does not have such authority, he shall be deemed to be vested with such authority by Law.

The Law on Copyright and Related Rights does not include equivalent provisions, for which reason the general provisions of the Code of Civil and Commercial Procedure and of the Judicial Organization Law apply. Article 114 of the Law merely establishes that, for the protection of members' economic rights, collective management companies shall be deemed to be their agents simply by being affiliated to them.

Pursuant to Article 44 of the Code of Civil and Commercial Procedure, anyone who freely enjoys his rights is entitled to take legal action. Persons not so entitled may be represented, assisted or authorized in accordance with the rules governing their legal capacity. Legal entities may take legal action by means of their representatives, in accordance with the law, their statutes or by-laws.

Under Articles 45 and 50 of the Code of Civil and Commercial Procedure representatives must justify their legal capacity in their first appearance in court, submitting the document of representation, and they must appear accompanied by a qualified attorney, except in cases involving a minimal amount (less than 1,000 quetzales) or when the place of the court has fewer than four qualified attorneys.

It is important to bear in mind that, under Article 188 of the Judicial Organization Law, persons who are entitled to act in court and, for any reason, cannot or do not want to do so in person, or legal persons who do not wish to attend through their chairman, managers or directors, may appear in any judicial proceeding through legal agents, provided they are aware of the acts that form the subject of the proceedings. Under the Article in question, in the case of companies formed abroad, their representatives with judicial authority must be replaced by an attorney in order to appear in court, if they are not members of that profession.

#### Mandatory appearance in court

Civil proceedings do not require mandatory personal appearance by the right holder, except in cases where a party to the proceeding expressly requests the opposing party to appear in person in order to respond to positions in the evidence brought forward in statements or when the agent or representative is unaware of the facts, as established in Article 132 of the Code of Civil and Commercial Procedure; or when one of the parties to the proceeding makes a confession in the claim or at another stage in the proceeding, in which case the interested party may request the court to order appearance by the person for the purposes of verifying the confession, and the summons shall be issued so that, if the person fails to heed it without just cause, the verification shall be regarded as having been effected, in accordance with the terms of Article 141 of the Code of Civil and Commercial Procedure.

### **3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to the proceeding to produce evidence which lies within its control?**

Neither the Industrial Property Law nor the Law on Copyright and Related Rights contains provisions on this matter. However, Article 182 of the Code of Civil and Commercial Procedure, which applies in suppletive form, does allow for this but it is confined to documentary evidence. Actually, this Article establishes that, when one of the parties to the proceeding needs to use a document which it claims is in the possession of the opposing party, it is required to submit a copy of it or, at least, all data known to it about the content and, in addition, to prove that the opposing party is or has been in possession of the document.

Under the same Article, in such a case the court will order the opposing party to hand over the document within the period established by the court with a warning that, if it does not hand over the document and does not produce counter information, the court will rule that the text of the document mentioned by the party requesting it is accurate, or will declare that the data supplied in connection with its content shall be regarded in the ruling as accurate.

If the evidence concerning the existence of the document in possession of the party is conflicting, the court shall reserve this announcement until the time of the final ruling, when it may draw from the statements by the parties and the evidence supplied any assumptions that are warranted.

**4. What means exist to identify and protect confidential information brought forward as evidence?**

In principle, the Constitution of the Republic, by recognizing the basic guarantee of public disclosure of administrative acts, which also applies to judicial proceedings, regards the supply of information under a guarantee of confidentiality as an exception.

Article 194 of the Industrial Property Law contains an express reference to the obligation to protect confidential information in cases where judicial authorities ordering a border measure authorize the person who obtained them free access to the detained goods or products in order to be able to inspect them and obtain additional proof in support of his claim.

Again, Article 199 of the Industrial Property Law, which sets out the principle of reversal of the burden of proof in the case of claims made for infringement of a patent-protected procedure, recognizes that in the submission of any evidence to the contrary, account shall be taken of the legitimate interests of the defendant regarding protection of his business secrets, although this shall not relieve him of the burden of proving that he uses a procedure different from one that is patent-protected.

Furthermore, Article 129 of the Code of Civil and Commercial Procedure contains a general rule prescribing the possibility of confidential taking of evidence when, on account of its nature, the judicial authority deems it appropriate.

Again, Article 63 of the Judicial Organization Law, in enunciating the principle that the acts and proceedings of the Courts of the Republic are public, allows exceptions to that principle for cases where, by legal mandate, for reasons of morality or public safety, they must be held confidential. In this respect, the Article allows the court to qualify acts or proceedings as confidential in very special cases and under its strict responsibility.

**5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative and jurisprudential, for their use:**

- **Injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**
- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

Injunctions

Article 185 of the Industrial Property Law stipulates that a ruling stating that any of the actions provided for in the Law is applicable must, in addition to resolving the merits of the case:

- Order that the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or be destroyed as articles of unlawful trade, principally when they affect or may affect human or animal or plant life or health, or may cause serious prejudice to the environment;
- order that the materials/implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort for the owner,

disposed of outside the channels of commerce or destroyed as articles of unlawful trade, in such a manner as to minimize the risks of further infringements;

- prohibit the entry of the infringing goods into the channels of commerce;
- order that the infringing goods, after the elimination or removal of distinctive signs, may be given free of charge by the court to private or public non-profit-making bodies for use exclusively in social welfare work or activities;
- order cessation of the infringing act or acts of unlawful competition and adoption of the requisite measures to prevent the consequences and avoid a repetition thereof, as well as the award of damages.

In the Law on Copyright and Related Rights, Article 134 *bis* establishes that the court, in the ruling that any of the actions provided for in the Law is applicable, must, in addition to determining the merits, depending on the case and in the light of the need for proportionality between the gravity of the infringement, the measures ordered and the rights of third parties shall:

- Order that the infringing goods be, without compensation of any sort, disposed of outside trade in such a manner as to avoid harm caused to the right holder, or be destroyed as articles of unlawful trade. In the case of clothing from which the infringing element may be removed, the court may order that, once the element has been removed and, if deemed appropriate, it be given free of charge to private or public non-profit-making bodies for use exclusively in social welfare works or activities, with a written record of the handing over of the goods.
- Order that the materials/implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort for the owner, disposed of outside trade and, if deemed appropriate, be given free of charge by the court to public or private non-profit-making bodies for use exclusively in social welfare works or activities, with a written record of the handing over of the goods.
- Prohibit entry of the infringing goods into trade.
- Order cessation of the infringing acts and adoption of the requisite measures to prevent the consequences and avoid a repetition thereof, as well as the award of damages.

Damages, including recovery of profits, and expenses, including attorney's fees

Article 1645 of the Civil Code establishes the general rule that anyone causing harm or prejudice to another, whether intentionally or by neglect or carelessness, is required to make good the act, except where it can be demonstrated that the harm or prejudice was a result of the inexcusable negligence or fault of the victim. The Judicial Organization Law also includes a general provision establishing that, in the event of an award of damages, the ruling shall specify the net amount. The provision adds that, if this is not possible, the ruling shall establish at least, in accordance with what has been requested, the bases for determining the assessment of the points at issue, or fixing the amount by experts.

The Industrial Property Law establishes in Article 185(e) that the ruling stating that any of the actions provided for in the Law is applicable requires the court to order the award of damages. Again, a similar rule is set out in Article 134 *bis* (d) of the Law on Copyright and Related Rights.

As to the matter of attorney's fees, Article 572 of the Code of Civil and Commercial Procedure sets out the general rule that each party to the proceeding is directly responsible for the costs incurred for the acts carried out and requested by it. However, the rule also establishes that in the event of an order to pay costs, the losing party shall compensate the other for all the necessary costs it has caused. Indeed, Article 573 of the same Code sets out the general requirement that the court, in the ruling concluding a proceeding, must sentence the losing party to payment of costs in favour of the other party. This requirement to pay costs entails exceptions in instances where judicial action has obviously been taken in good faith, where the claim or counterclaim involves exaggerated pretensions, where the judgement takes account solely of part of the fundamental pretensions of the claim or counterclaim, where defences of importance invoked by the losing party are admitted, where neither party wins or where the defendant accepts the claim.

Furthermore, Article 578 of the Code of Civil and Commercial Procedure determines the costs that are payable: cost of stamp duties, the fees of the chief attorney, notaries, attorneys, experts, depositaries and administrators; as well as costs incurred for seizures, dispatches, orders, publications, certifications, inventories, entries in registers and compensation to witnesses for time spent and travel costs. This rule makes it clear that judicial orders shall not entail personal costs unless they are costs of travel, payment of vehicles, transport and communications and the purchase of substances or other articles necessary to ascertain a fact.

#### Destruction or other disposal of infringing goods and materials/implements for their production

Article 185(a) of the Industrial Property Law establishes that where the ruling declares that any of the actions provided for in the Law is applicable the court shall, as appropriate, order that the infringing goods be destroyed as articles of unlawful trade, principally when they affect or may affect human or animal or plant life or health or may cause serious prejudice to the environment.

Similarly, Article 185(b) of the Industrial Property Law stipulates that, in the ruling, the court shall also, where appropriate, order that the materials/implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort for the owner, disposed of outside the channels of commerce or destroyed as articles of unlawful trade, in such a manner as to minimize the risks of further infringements. Also, Article 187(e) of the Industrial Property Law specifies that the court may order "any necessary measures to avoid the continuation or repetition of the infringement or of the acts of unlawful competition, including destruction of the products, materials or means referred to in paragraph (b) when they cause harm or constitute a risk to human, animal or plant life or health or to the environment ...".

In similar terms, the Law on Copyright and Related Rights establishes in Article 134(*bis*) that, in the ruling declaring that any of the action provided for in the Law is applicable, the court shall, in addition to determining the merits, order that the infringing goods be destroyed as articles of unlawful trade. Article 133 *bis* of the same Law also establishes that the court may order as a protective measure any measure necessary to avoid the continuation or repetition of the infringement, including destruction of the infringing products, including containers, packets, packaging, labelling, printed or advertising material, equipment, machinery and other materials connected with the infringement or used to commit it, and of the means used to carry out the infringement when they cause harm or constitute a risk to human, animal or plant life or health or to the environment.

#### Any other remedies

Article 185(c) of the Industrial Property Law establishes that, in a ruling declaring that any of the actions provided for in the Law is applicable, the court shall, where appropriate, order that the infringing goods be prohibited from entering the channels of commerce.

Similarly, paragraph (d) of the Article also stipulates that, in the ruling, the court may order that the infringing goods, after the elimination or removal of distinctive signs, may be given free of charge to private or public non-profit-making bodies for use exclusively in social welfare works.

These measures are established in similar terms in the Law on Copyright and Related Rights, in Articles 133 *bis* and 134 *bis*.

**6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?**

Neither the Industrial Property Law nor the Law on Copyright and Related Rights provides for such a possibility. Similarly, none of the procedural provisions which supplementarily apply or which set out the civil and criminal procedures grants any power to the court to issue an order of this kind.

However, the Law for the Protection of the Subjects of Proceedings and Persons Connected with the Administration of Criminal Justice establishes, *inter alia*, protection for witnesses, experts, consultants, related complainants and other persons exposed to danger on account of their participation in criminal proceedings. Such protection may include personal safety measures, change of residence, change of identity and any other changes that the Administrative Board of this system may determine. Any of the benefits contained in the above-mentioned Law may be granted only on the basis of a prior study that must take into account such factors as the danger to which the person requesting the benefit is exposed, the gravity of the punishable act and its social significance, as well as the evidentiary effect of the declaration in incriminating the participants, both intellectual and material, in the criminal act and whether the declaration might lead to the identification of the participants in any other criminal acts related to the one that is the subject of investigation.

**7. Describe provisions relating to the indemnification of defendants wrongly enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them.**

Under Article 537 of the Code of Civil and Commercial Procedure, whoever obtains a protective measure or order will be obliged to pay costs and damages, if the application is not made within the legal time-limit (15 days), if the order is revoked and, in addition, if the application is declared to be inadmissible.

In particular, the Industrial Property Law contains a similar provision in Article 195, relating to the granting of a border measure, as too does Article 132 of the Law on Copyright and Related Rights.

As to the liability of the public authorities and/or officials, the Judicial Organization Law lays an obligation on the judges to read and study the proceedings themselves and holds them responsible for the harm that they might cause through omission, ignorance or negligence. Furthermore, that same Law, in Article 56, places all the courts of the Republic under the supervision of the Judicial Organization Office, while each court is responsible for supervising the lower courts that are directly subordinate to it. Such supervision is carried out by means of periodic visits of inspection and is also required in the event of complaints about the way in which a case is being handled or with regard to the conduct of the members of a court, either on cases still in progress or already completed, so as to ensure the correct and proper administration of justice, the impartiality with which legal affairs must be conducted and, *inter alia*, the observance of the essential time-limits and formalities of the proceedings.

Pursuant to above-mentioned Article 56 of the Judicial Organization Law, the sanctions on the judicial officials subject to supervision are, as appropriate, the sanctions for fault, suspension or removal. If the conduct in question constitutes a criminal offence, the Supreme Court of Justice must, through the appropriate division, be informed beforehand of the preliminary proceedings against judges or magistrates.

Attention should be drawn in particular to the provisions of Article 186 of the Industrial Property Law and Article 133 *bis* of the Law on Copyright and Related Rights, whereby, in the event of any application for a protective measure or order, the court may, if it deems it appropriate, include in the ruling in which such measures are decreed a requirement that, prior to their application, a security or other assurance should be provided so as to protect not only the party affected by the measure and the authorities themselves, but also to prevent abuse.

Furthermore, the Intellectual Property Law stipulates in the last paragraph of Article 193 that judicial officials who order or apply border measures are exempt from all liability, unless it can be proved that they acted in bad faith or failed to apply strictly the rules contained in that chapter.

**8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.**

Oral proceedings, by means of which civil actions initiated under the Industrial Property Law and the Law on Copyright and Related Rights must be heard, are governed by Articles 199 to 210 of the Code of Civil and Commercial Procedure. The provisions in the Code relating to ordinary proceedings are also applicable, provided they do not conflict with the particular stipulations on oral proceedings.

According to these provisions, the application may be submitted verbally, in which case the clerk of the court will draw up the appropriate document, or in writing. In both cases the applicant must state clearly and accurately the facts on which his claim is based, the evidence that will be submitted, the legal basis and the petition, and also provide the documents on which his right is founded.

If the application meets to the legal requirements, the court proceeds to set a day and time for the parties to appear at the oral proceedings, warning them that in the event of failure to present their evidence before the court the hearings will continue in the absence of the party that has failed to appear. At least three days must elapse between the summoning of the defendant and the hearing, although that period may be extended on the grounds of distance.

At the first hearing, at the beginning of the proceedings the court must attempt to reconcile the parties, by proposing to them equitable formulas for conciliation, and will approve any form of settlement that they might reach, as long as it is not against the law. If the conciliation is only partial, the proceedings will continue on those issues on which agreement has not been reached.

Subsequently, if the defendant does not accept the applicant's claims, he must state clearly at the hearing the facts on which he bases his opposition and may, at that point, make a counterclaim against the applicant and present any objections that he may have. The court is obliged to resolve at the first hearing any prior objections there might be, although it may also resolve them separately. Major objections will be resolved in the ruling.

If it should not prove possible to provide all the evidence at the hearing fixed, a new hearing will be fixed within a period no longer than the following 15 days. If, extraordinarily and owing to circumstances beyond the control of the court or the parties, it has not been possible to submit all the evidence, the court may fix a third hearing exclusively for that purpose, to be held within the



following ten days. In any event, the court has the authority to set special time-limits when some means of evidence needs to be supplied from outside the territory of the Republic.

All the issues that by their nature cannot or should not be resolved beforehand will be decided in the ruling, together with any questions of invalidity. In any event the other party will have 24 hours to be heard.

If the defendant accepts the complaint or admits the facts set out in it, the court will give its ruling within three days of the last hearing. When the defendant fails to appear at the first hearing without due cause, the court will pronounce judgement, provided that it has received the evidence offered by the applicant. In any event, the ruling must be given within the five days following the last hearing.

While the actual duration of oral proceedings is affected by the backlog of cases going through the courts at any one time, as well as by the availability of court personnel, the actual duration of proceedings of this kind may be estimated as 9 to 12 months.

With regard to the cost of oral proceedings it should be noted, in the first place, that in accordance with the provisions contained in the final part of the second paragraph of Article 57 of the Judicial Organization Law, the administration of justice is free and equal for all. Accordingly, the second paragraph of Article 578 of the Code of Civil and Commercial Procedure stipulates that judicial proceedings shall not give rise to personal costs, other than for reasons of travel, payment of vehicles, transport or communications, purchase of substances and other articles that may be necessary to establish the truth of any fact.

Secondly, in accordance with the provisions contained in Article 572 of the Code of Civil and Commercial Procedure each party will be directly responsible for the costs arising from the acts that he carries out or requests, including stamp duties, the fees of attorneys, notaries, experts, depositaries and administrators etc. However, under Article 573 of the Code, the court is obliged to order the losing party to pay the other party's costs, other than some exceptions contained in Articles 574 and 575 of the Code.

As for the fees, there exists in Guatemala a Schedule of Fees of Lawyers, Arbitrators, Attorneys, Legal Agents, Experts, Depositaries and Administrators, as approved by Decree 11-96 of the Congress of the Republic. However, that Schedule of Fees does not prevent lawyers' fees from being established by agreement.

(b) Administrative procedures and remedies

**9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.**

Guatemalan legislation on the enforcement of intellectual property rights does not establish administrative procedures on the merits of a case.

**Provisional measures**

(a) Judicial measures

**10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.**

In conformity with Article 187 of the Industrial Property Law, the court may order, as appropriate, such measures as would reasonably lead to the protection of the right of the applicant or petitioner, such as:

- An immediate halt to the use, application, disposal and marketing of the infringing products and the unfair acts;
- seizure of the infringing products, including containers, packets, packaging, labels, printed or advertising material, machinery or other materials connected with the infringement or used to commit it, and of the means principally used to carry out the infringement;
- prohibit importation or order confiscation and transfer to the judicial depositories of the above-mentioned products, materials or means;
- any measure necessary to avoid the continuation or repetition of the infringement or of the acts of unfair competition, including destruction of the above-mentioned products, materials or means, when they might cause harm or constitute a risk to human, animal or plant health or life or to the environment;
- the suspension of registrations or sanitary licences or licences of any other kind necessary for the admission, distribution, sale or marketing of the infringing products.

The last paragraph of above-mentioned Article 187 of the Industrial Property Law makes it clear that mere removal of the marks illegally used or displayed will not prevent the measures specified in that Article from remaining in force and nor will it be sufficient for the goods or products to enter the channels of commerce.

In addition, the Law on Copyright and Related Rights stipulates in Article 133 *bis*, in similar terms to those used in the Industrial Property Law, that the court shall order such measures as would reasonably lead to protection of the right of the applicant's or petitioner's right such as:

- An immediate halt to the infringement alleged by the right holder;
- seizure of the infringing products, including the containers, packets, packaging, labels, printed material or publicity, equipment, machinery and other materials connected with the infringement or used to commit it, and the means used to carry out the infringement;
- prohibit importation and order confiscation and transfer to the judicial depositories the above-mentioned products, materials or means;
- any measure necessary to avoid the continuation or repetition of the infringement, including destruction of the above-mentioned products, materials, equipment or means, when they might cause harm or constitute a risk to human, animal or plant health or life, or to the environment; and
- the suspension or cancellation of registrations or sanitary licences or licences of any other kind necessary for the admission, distribution, sale or marketing of the infringing products.

It should be noted that, in conformity with Article 530 of the Code of Civil and Commercial Procedure, which applies in suppletive form in this matter, whoever has good reason to fear that, during the time necessary to enforce his right through the procedures established in the Code, that

right is threatened by imminent and irreparable damage, may request the court in writing to grant such urgent measures as would appear, according to the circumstances, to be most appropriate to ensure provisionally the effects of the decision on the merits of the case.

**11. In what circumstances may such measures be ordered *inaudita altera parte*?**

According to the provisions of the fourth paragraph of Article 186 of the Industrial Property Law and the second paragraph of Article 133 *ter* of the Law on Copyright and Related Rights, all protection orders will be processed and executed and without notification of intervention by the defendant, although the latter must be notified at the time of their application or immediately afterwards. It is also stipulated in that paragraph that the courts are obliged to take the requisite measures to ensure that the application for protection orders is kept confidential.

**12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.**

Under the first paragraph of Article 186 of the Industrial Property Law, anyone initiating or intending to initiate an action relating to industrial property rights, or on the grounds of the commission of acts of unfair competition, may request the court to order protective measures. The court, provided it has been given proof of the ownership of the right infringed and evidence indicating a reasonable presumption of the infringement or the imminence of such, has the authority to order forthwith the measures requested within a period not exceeding two days from the presentation of the application and, if it deems it advisable, can in the same ruling require that prior to the execution of such measures the applicant shall provide security or other assurance sufficient to protect the party affected by the measure and the authorities themselves, and also to prevent abuse. In this latter case, the measure must be executed within 48 hours from the time when the security is given.

Under the last paragraph of Article 186 of the Industrial Property Law, when a protective measure is ordered before the main action is initiated, it will automatically lapse if the person obtaining it fails to submit his application within a period of 15 days following the date when it was executed.

It is important to note that, under Article 188 of the Industrial Property Law, once a protective measure or order has been granted to ensure the results of the proceeding regarding a claim for restoration in a civil or commercial action, it cannot be deprived of its effect by means of a bond or security, which may only be lodged so as to lift measures to ensure a claim for compensation.

With regard to copyright and related rights, the relevant law lays down similar provisions in Articles 133 *bis*, 133 *ter* and 133 *quater*, with the difference that, when the court requires a sufficient security or assurance prior to the execution of the measures, the period of two days begins from the time the relevant security is lodged by the interested party.

Again, in accordance with Article 189 of the Industrial Property Law, the petition for protective measures or the application itself may contain a request for a judicial examination of places, documents or objects that have a bearing on the right infringed, or where it is presumed that acts leading to the infringement of industrial property rights or acts of unfair competition are being committed or prepared, in which case the court will order and execute it without requiring any security. In order to follow this up, according to the above-mentioned provision, the ruling ordering a judicial examination will implicitly include the use of a search warrant.

Such judicial examination may be supplemented by the presence of experts designated by the applicant or by the court itself; likewise, the court may order that movables or documents be produced. On application by the party and at the court's discretion, scientific methods of obtaining

evidence may also be used, photographs taken or audiovisual recordings made of the objects or places inspected and, in the case of the documents, they may be examined and copied by any means.

In the judicial examination the court may order the protective measures that have been requested and, if appropriate, establish the amount of the corresponding guarantee, in accordance with the provisions of the above-mentioned Article 186 of the Law. If, within the following five days the applicant has not provided or constituted the security fixed, the court will order the lifting of the measures decreed.

**13. Describe the provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.**

As already mentioned, once the judicial authority has received an application for protective measures, it must decide upon them and execute them within the following two days, a period that cannot be extended. If the court deems it appropriate that, prior to the execution of the measure, a security or other assurance should be provided so as to protect the party affected by the measure and the authorities themselves, and also to prevent abuse, the measure must be introduced within 48 hours from the time when the security or assurance is given in the case of industrial property rights, and of two days, following the time when the security or assurance is given in the case of copyright and related rights. In both cases, the measures will remain without effect if the person obtaining them does not submit the corresponding application within a period of 15 days following the date on which the measures were executed.

While the actual duration of proceedings to obtain protective measures or orders is affected by the backlog of cases going through the courts at any one time, as well as by the availability of court personnel, the actual duration of such proceedings may be estimated as one to two weeks.

With regard to the cost of such precautionary proceedings, it should be noted, in the first place, that in accordance with the provisions contained in the final part of the second paragraph of Article 57 of the Judicial Organization Law, the administration of justice is free and equal for all. Accordingly, the second paragraph of Article 578 of the Code of Civil and Commercial Procedure stipulates that judicial proceedings shall not give rise to personal costs, other than for reasons of travel, payment of vehicles, transport or communications, purchase of substances or other articles that may be necessary to establish the truth of any fact.

Secondly, in accordance with the provisions contained in Article 572 of the Code of Civil and Commercial Procedure, each party will be directly responsible for the costs arising from the acts that he carries out or requests, including stamp duties, the fees of attorneys, notaries, experts, depositaries and administrators, seizures clearance, edicts etc. However, under Article 573 of the Code the court is obliged to order the losing party to pay the other party's costs, other than some exceptions contained in Articles 574 and 575 of the Code.

As for the fees, there exists in Guatemala a Schedule of Fees of Lawyers, Arbitrators, Attorneys, Legal Agents, Experts, Depositaries and Administrators, as approved by Decree 11-96 of the Congress of the Republic. However, that Schedule of Fees does not prevent lawyers' fees from being established by agreement.

(b) Administrative measures

**14. Reply to the above questions in relation to any administrative provisional measures.**

Guatemalan legislation on the observance of intellectual property rights does not allow for the possibility of obtaining any administrative provisional measures.

Special requirements related to border measures

**15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application from such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?**

Pursuant to Article 190 of the Industrial Property Law and Article 129 of the Law on Copyright and Related Rights respectively, only the holders of intellectual property rights relating to trademarks and to copyright and related rights may request from the competent authority suspension by the customs authorities of the release or admission of goods or the process for exporting them. In both cases, the respective provisions are in line with the footnote to Article 51 of the TRIPS Agreement.

The second paragraph of Article 190 of the Industrial Property Law provides that such border measures do not apply to the import of goods in transit, the import of goods that have been marketed in another country by the right holder himself, or by a third party with his consent and, furthermore, do not apply to non-commercial articles imported as part of travellers' personal effects.

**16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). Have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?**

According to Articles 190 and 191 of the Industrial Property Law, border measures that may infringe the rights of the owner of trademarks must be requested from the judicial authorities, specifically from the judge of the court of first instance with jurisdiction in the territory in which the relevant customs is situated. In the application the applicant must provide reasonable evidence of a *prima facie* infringement and a sufficiently detailed description of the illegal goods and of the nature of the goods alleged to be imported or exported, so that they may be readily recognized by the customs authorities. In any event, the court may, before taking a decision, require the applicant to present additional evidence or information.

In accordance with Article 193 of the Industrial Property Law, the suspension of imports or exports will remain in force for a period of ten days beginning from the date of notification of the relevant ruling to the applicant. This period may be extended once for a further ten days, only if, within the original period, the applicant demonstrates that he has initiated legal action on the merits of the case or that he has obtained from the judicial authorities confirmation of the suspension as a protective measure.

Under Article 195 of the Industrial Property Law, whoever requests a border measure will be liable to the importer, the consignee and the owner of the detained goods for any damage and injury caused, in the event of the application not being submitted within 15 days following the date on which the border measure was executed, if that measure is revoked and also, if the application is declared inadmissible.

Article 186 of the Industrial Property Law is also applicable, for under the first paragraph of that Article the court, may in the same ruling that orders a protective measure, including a border measure, require the applicant to provide, prior to execution, a security or other assurance so as to protect the party affected and the authorities themselves with a view to preventing abuse.

Pursuant to Article 194 of the Industrial Property Law, without prejudice to the obligation to protect confidential information, the judicial authorities ordering a border measure may allow the applicant free access to the detained goods or products, in order to be able to inspect them and obtain additional proof in support of his claim. A similar right is granted to the importer and exporter. In all cases, such inspection must be carried out in the presence of the judicial authorities and with notification given to the opposing party.

As to copyright and related rights, we find rules similar to those already described in Articles 129, 130, 131 and 132 of the Law on Copyright and Related Rights, with the following differences:

- (a) In this field the right holder affected may request the border measure directly from the customs authority, which may order suspension of the relevant import or export for a period not exceeding ten working days;
- (b) if ten working days elapse from the date of notification to the applicant, without any order being received from the competent judge to maintain it in force, the customs authority itself will ex officio lift the suspension and order clearance of the detained goods; and
- (c) if ten days elapse without action being initiated for the alleged infringement committed, beginning from the notification of the suspension of the import or export, the applicant will be subject to the obligation to pay damages.

**17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?**

Under Article 186 of the Industrial Property Law, relating to protective measures and applicable, when appropriate, to border measures, this type of measure may be requested as a protective measure, together with the application or after the application has been submitted.

The court must order and execute the measures within a period of not more than two days, provided the applicant has furnished proof of ownership of the right infringed and reasonable evidence of a prima facie infringement or the imminence of such. If a security or other assurance is required, the period established will be 48 hours beginning from the time the security or other assurance required is given. The same provision lays upon the court an obligation to process and execute the measures without notification of or intervention by the defendant and to take the requisite measures to ensure that the application in question is maintained in reserve.

A similar procedure is envisaged in Article 133 *ter* of the Law on Copyright and Related Rights, according to which the judge shall order and execute the measures requested within a period of not longer than two days, which, in the case of measures requested prior to the application, will begin from the time when the security or assurance requested is lodged. This provision also stipulates that all the protective orders shall be processed and executed without notification of or intervention by the defendant, and that the courts shall take the measures necessary to ensure that the application for protection orders is kept confidential.

Since the Industrial Property Law and the amendments to the Law on Copyright and Related Rights have only recently come into force, there is no information yet available on the actual duration of proceedings to obtain border measures. However, as in the case of other kinds of protective measures, it will depend on the backlog of cases going through the courts at any one time, as well as on the availability of court personnel. Consequently, it may be estimated that the actual duration of such proceedings will be one to two weeks.

With regard to the cost of such proceedings, it should be noted, in the first place, that in accordance with the provisions contained in the final part of the second paragraph of Article 57 of the Judicial Organization Law, the administration of justice is free and equal for all. Accordingly, the second paragraph of Article 578 of the Code of Civil and Commercial Procedure stipulates that judicial proceedings shall not give rise to personal costs, other than for reasons of travel, payment of vehicles, transport or communications, purchase of substances or other articles that may be necessary to establish the truth of any fact.

Secondly, in accordance with the provisions contained in Article 572 of the Code of Civil and Commercial Procedure, each party will be directly responsible for the costs arising from the acts that he carries out or requests, including stamp duties, the fees of attorneys, notaries, experts, depositaries and administrators, seizures, clearance, edicts, etc. However, under Article 573 of the Code the court is obliged to order the losing party to pay the other party's costs, other than some exceptions contained in Articles 574 and 575 of the Code.

As for fees, there exists in Guatemala the Scale of Fees of Lawyers, Arbitrators, Attorneys, Legal Agents, Experts, and Bailees, approved by Decree 11-96 of the Congress of the Republic. However, the Scale of Fees does not prevent lawyers' fees from being established by agreement.

In both cases, the period or time-frame of validity of decisions taken by the competent authorities suspending the release of the goods into free circulation is ten days, and may be extended by a further ten days if, prior to the expiry of the original period, the interested party demonstrates that he has initiated legal action on the merits of the case or that he has obtained legal confirmation of the suspension.

**18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to ex officio action?**

No. Neither the customs authorities nor the judicial authorities are empowered to decide or order border measures ex officio.

**19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.**

As stated above, at the request of the holder or licensee of trademark rights, the judicial authorities may order the respective customs department to suspend the release and admission or the process of exporting the goods that injure or infringe those rights.

By way of criteria regulating their use, both the Industrial Property Law and the Law on Copyright and Related Rights prescribe that an applicant for border measures must furnish reasonable evidence of a prima facie infringement and, likewise, a detailed description of the illegal goods and the nature of the goods allegedly imported or exported, so that they may be readily recognized by the customs authorities. In any event, the judicial authority may, before taking a decision, request the applicant to submit additional proof or information.

The decision ordering suspension must be notified immediately to the applicant and, once executed, to the importer, consignee or exporter. In this latter case, the notice may be validly served to customs agents accredited to the customs department.

Criminal procedures

**20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.**

The courts with jurisdiction over such infringements are the criminal courts of first instance, but as in all cases of offences prosecutable ex officio, the Department of Public Prosecution may intervene. Following the investigation, if it is determined that there is sufficient basis for a trial, the proceedings are referred to the criminal courts of first instance, which will conduct the hearing.

**21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?**

In keeping with the classification of infringing conduct set forth in Articles 274 and 275 of the Criminal Code, infringements affecting all intellectual property rights recognized under the relevant laws are subject to the prescribed criminal procedures and penalties.

Indeed, Article 274 of the Criminal Code determines the following types of conduct as offences against copyright and related rights:

- (a) The false attribution of the status of author and/or copyright holder, performer, phonographic producer or a broadcasting entity;
- (b) the deformation, mutilation, modification or any action that causes injury to the integrity of the work or to the honour and reputation of the author;
- (c) the reproduction of any work, interpretation or performance, phonogram or broadcast, without the authorization of the author or relevant right holder;
- (d) the adaptation, arrangement or transformation of a protected work or part thereof, without the authorization of the author or the right holder;
- (e) the communication to the public by any means or procedure of a protected work or a phonogram, without the authorization of the relevant right holder;
- (f) the distribution of unauthorized reproductions, total or partial, of a protected work or a phonogram, whether by means of sale, rental, lease, rental with the option to buy, loan or in any other form;
- (g) the sound fixing, reproduction or communication to the public, by any means or procedure, of an artistic performance without the authorization of the performer or the right holder;
- (h) the sound fixing, reproduction or re-transmission of a broadcast, transmitted by satellite, broadcasting or by wire, cable, fibre optics or any other procedure, without the authorization of the owner;
- (i) the communication to the public of a broadcast or transmission in a place to which the public can gain access by the payment of an admission fee, or otherwise, for the purposes of consuming or purchasing products or services without the authorization of the relevant right holder;



- (j) the publication of a protected work with the title changed or removed, with or without being altered;
- (k) the decodification of programme-carrying signals of any kind transmitted by satellite or any other means of telecommunication, without the authorization of the legitimate distributor;
- (l) any act that circumvents or attempts to circumvent a technological measure implemented by the author or the holder of the relative right or the holder of a related right to avoid the unauthorized use of any kind of work, phonogram, artistic performance or a broadcast;
- (m) any act that induces, permits, facilitates or conceals an infringement of any of the exclusive rights pertaining to the authors, copyright holders, performers, phonogram producers or broadcasting organizations;
- (n) the unauthorized removal or alteration of any electronic information concerning the collective management of copyright or related rights;
- (o) the unauthorized distribution, marketing, promotion, importation, broadcasting or communication to the public of works, artistic performances, phonographic productions or broadcasts, in the knowledge that the electronic information concerning the collective management of any of those rights has been removed or altered without authorization;
- (p) the transportation, storage or concealment of reproductions or copies, in any physical medium, of protected works, phonograms, artistic performances or broadcasts, made without the consent of the author or relevant right holder concerned;
- (q) the collection of financial benefits for the use of protected works, artistic performances, phonograms or broadcasts belonging to broadcasting organizations, or engaging in any other activities proper to a collective management company, without being authorized to do so;
- (r) the publication of an unpublished work without the consent of the author or relevant right holder;
- (s) the full or partial translation of a work without the authorization of the author or relevant right holder;
- (t) the unauthorized distribution of original or legitimate reproductions of a protected work or a phonogram, whether by means of sale, rental, rental with the option to buy, loan or in any other way; and
- (u) the importation or exportation of the original or reproductions of any protected work for their commercial exploitation, in any type of medium, or of phonograms, without the authorization of the relevant right holder.

As regards industrial property, Article 275 of the Criminal Code establishes that the following types of conduct are offences against those rights:

- (a) Introducing into commerce, selling, putting up for sale, storing or distributing products or services covered by a registered distinctive sign or by an imitation or

counterfeit thereof in connection with products or services identical or similar to those protected by the registration;

- (b) using in commerce a protected tradename, advertising emblem or slogan or sign;
- (c) introducing into commerce, selling, putting up for sale, storing or distributing products or services covered by a registered distinctive sign, after having totally or partially altered, replaced or removed it;
- (d) using, putting up for sale, storing or distributing products or services that carry a registered mark that is similar enough to be confused with another registered mark, after a decision has been issued ordering cessation of the use of that mark;
- (e) manufacturing labels, containers, wrappings, packaging or other similar materials that reproduce or contain the registered sign or an imitation or counterfeit thereof, as well as marketing, storing or possessing such materials;
- (f) refilling or re-using for any purpose, containers, wrappings or packaging bearing a registered distinctive sign;
- (g) using in commerce any labels, wrappings, containers and other means of packaging or packing of products or of identifying the services of a trader, or copies, imitations or reproductions thereof these that could prove misleading or create confusion as to the origin of the products or services;
- (h) using or exploiting another person's business secret, as well as any act of marketing, disclosure or improper acquisition of such secrets;
- (i) revealing to a third party a business secret obtained through one's work, position, post, profession, business relationship or by virtue of a licence of use, after having been advised of the confidential nature of that information;
- (j) procuring a business secret, by any means, without the permission of the person who keeps it or of its authorized user;
- (k) manufacturing, processing, marketing, putting up for sale, placing in circulation, storing or possessing products covered by a patent belonging to another person;
- (l) using a procedure covered by a patent belonging to another person or engaging in any of the actions set out in the preceding subparagraph, in connection with a product obtained directly by that procedure;
- (m) manufacturing, processing, marketing, putting up for sale, placing in circulation, storing or possessing products which in themselves or in their presentation reproduce a protected industrial design;
- (n) in connection with a product or service, using in commerce, a false geographical indication or one that could mislead the public as to the origin of that product or service or the identity of the product, the manufacturer or the trader who distributes it; and
- (o) in connection with a product, using in commerce, a false or misleading appellation of origin, even when the true origin of the product is indicated, a translation of the

appellation is used, or is used in conjunction with expressions such as "type", "kind", "manner", "imitation" and the like.

Furthermore, Article 358 of the Criminal Code states the following: "Anyone perpetrating an act described as one of unfair competition shall, pursuant to the provisions in that regard set forth in the Industrial Property Law, incur a fine of 50,000 to 100,000 quetzales, except where the act is one of the industrial property rights infringements classified under Article 275 of this Code."

**22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?**

Pursuant to Articles 206 of the Industrial Property Law and 127 of the Law on Copyright and Related Rights, the Department of Public Prosecutions is responsible for the criminal prosecution of intellectual property offences.

Under Article 251 of the Constitution of the Republic, the Department of Public Prosecutions is an institution forming part of the public administration and the courts, operating independently, and its main objectives are to ensure strict compliance with the laws of the land. The head of the Department of Public Prosecutions is the Chief Public Prosecutor, who is responsible for criminal prosecution.

Especially worthy of mention are the rules set forth in Articles 214 of the Industrial Property Law and 137 *bis* of the Law on Copyright and Related Rights whereby, within a maximum period of one year as from the effective date of that Law, that is, 1 November 2000, the Chief Public Prosecutor of the Republic must create and organize a Special Procurator's Office for Industrial Property Offences.

**23. Do private persons have standing to initiate criminal proceedings and, if so, who?**

Above-mentioned Article 206 of the Industrial Property Law and Article 127 of the Law on Copyright and Related Rights likewise prescribe that the holder or licensee of the infringed rights may initiate criminal prosecution by denouncing an infringement of those rights, or by joining an action already initiated by the Department of Public Prosecutions. Representative associations or organizations of any production sector or of consumers may also initiate criminal proceedings.

Moreover, it is pertinent to mention that, pursuant to Article 297 of the Code of Criminal Procedure, all persons must communicate, whether in writing or orally, to the police, the Department of Public Prosecutions or to a court, any information they may have concerning the commission of a publicly actionable offence. Likewise, civil servants who learn of such offences in the course of their duties are obliged to report them, except where they are bound to secrecy, as prescribed in paragraph 1 of Article 298 of the Code of Criminal Procedure.

**24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:**

- **Imprisonment;**
- **monetary fines;**
- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production;**
- **other.**

### Imprisonment

Articles 274 and 275 of the Criminal Code prescribe one to four years' imprisonment for persons committing offences against various intellectual property rights, in the first of those Articles against copyright and related rights, and in the second against industrial property rights.

### Monetary fines

In addition to prescribing imprisonment, the above-mentioned Articles 274 and 275 of the Criminal Code also specify monetary penalties in the form of a fine to be set by the court, ranging from a minimum of 1,000 quetzales to a maximum of 500,000 quetzales.

With respect to unfair competition, Article 358 of the Criminal Code specifies fines ranging from 50,000 to 100,000 quetzales for persons committing acts of unfair competition under the provisions in that regard set forth in the Industrial Property Law, except where the act is a breach of the industrial property rights set out in Article 275 of the Criminal Code.

### Seizure, forfeiture and destruction of infringing goods and materials and implements for their production

Pursuant to Article 185 of the Industrial Property Law, the courts shall, depending on the case and taking into account the need for proportionality between the seriousness of the infringement, the remedies ordered as well as the rights of third parties, order that the infringing goods be without compensation of any sort, disposed of outside the channels of commerce so as to avoid injury to the right holder or that they be destroyed as articles of unlawful trade, principally when they affect or could affect the human, animal or plant health or life or the environment. The courts may also order that the implements and materials the predominant use of which has been in the creation of the infringing goods be disposed of outside the channels of commerce or destroyed as objects of unlawful trade.

Similarly, Article 134 *bis* of the Law on Copyright and Related Rights establishes that the court, in the ruling that any of the actions provided for in law is applicable, must in addition to determining the merits, depending on the case and in the light of the need for proportionality between the gravity of the infringement, the measures ordered and the rights of third parties, order that the infringing goods be, without compensation of any sort, disposed of outside commerce in order to avoid injury to the right holder, or be destroyed as articles of unlawful trade. Nevertheless, the Law makes it clear that, in the case of clothing from which the infringing element can be removed, the court may order that once this has been done, and if deemed appropriate, it may be given free of charge to public or private non-profit-making bodies for use exclusively in social welfare works or activities, with a written record that the goods have been handed over.

Moreover, that rule requires the court to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort for their owner, disposed of outside commerce and, if deemed appropriate, given free of charge by the court to private or public non-profit-making bodies for use exclusively in social welfare works or activities, with a written record that the goods have been handed over.

### Other

Article 185 of the Industrial Property Law requires that the judicial authorities, in a ruling stating that any of the actions provided for in that Law is applicable, in addition to resolving the merits, must order any of the following measures, depending on the case, and in the light of the need for proportionality between the gravity of the infringement and the measures ordered and the rights of third parties:

- Prohibit the entry of the infringing goods into the channels of commerce;
- after the elimination or removal of the distinctive signs, the infringing goods may be handed over free of charge by the court to public or private non-profit-making bodies for exclusive use in social welfare works or activities;
- cessation of the infringing acts or acts of unfair competition and adoption of the requisite measures to prevent the consequences and avoid a repetition thereof, as well as the award for damages.

Similarly, with respect to copyright and related rights, Article 134 *bis* of the relevant Law prescribes that the judicial authorities, in a ruling that any of the actions provided for in the Law is applicable, in addition to determining the merits, depending on the case and in the light of the need for proportionality between the gravity of the infringement, the measures ordered and the rights of third parties, shall:

- Prohibit entry of the infringing goods into trade;
- order cessation of the infringing acts and adoption of the requisite measures to prevent the consequences and avoid a repetition thereof, and the award of damages.

**25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.**

The procedure applicable to publicly actionable offences for bringing before the courts such criminal actions as may be appropriate in cases of infringement of intellectual property rights is regulated by the Code of Criminal Procedure.

In accordance with the Code, all proceedings are initiated by an information, a complaint or judicial notice in the event of the commission of an offence, and the Department of Public Prosecutions is the responsible body.

The procedure entails the following stages:

Preparatory stage

At this stage, the Department of Public Prosecutions has a period of three months in which to investigate whether the accused may be guilty of the offence in question and, if so, to bring charges. Should this time-frame not be sufficient, the Department may request an extension from the examining magistrate to pursue the investigation of the offence. Once this period has expired, the Department of Public Prosecutions must request some form of suspension of the investigation from the examining magistrate, including the shelving of the case if sufficient evidence is not found, or the issue of an initiating order with respect to the accused if the relevant convincing evidence has been gathered, in which case the Department brings formal charges.

Intermediate stage

This stage begins with the indictment by the Department of Public Prosecutions and is the point at which the plaintiff or those seeking indemnification join in the proceedings. The examining magistrate notifies the accused and the other parties of the indictment by the Department of Public Prosecutions so that within the next six days they may state their opinions concerning any procedural defects, submit pleas or raise objections with respect to the request from the Department of Public Prosecutions. Similarly on the day following receipt of the indictment, the examining magistrate indicates the date and time for holding an oral hearing, which must take place within a period of not

less than ten days and not more than 15 days afterwards, so as to decide whether the request to start the proceeding is admissible. After this hearing, the examining magistrate must immediately take a decision concerning the start of the proceeding, or otherwise, announce the closure of the proceedings or the shelving of the case. Only when the complexity of the matter so warrants, this decision may be postponed by 24 hours. In that same decision, the judge shall summon all the parties to appear before the appointed court within a period of not more than ten days, which court shall be the place for the receipt of notices and submission of evidence.

#### Preparing the arguments

This stage takes place before the criminal court of first instance, which, once the documents have been received, hears the parties to the proceedings so that they may acquaint themselves with the challenges and pleas. Once all the issues have been resolved, the parties then have eight days in which to submit the list of witnesses, experts and interpreters and to indicate the facts on which the examination will turn during the discussion. The court may, ex officio or on application, order a further investigation within the aforementioned eight days. In the same decision settling all the matters raised, the court shall indicate the place, date and time for the discussion, which must take place within the next 15 days.

#### Arguments

Guatemalan criminal proceedings are oral and held in public in the presence of the judges who will make a ruling. During the discussion, the accused is informed of the reasons and facts constituting the offence for which he is being tried. The bill of indictment and the initiation order issued by the Department of Public Prosecutions are read out. Statements by the defendant and witnesses are heard and other evidence furnished by the Department of Public Prosecutions, plaintiff and the defence is received. Once that evidence has been received, all the parties are afforded an opportunity to state their conclusions orally.

In exceptional circumstances, the discussion may be adjourned but must resume no later than 11 days later. When the discussion has ended, the three judges making up the court immediately retire to deliberate in camera. The ruling is pronounced on that same occasion and is read out in the courtroom.

A special appeal may be brought against the ruling and must be filed within the next ten days. If the appeal is admitted, the documents are forwarded and the parties are allowed five days in which to appear in person before the appellate court and to indicate their address for service. The court shall make the case file available for examination by the parties over a six-day period. Upon expiry of this period, the presiding judge indicates the date and time for the discussion hearing, which must be held within ten days. Once that hearing is completed, the court then goes into deliberation and subsequently hands down a ruling in public. Only when the lateness of the hour, the significance or complexity of the issues raised are such that the deliberation or the ruling must be postponed, the court will announce in the courtroom the date and time when the ruling will be read out.

While the actual duration of criminal oral proceedings depends on the backlog of cases going through the courts at any one time and on the availability of court personnel, actual duration of criminal proceedings of this kind may be estimated as 9 to twelve months.

With regard to the cost of criminal oral proceedings, it should be noted, in the first place, that pursuant to the last part of the second paragraph of Article 57 of the Judicial Organization Law, the administration of justice is free and equal for all. Accordingly, the second paragraph of Article 578 of the Code of Civil and Commercial Procedure stipulates that judicial proceedings shall not give rise to personal costs, other than for reasons of travel, payment of vehicles, transport or communications, the purchase of substances or other articles that may be necessary to verify any fact.

In the second place, Article 507 of the Code of Criminal Procedure prescribes that all decisions ending a proceedings or an issue must also contain a statement on the payment of court costs, which shall be borne by the losing party, except where the court finds sufficient reason to exempt that party totally or partially from payment. Pursuant to Article 509 of the Code, costs include those arising from the handling of the case and the payment of fees in accordance with the scale of fees of lawyers and other professionals who take part in the trial.

As for the fees, there exists in Guatemala a Schedule of Fees of Lawyers, Arbitrators, Attorneys, Legal Agents, Experts and Depositaries, as approved by Decree 11-96 of the Congress of the Republic. However, the Schedule of Fees does not prevent lawyers' fees from being established by agreement.

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