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UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT

Report of the Panel

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I. INTRODUCTION

1.1 On 26 January 1999, the European Communities and their member States (hereafter referred to as the European Communities) requested consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") regarding Section 110(5) of the United States Copyright Act as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998.[1]

1.2 The European Communities and the United States held consultations on 2 March 1999, but failed to reach a mutually satisfactory solution. On 15 April 1999, the European Communities requested the establishment of a panel under Article 6 of the DSU and Article 64.1 of the TRIPS Agreement.[2]

1.3 At its meeting on 26 May 1999, the Dispute Settlement Body ("DSB") established a panel in accordance with Article 6 of the DSU with the following standard terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS160/5, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[3]

1.4 Australia, Brazil, Canada, Japan and Switzerland reserved their rights to participate in the panel proceedings as third parties.

1.5 On 27 July 1999, the European Communities made a request, with reference to Article 8.7 of the DSU, to the Director-in-charge to determine the composition of the Panel. On 6 August 1999, the Panel was composed as follows:

Chairperson:	Mrs. Carmen Luz Guarda
Members:	Mr. Arumugamangalam V. Ganesan
	Mr. Ian F. Sheppard

1.6 The Panel met with the parties on 8-9 November 1999 and 7 December 1999. It met with the third parties on 9 November 1999.

1.7 On 15 November, the Panel sent a letter to the International Bureau of the World Intellectual Property Organization (WIPO), that is responsible for the administration of the Berne Convention for the Protection of Literary and Artistic Works. In that letter, the Panel requested factual information on the provisions of the Paris Act of 1971 of that Convention ("Berne Convention (1971)"), incorporated into the TRIPS Agreement by its Article 9.1, relevant to the matter. The International Bureau of WIPO provided such information in a letter, dated 22 December 1999. The parties to the dispute provided comments on this information by means of letters, dated 12 January 2000.

1.8 The Panel submitted its interim report to the parties on 14 April 2000. The Panel submitted its final report to the parties on 5 May 2000.

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[1] *See* document WT/DS160/1 (4 February 1999).
[2] *See* document WT/DS160/5 (16 April 1999) reproduced in Annex 1 to this report.
[3] *See* document WT/DS160/6 (6 August 1999) reproduced in Annex 2 to this report.

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II. FACTUAL ASPECTS

2.1 The dispute concerns Section 110(5) of the US Copyright Act of 1976[4], as amended by the Fairness in Music Licensing Act of 1998 ("the 1998 Amendment"),[5] which entered into force on 26 January 1999. The provisions of Section 110(5) place limitations on the exclusive rights provided to owners of copyright in Section 106 of the Copyright Act in respect of certain performances and displays.

2.2 The relevant parts of the current text of Section 106 read as follows:

> "**§ 106. Exclusive rights in copyrighted works**
>
> Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> …
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> …"[6,7]

[4] United States Copyright Act of 1976, Act of 19 October 1976, Pub.L. 94-553, 90 Stat. 2541 (as amended).

[5] Fairness in Music Licensing Act of 27 October 1998, Pub.L. 105-298, 112 Stat. 2830, 105th Cong., 2nd Session (1998).

[6] As contained in Exhibit US-15(b).

[7] Section 101 of the US Copyright Act contains a number of definitions, of which the following are most relevant to the matter (as notified by the United States to the Council for TRIPS under Article 63.2 of the TRIPS Agreement, *see* WTO document IP/N/1/USA/1, dated 25 March 1996):

> "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."
>
> "To perform or display a work 'publicly' means
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."
>
> "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

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2.3 The relevant parts of the current text of Section 110(5) read as follows:[8]

"§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

…

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

[8] As contained in Exhibit US-15(a). There is no official US Government consolidated text of the amended Section 110(5).

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(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed; and

…"[9]

2.4 Subparagraph (A) of Section 110(5) essentially reproduces the text of the original "homestyle" exemption contained in Section 110(5) of the Copyright Act of 1976. When Section 110(5) was amended in 1998, the homestyle exemption was moved to a new subparagraph (A) and the words "except as provided in subparagraph (B)" were added to the beginning of the text.

2.5 A House Report (1976) accompanying the Copyright Act of 1976 explained that in its original form Section 110(5) "applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use". "The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed." "[The clause] would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or

[9] Section 205 of the Fairness in Music Licensing Act amended Section 110 of the Copyright Act of 1976 by inserting a number of definitions thereto that relate to the new Section 110(5)(B), including the following:

"An 'establishment' is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly."

"A 'food service or drinking establishment' is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly."

"The 'gross square feet of space' of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise."

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extensive amplification equipment) into the equivalent of a commercial sound system."[10] A subsequent Conference Report (1976) elaborated on the rationale by noting that the intent was to exempt a small commercial establishment "which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[11]

2.6 The factors to consider in applying the exemption are largely based on the facts of a case decided by the United States Supreme Court immediately prior to the passage of the 1976 Copyright Act. In *Aiken*,[12] the Court held that an owner of a small fast food restaurant was not liable for playing music by means of a radio with outlets to four speakers in the ceiling; the size of the shop was 1,055 square feet (98 m^2), of which 620 square feet (56 m^2) were open to the public. The House Report (1976) describes the factual situation in *Aiken* as representing the "outer limit of the exemption" contained in the original Section 110(5). This exemption became known as the "homestyle" exemption.

2.7 As indicated in the first quotation in the preceding paragraph, the homestyle exemption was originally intended to apply to performances of all types of works. However, given that the present subparagraph (B) applies to "a performance or display of a nondramatic musical work", the parties agree, by way of an *a contrario* interpretation, that the effect of the introductory phrase "except as provided in subparagraph (B)", that was added to the text in subparagraph (A), is that it narrows down the application of subparagraph (A) to works other than "nondramatic musical works".[13]

2.8 The Panel notes that it is the common understanding of the parties that the expression "nondramatic musical works" in subparagraph (B) excludes from its application the communication of music that is part of an opera, operetta, musical or other similar dramatic work when performed in a dramatic context. All other musical works are covered by that expression, including individual songs taken from dramatic works when performed outside of any dramatic context. Subparagraph (B) would, therefore, apply for example to an individual song taken from a musical and played on the radio. Consequently, the operation of subparagraph (A) is limited to such musical works as are not covered by subparagraph (B), for example a communication of a broadcast of a dramatic rendition of the music written for an opera.[14]

2.9 The 1998 Amendment has added a new subparagraph (B) to Section 110(5), to which we, for the sake of brevity, hereinafter refer to as a "business" exemption. It exempts, under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public,

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[10] These quotations are from the Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Congress, 2nd Session 87 (1976), as reproduced in Exhibit US-1. The Report adds that "[f]actors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance".

[11] Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Congress., 2nd Session 75 (1976), as reproduced in Exhibit US-2.

In their first written submissions, the European Communities and the United States expressed their views on the background and subsequent application of the original homestyle exemption.

[12] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

[13] *See* the second written submissions by the United States (paragraph 3) and the European Communities (paragraph 7).

[14] The notion "nondramatic musical work" was introduced to Section 110(5) with the 1998 Amendment. However, this notion is also used in the Copyright Act of 1976 in a number of other limitations to the public performance right (Section 110(2), (3), (4), (6) and (7)), and certain provisions concerning the making of phonorecords (Section 115), juxeboxes (Section 116) and noncommercial broadcasting (Section 118), all of which apply to nondramatic musical works, but not to dramatic works.

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originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier.

2.10 The beneficiaries of the business exemption are divided into two categories: establishments other than food service or drinking establishments ("retail establishments"), and food service and drinking establishments. In each category, establishments under a certain size limit are exempted, regardless of the type of equipment they use. The size limits are 2,000 gross square feet (186 m^2) for retail establishments and 3,750 gross square feet (348 m^2) for restaurants.

2.11 In its study of November 1995[15] prepared for the Senate Judiciary Committee, the Congressional Research Service ("CRS") estimated that 16 per cent of eating establishments, 13.5 per cent of drinking establishments and 18 per cent of retail establishments were below the area of the restaurant ran by Mr. Aiken, i.e. 1,055 square feet.[16] Furthermore, the CRS estimated that 65.2 per cent of eating establishments and 71.8 per cent of drinking establishments would have fallen at that time under a 3,500 square feet limit, and that 27 per cent of retail establishments would have fallen under a 1,500 square feet limit.

2.12 In 1999, Dun & Bradstreet, Inc. ("D&B") was requested on behalf of the American Society of Composers, Authors and Publishers (ASCAP) to update the CRS study based on 1998 data and the criteria in the 1998 Amendment. In this study, the D&B estimated that 70 per cent of eating establishments and 73 per cent of drinking establishments fell under the 3,750 square feet limit, and that 45 per cent of retail establishments fell under the 2,000 square feet limit.[17]

2.13 The studies conducted by the National Restaurant Association (NRA) concerning its membership indicate that 36 per cent of table service restaurant members (those with sit-down waiter service) and 95 per cent of quick service restaurant members are less than 3,750 square feet.[18,19]

2.14 If the size of an establishment is above the limits referred to in paragraph 2.10 above (there is no maximum size), the exemption applies provided that the establishment does not exceed the limits set for the equipment used. The limits on equipment are different as regards, on the one hand, audio performances, and, on the other hand, audiovisual performances and displays. The rules concerning equipment limitations are the same for both retail establishments and restaurants above the respective size limits.

2.15 The types of transmissions covered by both subparagraphs (A) and (B) of Section 110(5) include original broadcasts over the air or by satellite, rebroadcasts by terrestrial means or by satellite, cable retransmissions of original broadcasts, and original cable transmissions or other transmissions by wire.[20] The provisions do not distinguish between analog and digital transmissions.

2.16 Section 110(5) does not apply to the use of recorded music, such as CDs or cassette tapes, or to live performances of music.

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[15] As reproduced in Exhibit EC-16.

[16] The *Aiken* case is explained in paragraph 2.6 above.

[17] *See* paragraph 49 of the first written submission by the EC. The EC observers that the percentage figures referred to in paragraphs 2.11 and 2.12 do not take account of other exempted establishments such as hotels, financial services outlets, estate property brokers, and other types of service providers.

[18] *See* the response from the US to question 9 from the Panel and confidential exhibit US-18.

[19] The relevance of the percentage figures referred to in paragraphs 2.11 and 2.13 for the case at hand, as well as other factual information and estimations concerning the number of establishments licenced by collective management organizations and the revenues collected by them provided by the parties will be discussed in section VI of this report. For complete information, please see the attached submissions by the parties.

[20] *See* the response of the US to question 5 from the Panel.

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2.17 Holders of copyright in musical works (composers, lyricists and music publishers) normally entrust the licensing of nondramatic public performance of their works to collective management organizations ("CMOs" or performing rights organizations). The three main CMOs in the United States in this area are ASCAP, the Broadcast Music, Inc. (BMI) and SESAC, Inc. CMOs license the public performance of musical works to users of music, such as retail establishments and restaurants, on behalf of the individual right holders they represent, collect licence fees from such users, and distribute revenues as royalties to the respective right holders. They normally enter into reciprocal arrangements with the CMOs of other countries to license the works of the right holders represented by them. Revenues are distributed to individual right holders through the CMOs that represent the right holders in question. The above-mentioned three US CMOs license nondramatic public performances of musical works, including nondramatic renditions of "dramatic" musical works.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 The European Communities alleges that the exemptions provided in subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act are in violation of the United States' obligations under the TRIPS Agreement. In particular, it alleges that these US measures are incompatible with Article 9.1 of the TRIPS Agreement together with Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention (1971) and that they cannot be justified under any express or implied exception or limitation permissible under the Berne Convention (1971) or the TRIPS Agreement. In the view of the EC, these measures cause prejudice to the legitimate rights of copyright owners, thus nullifying and impairing the rights of the European Communities.

3.2 The European Communities requests the Panel to find that the United States has violated its obligations under Article 9.1 of the TRIPS Agreement together with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) and to recommend that the United States bring its domestic legislation into conformity with its obligations under the TRIPS Agreement.

3.3 The United States contends that Section 110(5) of the US Copyright Act is fully consistent with its obligations under the TRIPS Agreement. The Agreement, incorporating the substantive provisions of the Berne Convention (1971), allows Members to place minor limitations on the exclusive rights of copyright owners. Article 13 of the TRIPS Agreement provides the standard by which to judge the appropriateness of such limitations or exceptions. The exemptions embodied in Section 110(5) fall within the Article 13 standard.

3.4 The United States requests the Panel to find that both subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act meet the standard of Article 13 of the TRIPS Agreement and the substantive obligations of the Berne Convention (1971). Accordingly, the United States requests the Panel to dismiss the claims of the European Communities in this dispute.

IV. ARGUMENTS OF THE PARTIES AND THE THIRD PARTIES AND FACTUAL INFORMATION PROVIDED BY THE INTERNATIONAL BUREAU OF WIPO

4.1 The arguments of the parties and the third parties are set out in their submissions to the Panel (see Attachment 1 for the European Communities, Attachment 2 for the United States and Attachment 3 for the third parties). The letter from the Chair of the Panel to the Director General of WIPO and the response thereto by the Director General of WIPO are reproduced in Attachment 4. [21]

[21] Exhibits attached to the submissions and annexes to the letter from the Director General of WIPO are not reproduced in this report.

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V. INTERIM REVIEW

5.1 On 26 April 2000, the European Communities and the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 14 April 2000. Neither the European Communities nor the United States requested that a further meeting of the Panel with the parties be held. In a letter, dated 1 May 2000, the United States made observations on some of the EC comments.

5.2 The European Communities made some editorial comments and requested some clarifications to the Panel's reasoning:

(a) The European Communities deemed section III on "findings and recommendations requested by the parties" and subsection VI.A on "claims" overlapping. We considered that it was useful to reflect the parties' main claims in both sections.

(b) In subsection VI.B on "preliminary issue", the European Communities suggested shortening the Panel's reasoning on its treatment of a letter from a law firm representing ASCAP to the United States Trade Representative that was copied to it. We made an editorial adjustment to the wording of paragraph 6.8.

(c) As proposed by the European Communities, we deleted the last sentence of paragraph 6.27 of the interim report.

(d) With regard to an EC comment on the last sentence of paragraph 6.41, we considered it useful to note that Article 30 of the Vienna Convention on the relation between successive treaties on the same subject-matter was not relevant to the case at hand.

(e) We were of the view that it was not necessary to rephrase our statement in paragraph 6.93 that the minor exceptions doctrine is *primarily* concerned with *de minimis* use.

(f) As suggested by the European Communities, we agreed to refer to the Dun & Bradstreet study prepared in 1999 based on data from 1998 as the 1999 D&B study.

(g) As regards the second sentence of paragraph 6.140, the European Communities stressed that it had consistently referred to the *Claire's Boutique* and *Edison Bros*. cases as evidence that the homestyle exemption is not narrowly confined but had been applied to huge nationally operating corporations. We clarified the sentence by indicating that it expresses *our* understanding of the EC argumentation.

(h) The European Communities requested us to clarify our reasoning in paragraph 6.214. We deemed the reasoning to be sufficiently clear.

(i) We did not agree to change our finding in paragraph 7.1(a), as suggested by the European Communities, by adding, after the words "subparagraph (A) of Section 110(5) of the US Copyright Act", the words "which covers exclusively dramatic musical works".

5.3 The United States mainly made comments of an editorial and factual nature:

(a) We accepted certain editorial suggestions and made minor clerical changes in paragraphs 6.97, 6.205 and 6.260 of the findings.

(b) We agreed, as requested by the United States, to refer to exhibits US-17 and US-18 as "confidential exhibits", given that the United States had obtained them in confidence.

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(c) Furthermore, as proposed by the United States, we deleted a reference in footnote 127, inserted specific factual information from its responses to questions in footnote 173 and added updated information in footnote 188.

VI. FINDINGS

A. CLAIMS

6.1 As mentioned above, the European Communities alleges that the exemptions provided in subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act are in violation of the United States' obligations under the TRIPS Agreement, and requests the Panel to find that the United States has violated its obligations under Article 9.1 of the TRIPS Agreement together with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) and to recommend that the United States bring its domestic legislation into conformity with its obligations under the TRIPS Agreement.

6.2 The United States contends that Section 110(5) of the US Copyright Act is fully consistent with its obligations under the TRIPS Agreement, and requests the Panel to find that both subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act meet the standard of Article 13 of the TRIPS Agreement and the substantive obligations of the Berne Convention (1971). Accordingly, the United States requests the Panel to dismiss the claims of the European Communities in this dispute.

B. PRELIMINARY ISSUE

6.3 Before examining the substantive aspects of this dispute, we discuss how we treat a letter from a law firm representing ASCAP to the United States Trade Representative ("USTR") that was copied to the Panel.

6.4 By means of a letter addressed to a law firm representing ASCAP, dated 16 November 1999,[22] the USTR requested information from ASCAP in relation to questions 9-11 from the Panel to the United States, which were reproduced in the letter.[23] The law firm responded to the USTR by means of a letter, dated 3 December 1999. It forwarded a copy of this letter, addressed to the USTR, to the Panel. The Panel received this copy on 8 December 1999. The Panel transmitted the letter forthwith to both parties and invited them to comment on it if they so wished.

6.5 In a letter, dated 17 December 1999, the United States, *inter alia*, distanced itself from positions expressed in the letter by that law firm and emphasized that in its view the letter was of little probative value for the Panel because it provided essentially no factual data not already provided by either party. But the United States supported in general the right of private parties to make their views known to WTO dispute settlement panels.

6.6 In a letter, dated 12 January 2000, the European Communities stated that it did not have substantive comments on the letter. While it appreciated ASCAP's contribution to the current case, it considered that the letter did not add any new element to what was already submitted by the parties. In referring to the Appellate Body's interpretation of Article 13 of the DSU in its report in the dispute *United States – Import Prohibition of Certain Shrimp and Shrimp Products*,[24] the European Communities also remarked that in its view, the authority of panels is limited to the consideration of factual information and technical advice by individuals or bodies alien to the dispute and thus did not

[22] Exhibit US-19(a). The USTR sent a similar letter to the BMI, Exhibit US-19(b).

[23] These questions and the responses thereto by the United States are contained in Attachment 2.3 to the report.

[24] Appellate Body Report on *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R, paragraphs 99-110.

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include the possibility for a panel to accept any legal argument or legal interpretation from such individuals or bodies.

6.7 According to Article 13 of the DSU, "each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. …". We recall that in the *United States – Shrimps* dispute the Appellate Body reasoned with respect to the treatment by a panel of non-requested information that the "authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has discretionary authority to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. …".[25]

6.8 In this dispute, we do not reject outright the information contained in the letter from the law firm representing ASCAP to the USTR that was copied to the Panel. We recall that the Appellate Body has recognized the authority of panels to accept non-requested information. However, we share the view expressed by the parties that this letter essentially duplicates information already submitted by the parties. We also emphasize that the letter was not addressed to the Panel but only copied to it. Therefore, while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings.

C. BURDEN OF PROOF

6.9 Before turning to the substantive aspects of this dispute, we also discuss the issue of burden of proof.

6.10 We note that the United States does not dispute that subparagraphs (A) and (B) of Section 110(5) implicate Articles 11 and 11*bis* of the Berne Convention (1971) as incorporated into the TRIPS Agreement. But we also recall the US statement that the question of whether these subparagraphs are consistent with those Articles cannot be determined without looking both to the scope of the rights that they afford and to the exceptions which are permitted to those rights. In the view of the United States, only if subparagraphs (A) and (B) of Section 110(5) do not fall within the confines of the relevant exceptions under the TRIPS Agreement, will a finding of inconsistency be possible.[26]

6.11 We further recall the European Communities' contention that it merely needs to establish an inconsistency of Section 110(5) with any provision of the TRIPS Agreement (including those of the Berne Convention (1971) incorporated into it). Once such inconsistency is established by the complainant (or admitted by the respondent), in the view of the European Communities, the burden rests on the United States to invoke and prove the applicability of an exception.[27]

6.12 Recalling the principles set out in the Appellate Body report on *United States – Shirts and Blouses*,[28] we note that the burden of proof rests upon the party, whether complaining or defending,

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[25] Appellate Body Report on *United States – Shrimps*, op.cit., paragraph 108.

[26] Response to question 2 from the Panel to the United States at the first substantive meeting.

[27] First written submission by the European Communities, paragraph 74; the second written submission by the European Communities, paragraph 34.

[28] In *United States – Shirts and Blouses*, the Appellate Body stated:

"… the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." (Footnotes omitted). *See* the Appellate Body Report on *United States – Measures Affecting Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p.14.

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who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

6.13 Consistent with past WTO dispute settlement practice,[29] we consider that the European Communities bears the burden of establishing a *prima facie* violation of the basic rights that have been provided under the copyright provisions of the TRIPS Agreement, including its provisions that have been incorporated by reference from the Berne Convention (1971). By the same token, once the European Communities has succeeded in doing so, the burden rests with the United States to establish that any exception or limitation is applicable and that the conditions, if any, for invoking such exception are fulfilled.

6.14 The same rules apply where the existence of a specific fact is alleged. We note that a party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. It is for the party alleging the fact to prove its existence. It is then for the other party to submit evidence to the contrary if it challenges the existence of that fact.

6.15 While a duty rests on all parties to produce evidence and to cooperate in presenting evidence to the Panel, this is an issue that has to be distinguished from the question of who bears the ultimate burden of proof for establishing a claim or a defence.

6.16 Thus we conclude that it is for the European Communities to present a *prima facie* case that Section 110(5)(A) and (B) of the US Copyright Act is inconsistent with the provisions of the TRIPS Agreement (including those of the Berne Convention (1971) incorporated into it). Should the European Communities fail in establishing such violation, it goes without saying that the United States would not have to invoke any justification or exception. However, we also consider that the burden of proving that any exception or limitation is applicable and that any relevant conditions are met falls on the United States as the party bearing the ultimate burden of proof for invoking exceptions.[30] In view of the statements made by both parties at the first substantive meeting to the Panel, it is our understanding that the parties do not disagree with our interpretation concerning the allocation of the burden of proof as described above.

D. SUBSTANTIVE ASPECTS OF THE DISPUTE

1. General considerations about the exclusive rights concerned and limitations thereto

(a) Exclusive rights implicated by the EC claims

6.17 Articles 9–13 of Section 1 of Part II of the TRIPS Agreement entitled "Copyright and Related Rights" deal with the substantive standards of copyright protection. Article 9.1 of the TRIPS Agreement obliges WTO Members to comply with Articles 1–21 of the Berne Convention (1971) (with the exception of Article 6*bis* on moral rights and the rights derived therefrom) and the Appendix thereto.[31] The European Communities alleges that subparagraphs (A) and (B) of Section 110(5) are inconsistent primarily with Article 11*bis*(1)(iii) but also with Article 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement.

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[29] Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p.22; Appellate Body Report on *United States – Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p.14.

[30] Appellate Body Report on *United States – Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p.22-23.

[31] Article 9.1 of the TRIPS Agreement: "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Articles 6*bis* of that Convention or the rights derived therefrom."

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6.18 We note that through their incorporation, the substantive rules of the Berne Convention (1971), including the provisions of its Articles 11*bis*(1)(iii) and 11(1)(ii), have become part of the TRIPS Agreement and as provisions of that Agreement have to be read as applying to WTO Members.

(i) Article 11bis of the Berne Convention (1971)

6.19 The provision of particular relevance for this dispute is Article 11*bis*(1)(iii).[32] Article 11*bis*(1) provides:

> "Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
>
> (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
>
> (ii) any communication to the public by wire or by re-broadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
>
> (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

6.20 In the light of Article 2 of the Berne Convention (1971), "artistic" works in the meaning of Article 11*bis*(1) include nondramatic and other musical works. Each of the subparagraphs of Article 11*bis*(1) confers a separate exclusive right; exploitation of a work in a manner covered by any of these subparagraphs requires an authorization by the right holder. For example, the communication to the public of a broadcast creates an additional audience and the right holder is given control over, and may expect remuneration from, this new public performance of his or her work.

6.21 The right provided under subparagraph (i) of Article 11*bis*(1) is to authorize the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both radio and television broadcasts. Subparagraph (ii) concerns the subsequent use of this emission; the authors' exclusive right covers any communication to the public by wire or by rebroadcasting of the broadcast of the work, when the communication is made by an organization other than the original one.

6.22 Subparagraph (iii) provides an exclusive right to authorize the public communication of the broadcast of the work by loudspeaker, on a television screen, or by other similar means. Such communication involves a new public performance of a work contained in a broadcast, which requires a licence from the right holder.[33] For the purposes of this dispute, the claims raised by the European Communities under Article 11*bis*(1) are limited to subparagraph (iii).[34]

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[32] Article 11*bis* was introduced into the Berne Convention at the occasion of the Rome Revision (1928) and further elaborated by the Brussels Revision (1948) in the light of technological developments.

[33] The Guide to the Berne Convention, published by WIPO in 1978 ("Guide to the Berne Convention") gives the following explanation on the situation covered by Article 11*bis*(1)(iii): "This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. … The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or many not be for commercial ends. … The Convention's answer is 'no'. Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1)(ii)), so, in this case, too, the work is made perceptible to listeners (and perhaps to viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the

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(ii) Article 11 of the Berne Convention (1971)

6.23 Of relevance to this dispute are also the exclusive rights conferred by Article 11(1)(ii) of the Berne Convention (1971). Article 11(1) provides:

> "Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
>
> (i) the public performance of their works, including such public performance by any means or process;
>
> (ii) any communication to the public of the performance of their works."

6.24 As in the case of Article 11*bis*(1) of the Berne Convention (1971), which concerns broadcasting to the public and communication of a broadcast to the public, the exclusive rights conferred by Article 11 cover *public* performance; private performance does not require authorization. Public performance includes performance by any means or process, such as performance by means of recordings (e.g., CDs, cassettes and videos).[35] It also includes communication to the public of a performance of the work. The claims raised by the European Communities under Article 11(1) of the Berne Convention (1971) are limited to its subparagraph (ii).

6.25 Regarding the relationship between Articles 11 and 11*bis*, we note that the rights conferred in Article 11(1)(ii) concern the communication to the public of performances of works in general. Article 11*bis*(1)(iii) is a specific rule conferring exclusive rights concerning the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work.

6.26 As set out in section III above, the European Communities raises claims against Section 110(5) primarily under Article 11*bis*(1)(iii), which covers the communication to the public of a broadcast which has been transmitted at some point by hertzian waves. But the EC claims also relate to Article 11(1)(ii) to the extent that a communication to the public concerns situations where the entire transmission has been by wire.

6.27 We share the understanding of the parties that a communication to the public by loudspeaker of a performance of a work transmitted by means other than hertzian waves is covered by the exclusive rights conferred by Article 11(1) of the Berne Convention (1971).[36] Moreover, we note that both parties consider that it is the third exclusive right under Article 11*bis*(1)(iii) – i.e., the author's right to authorize the public communication of a broadcast of a work by loudspeaker or any other analogous instrument – which is primarily concerned in this dispute. But we also note that there is no

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family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work." *See* Guide to the Berne Convention, paragraphs 11*bis*.11 and 11*bis*.12, p.68-69.

[34] EC reply to question 8 of Panel; Paragraphs 41-46 of the EC oral statement at the first panel meeting; Paragraphs 61-72 of the EC first written submission.

[35] However, public performance by means of cinematographic works is separately covered in Article 14(1)(ii) of the Berne Convention. Public performance of a literary work or communication to the public of the recitation is covered by Article 11*ter* of the Berne Convention.

[36] In this respect we recall the explanation given in the Guide to the Berne Convention: "The communication to the public of a performance of the work … covers all public communication except broadcasting which is dealt with in Article 11*bis*. For example, a broadcasting organisation broadcasts a chamber concert – Article 11*bis* applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11." Guide to the Berne Convention, paragraph 11.5, p. 65.

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disagreement between the parties that both subparagraphs (A) and (B) of Section 110(5) implicate both Articles 11*bis*(1)(iii) and 11(1)(ii) – albeit to a varying extent.[37]

6.28 Both provisions, i.e., Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) are implicated only if there is a *public* element to the broadcasting or communication operation. We note that it is undisputed between the parties that playing radio or television music by establishments covered by Section 110(5) involves a communication that is available to the *public* in the sense of Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971). We share this view of the parties.[38]

6.29 As noted above, the United States acknowledges that subparagraphs (A) and (B) of Section 110(5) implicate Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971). Consequently, the core question before this Panel is which of the exceptions under the TRIPS Agreement invoked are relevant to this dispute and whether the conditions for their invocation are met so as to justify the exemptions under subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act.

(b) Limitations and exceptions

(i) Introduction

6.30 A major issue in this dispute is the interpretation and application to the facts of this case of Article 13 of the TRIPS Agreement. The US defense is firmly based upon it. The United States submits that the Article clarifies and articulates the "minor exceptions" doctrine applicable under certain provisions of the Berne Convention (1971) and incorporated into the TRIPS Agreement. But the determination of the dispute raises other questions, for instance questions concerning the relationship between Article 13 and the "minor exceptions" doctrine developed in relation to Articles 11 and 11*bis*(1) and (2) of the Berne Convention (1971) and incorporated into the TRIPS Agreement by Article 9.1 thereof. So although the US case rests on Article 13, the determination of the questions at issue between the parties involves considerations beyond those that arise from the mere application of Article 13 to the facts of this case.

6.31 Article 13 of the TRIPS Agreement, entitled "Limitations and Exceptions", is the general exception clause applicable to exclusive rights of the holders of copyright. It provides:

> "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

6.32 We discuss the scope of Article 13 of the TRIPS Agreement in subsection (iv) of this section (paragraphs 6.71ff). In the second part of this report (paragraphs 6.97ff), we will apply the three

[37] EC reply to question 8 of Panel; Paragraphs 41-46 of the EC oral statement at the first panel meeting; Paragraphs 61-72 of the EC first written submission; US response to question 2 by the Panel to the United States. The United States emphasizes, however, that it may not be found in violation of Articles 11 and/or 11*bis* if subparagraphs (A) and (b) of Section 110(5) meet the requirements of relevant exceptions or limitations under the TRIPS Agreement.

[38] We note that Section 101 of the US Copyright Act contains the following definition: "To perform or display a work 'publicly' means

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public are capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

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conditions contained in that Article to subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act.

(ii) Summary of the arguments raised by the parties

6.33 The United States submits that the TRIPS Agreement, incorporating the substantive provisions of the Berne Convention (1971), allows Members to place minor limitations on the exclusive rights of copyright owners. Article 13 of the TRIPS Agreement provides the standard by which to judge the appropriateness of such limitations or exceptions. The exemptions embodied in Section 110(5) fall within the Article 13 standard.

6.34 The principal EC argument concerning Article 13 is that it only applies to exclusive rights newly introduced under the TRIPS Agreement and that the rights conferred under Articles 1–21 of the Berne Convention (1971) as incorporated into the TRIPS Agreement can be derogated from only on the grounds of pre-existing exceptions applicable under the Berne Convention (1971). In the EC view, its position is supported by Article 2.2 of the TRIPS Agreement and Article 20 of the Berne Convention (1971), which it interprets as a prohibition on any derogation from existing standards of protection under the Berne Convention (1971).

6.35 In the US view, Article 13 applies to all copyright-related provisions of the TRIPS Agreement, including the articles of the Berne Convention (1971) incorporated into it. As far as Articles 11*bis*(1) and 11(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement are concerned, the US view is that Article 13 clarifies and articulates the scope of the so-called "minor exceptions" doctrine,[39] which applies to the exclusive rights provided under those Articles. Thus, the United States argues that Article 13 provides the standard by which the permissibility of limitations or "minor exceptions" from exclusive rights in question has to be judged.

6.36 In the alternative to its argument referred to in paragraph 6.34 above, the European Communities contends that even if Article 13 of the TRIPS Agreement was considered to be applicable to the exclusive rights provided under the Berne provisions incorporated into the TRIPS Agreement, its role would be to confine the scope of the pre-existing limitations and exceptions provided in those Berne provisions. The European Communities concedes that the minor exceptions doctrine has been referred to in the discussions during the diplomatic conferences for the revision of the Berne Convention held in Brussels in 1948[40] and Stockholm in 1967,[41] but considers its precise scope and legal status under the Berne Convention as unclear. In its view, the scope of limitations allowed under the minor exceptions doctrine is limited to public performance of works for religious ceremonies, military bands and the needs of child and adult education. It adds that such uses are characterized by their non-commercial character. The European Communities also argues that the minor exceptions doctrine was intended to "grandfather" only pre-existing exceptions that existed in national legislation prior to the Stockholm Diplomatic Conference of 1967, regardless of when a particular country acceded to the Berne Convention.[42]

6.37 The United States submits that the minor exceptions doctrine constitutes a subsequent practice of the Berne Union members in the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties ("Vienna Convention"). In the US view, it is not limited to the specific examples mentioned in the reports of the Brussels and Stockholm diplomatic conferences. There is no

[39] See explanation in paragraphs 6.45ff below.
[40] Brussels Diplomatic Conference for the Revision of the Berne Convention, 5 to 26 June 1948.
[41] Intellectual Property Conference of Stockholm, 11 June to 14 July 1967.
[42] *See, inter alia*, the second written submission by the European Communities, paragraphs 16, 17, 22, 23, 27 and 28.

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requirement that exempt uses be non-commercial. Moreover, the minor exceptions doctrine is not limited to pre-existing exceptions in force prior to 1967 or any other date.[43]

6.38 As far as the exclusive rights conferred by Article 11*bis*(1) are concerned, the European Communities takes the position that neither the minor exceptions doctrine nor Article 13 can be applied in isolation from the requirement to provide an equitable remuneration set forth in Article 11*bis*(2) of the Berne Convention (1971). In its view, an exception to the exclusive rights in question must provide, as a minimum, equitable remuneration to the right holder, in addition to meeting the three conditions of Article 13. In its view, an equitable remuneration can be provided through means other than compulsory licensing[44] and thus the scope of application of Article 11*bis*(2) covers all exceptions to the exclusive rights conferred by Article 11*bis*(1). The European Communities also refers to the extensive argumentation supporting this interpretation as developed in Australia's third party submission.[45]

6.39 The United States responds that there is a basic distinction between exceptions to exclusive rights and compulsory licences. Article 11*bis*(2) merely authorizes a country to substitute a compulsory licence, or its equivalent, for an exclusive right under Article 11*bis*(1). Neither the negotiating history of the Berne Convention nor the subsequent writings of commentators support the view that 11*bis*(2) authorizes outright exceptions to Article 11*bis*, or represents a standard against which to judge such exceptions. Consequently, Article 11*bis*(2) is not related to the minor exceptions doctrine, and does not bear upon the scope of exceptions permissible under that doctrine.[46]

6.40 In the following, we first examine the legal status and scope of the minor exceptions doctrine under the TRIPS Agreement, and then the applicability of Article 13 to the rights provided under the provisions of the Berne Convention (1971), in particular to its Articles 11*bis*(1) and 11(1), as incorporated into the TRIPS Agreement. We then consider the relevance of Article 11*bis*(2) of the Berne Convention (1971) for this case.

6.41 In examining these issues, the question that arises is how the conditions for invoking exceptions provided under the Berne Convention (1971), in particular under the minor exceptions doctrine and Article 11*bis*(2), and the conditions for invoking Article 13 of the TRIPS Agreement interrelate. We note that Article 30 of the Vienna Convention[47] on the application of successive treaties is not relevant in this respect, because all provisions of the TRIPS Agreement – including the incorporated Articles 1–21 of the Berne Convention (1971) – entered into force at the same point in time.

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[43] *See* the second written submission by the United States, paragraphs 16-22.

[44] The European Communities notes that "[i]t would appear that a country could set minimum or precise levels of royalties to be paid for the different uses protected under Article 11*bis* of the Berne Convention. Another way to provide for equitable remuneration could be the introduction of a levy system for the audio/TV equipment purchased by the establishment being allowed to play copyrighted works without authorisations, whereby the proceeds from such a levy system is distributed to the right holders". *See* EC response to question 12 from the Panel to the European Communities.

[45] The written submission of Australia, paragraphs 2.8-2.14, 3.7-3.14, 4.3 and 4.8.

[46] Paragraphs 23 and 24 of the US second written submission; *see* also US response to question 6 from the Panel to both parties.

[47] The relevant parts of Article 30 of the Vienna Convention on the Law of Treaties provide: "…

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. …"

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(iii) The minor exceptions doctrine

6.42 As we noted above, the US view is that Article 13 of the TRIPS Agreement clarifies and articulates the scope of the minor exceptions doctrine, which is applicable under the TRIPS Agreement. Before considering the applicability of Article 13 to Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement, we will first examine whether the minor exceptions doctrine applies under the TRIPS Agreement. This examination involves a two-step analysis. As the first step, we analyse to what extent this doctrine forms part of the Berne Convention *acquis*; in doing so, we will also consider the different views of the parties as to the scope of the doctrine. The second step is to analyse whether that doctrine, if we were to find that it applies under certain Articles of the Berne Convention (1971), has been incorporated into the TRIPS Agreement, by virtue of Article 9.1 of that Agreement, together with Articles 1–21 of the Berne Convention (1971).

General rules of interpretation

6.43 As frequently referred to by WTO panels and the Appellate Body, the fundamental rules of treaty interpretation are Article 31[48] "General rule of interpretation" and Article 32 "Supplementary means of interpretation" of the Vienna Convention. We note that, pursuant to Article 31(1) of the Vienna Convention, we have to interpret in good faith the provisions within our terms of reference in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. We have already addressed the terms of these Articles. But our task does not end with that. The ordinary meaning has to be given to the terms of a treaty in their context and in the light of its object and purpose.[49]

6.44 In that respect, we note that Article 31(2) of the Vienna Convention provides that:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; …"[50]

6.45 The International Law Commission explains in its commentary on the final set of draft articles on the law of treaties that this provision is based on the principle that a unilateral document cannot be regarded as forming part of the context unless not only was it made in connection with the conclusion of the treaty, but its relation to the treaty was accepted by the other parties.[51] "On the other hand, the fact that these two classes of documents are recognized in paragraph 2 as forming part of the 'context' does not mean that they are necessarily to be considered as an integral part of the treaty.

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[48] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose."

[49] Reading treaty terms in their context requires that the text of the treaty must of course be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part. (Cf. Ian Sinclair, The Vienna Convention on the Law of Treaties (2nd ed.), Manchester (1984), p. 127.). *See* also: Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8; Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991, p. 69; Polish Postal Service in Danzig, P.I.C.J. Series B, No. 11, p. 39. Yasseen notes that "[d]'autres dispositions plus ou moins éloignées risquent d'apporter une exception à la disposition qu'il s'agit d'interpréter ou de poser une condition à la mise en oeuvre de cette disposition". *See* Yasseen, L'interprétation des traités d'aprés la Convention de Vienne sur le Droit des Traités, 151 Recueil des Cours (1976-III), p. 34.

[50] Subparagraph (b) of Article 31(2) provides that the context for the purpose of the interpretation of a treaty also comprises: "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

[51] Sinclair, op.cit. p. 129.

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Whether they are an actual part of the treaty depends on the intention of the parties in each case."[52] It is essential that the agreement or instrument should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application.[53] It must equally be drawn up on the occasion of the conclusion of the treaty.[54] Any agreement or instrument fulfilling these criteria will form part of the "context" of the treaty and will thus not be treated as part of the preparatory works but rather as an element in the general rule of interpretation.[55]

6.46 Also uncontested interpretations given at a conference, e.g., by a chairman of a drafting committee, may constitute an "agreement" forming part of the "context".[56] However, interpretative or explanatory statements by members of a drafting committee in their personal capacity should be considered, if at all, simply as part of the preparatory works. We recall in this respect that, according to Article 32 of the Vienna Convention, preparatory works of a treaty are relevant as supplementary means of interpretation, together with the circumstances of its conclusion, *inter alia*, in order to confirm the meaning resulting from the application of Article 31 of that Convention.

The legal status of the minor exceptions doctrine under the Berne Convention

6.47 We will now apply these fundamental rules of interpretation to the provisions of the Berne Convention (1971) within our terms of reference, with a view to ascertaining the legal status of the minor exceptions doctrine in relation to Articles 11*bis*(1) and 11(1) of that Convention.

6.48 We note that, in addition to the explicit provisions on permissible limitations and exceptions to the exclusive rights embodied in the text of the Berne Convention (1971), the reports of successive revision conferences of that Convention refer to "implied exceptions" allowing member countries to provide limitations and exceptions to certain rights. The so-called "minor reservations" or "minor exceptions" doctrine is being referred to in respect of the right of public performance and certain other

[52] Yearbook of the International Law Commission (1966-II), p. 221.

[53] Yasseen, L'interprétation des traités d'aprés la Convention de Vienne sur le Droit des Traités, op.cit., p. 37; cited by Sinclair, op.cit., p.129.

[54] "Il y a ici une certaine notion de contemporanéité, l'un ou l'autre peut être concomitant à cette conclusion, mais il peut la précéder ou la suivre sans s'en éloigner trop. Cette condition est justifée par l'idée même du contexte." See: Yasseen, op.cit., paragraph 16, p. 38.

[55] Sinclair, op.cit. 129. Sinclair mentions the example of the Council of Europe, where governmental experts charged with the task of negotiating and formulating an international convention of a particular topic, draw up, in parallel with the text of the convention, an explanatory report which sets out the framework within which and the background against which the convention has been drawn up, and which then goes on to furnish an article by article commentary on the text. The explanatory report is agreed upon unanimously by the governmental experts responsible for drawing up the text of the convention and it is adopted simultaneously with the text of the convention.

[56] "De plus, la procédure de certaines conférences générales permet, sans adoption de résolution formelle, de discerner un accord qui fait partie du contexte. Des explications concernant une disposition pourront être données, avant le vote de cette disposition, par une personne chargée par la conférence d'une certaine fonction. Le président du comité de rédaction peut, en tant que tel, être appelée à préciser le sens d'une disposition telle qu'elle est adoptée par ce comité. Si la déclaration n'a pas été contredite ou moins pas sérieusement, et si la disposition ainsi clarifiée est acceptée par un vote à la majorité requise, il est possible de soutenir que cette acceptation s'étend à ladite déclaration, qui peut ainsi être considérée comme la base d'un accord faisant partie du contexte. Tout se ramène ici à une question de preuve susceptible d'être élucidée par les circonstances qui ont entouré l'adoption de la disposition dont il s'agit." *See*: Yasseen, op.cit., paragraph 20, p. 39.

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exclusive rights.[57] Under that doctrine, Berne Union members may provide minor exceptions to the rights provided, *inter alia*, under Articles 11*bis* and 11 of the Berne Convention (1971).[58]

6.49 This possibility, available to all Berne Union members, to provide exceptions to certain exclusive rights is most often referred to as "minor reservations" doctrine. However, this terminology is somewhat misleading in the sense that this possibility does not constitute a reservation within the meaning of Articles 19–23 of Section 2 on "Reservations" of the Vienna Convention. Specific rules apply to the members of the Berne Union under Article 30 of the Berne Convention (1971) for making reservations under that Convention. It should also be noted that WTO Members are forbidden to make reservations under Article 72 of the TRIPS Agreement[59] without the consent of the other Members. No reservation has been made on this basis under the TRIPS Agreement on this or any other matter.[60] For the sake of clarity, we therefore use hereinafter the term "minor exceptions" doctrine.

6.50 With respect to public performance of works, until 1948 only a national treatment obligation was provided for under the Berne Convention. Subparagraphs (i) and (ii) of Article 11 of that Convention originated in the Brussels Act of 1948. Their wording remained essentially unchanged in the Stockholm Act of 1967 and the Paris Act of 1971. No specific exception clause applicable to this right was added to the text of the Convention. However, when the general right of public performance was embodied for the first time in Article 11 of the Brussels Act, a statement was included in the General Report of the Brussels Conference referring to the minor exceptions doctrine.

6.51 The provisions currently contained in Article 11*bis*(1)(i) and 11*bis*(2) were first introduced into the Berne Convention at the Rome Conference of 1928, but subsequently modified. Subparagraphs (ii) and (iii) of Article 11*bis*(1) were added to the Convention at the Brussels Conference of 1948. In discussing subparagraphs (ii) and (iii) of Article 11*bis*(1), the General Report of the Brussels Conference states that the minor exceptions doctrine applies also to the exclusive rights under Article 11*bis*.

6.52 More specifically, it was proposed at the Brussels Conference of 1948 that a general provision be inserted into the Berne Convention under which it would be permissible for States parties to the Convention to retain various minor exceptions that already existed in their national laws. However, the proposal was not adopted by the Conference due to a concern that such a general provision could encourage the widening of existing minor exceptions or the introduction of additional minor exceptions in national laws. But the Conference did not question the very existence and maintenance of minor exceptions in national laws as such. In the context of the discussions on Article 11, it was agreed that rather than dealing with this matter in the text of the Convention itself, a statement

[57] The other main category of implied exceptions are understood to apply to the use of translations of literary works.

[58] The doctrine refers to (i) public performance and (ii) communication thereof to the public in the meaning of Article 11(1)(i-ii) as well as to (i) broadcasting by wireless diffusion, (ii) communication of the broadcast to the public by wire or re-broadcasting, and (iii) public communication by loudspeaker etc. of the broadcast in the meaning of Article 11*bis*(1). The minor exceptions doctrine also has been referred to in the context of Articles 11*ter*, 13 and 14 of the Berne Convention. *See* the Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986, published by the International Bureau of WIPO (1986), published by the International Bureau of WIPO in 1986 ("Berne Convention Centenary"), pp. 203 and 204. *See* also Ricketson, Sam: The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, Centre for Commercial Law Studies, Queen Mary College, London (1987), pp. 532-537ff.

[59] Article 72 of the TRIPS Agreement: "Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members."

[60] Article XVI:5 of the Agreement Establishing the WTO reaffirms Article 72 of the TRIPS Agreement.

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concerning the possibility to provide minor exceptions in national law would be included into the General Report.[61]

6.53 When ascertaining the legal status of the minor exceptions doctrine, it is important to note that the General Report states that the Rapporteur-General had been "*entrusted with making an express mention* of the possibility available to national legislation to make what is commonly called minor reservations".[62] We believe that the choice of these words reflects an agreement within the meaning of Article 31(2)(a) of the Vienna Convention between the Berne Union members at the Brussels Conference to retain the possibility of providing minor exceptions in national law. We arrive at this conclusion for the following reasons. First, the introduction of Articles 11*bis*(1)(iii) and 11(1)(ii) occurred simultaneously with the adoption of the General Report expressly mentioning the minor exceptions doctrine. Second, this doctrine is closely related to the substance of the amendment of the Berne Convention in that it limits the scope of the exclusive rights introduced by Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention. Third, an "agreement" between all the parties exists because, on the one hand, the Rapporteur-General is being "entrusted to expressly mention" minor exceptions and, on the other hand, the General Report of the Brussels Conference reflecting this express mentioning was formally adopted by the Berne Union members. We therefore conclude that an agreement within the meaning of Article 31(2)(a) of the Vienna Convention between all the parties on the possibility to provide minor exceptions was made in connection with the conclusion of a revision of the Convention introducing additional exclusive rights, including those contained in Articles 11*bis*(1)(iii) and 11(1)(ii), to which these limitations were to apply, and that this agreement is relevant as context for interpreting these Articles.[63]

6.54 As pointed out above, the wording of Articles 11*bis* and 11 remained essentially the same at the Diplomatic Conferences in Stockholm (1967) and Paris (1971) where the General Reports were also formally adopted by the Berne Union members. The reports of the Stockholm Conference reconfirm our conclusion concerning the existence of an agreement on minor exceptions. The report of the Main Committee I[64] refers to the existence of an agreement between the Berne Union members

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[61] The relevant part of the General Report of the Brussels Diplomatic Conference reads as follows:

"Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark, and Finland, the Delegate of Switzerland and the Delegate of Hungary, have all mentioned these limited exceptions allowed for religious ceremonies, military bands and the needs of the child and adult education. These exceptional measures apply to articles 11*bis*, 11*ter*, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principles of the right." *See* Annex XII.1 to the letter from the Director General of WIPO to the Chair of the Panel. The statement is also reproduced in the Berne Convention Centenary, op.cit., p. 181.

[62] This is not merely a statement by a chair of a drafting group made in his/her personal capacity.

[63] If there were no possibility for "minor exceptions" from Articles 11*bis* and 11, no *de minimis* exemptions in national law whatsoever, allowing the use of the rights conferred by these Articles without remuneration, could be justified under any provision of the Berne Convention.

[64] The relevant parts of the Report of the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20) read as follows:

"209. In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands, and the requirements of education and popularization. The exceptions also apply to articles 11*bis*, 11*ter*, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle in the right.

210. It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference."

See the Berne Convention Centenary, p. 204. For a more complete review of the history of the minor exceptions doctrine and other implied exceptions under the Berne Convention, *see* e.g. Ricketson, The Berne Convention, op. cit., pp. 532 f.

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that minor exceptions are permitted, *inter alia*, in respect of Articles 11 and 11*bis* of the Berne Convention.[65]

6.55 Furthermore, we recall that Article 31(3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice,[66] or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine.[67] In our view, state practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine.[68]

The scope of the minor exceptions doctrine

6.56 Apart from the legal status of the minor exceptions doctrine under the Berne Convention, the parties disagree also on the scope of the doctrine. In the US view, the defining element of the minor exceptions doctrine is that a limitation or exception must be minimal in nature to be permissible. The possibility of providing minor exceptions is not limited to the examples provided in the records of the Brussels and Stockholm Conferences cited above. In contrast, the European Communities argues that the examples given in the Brussels and Stockholm records are exhaustive. It submits that the minor exceptions doctrine is confined to limitations or exceptions of exclusively non-commercial character. It also emphasizes that the records of the Stockholm Conference describe the minor exceptions

[65] While we note that this statement in the reports of the Stockholm Conference of 1967 confirms the agreement on the possibility of providing minor exceptions to certain exclusive rights at the Brussels Conference of 1948, we feel that there is no need to determine whether it constitutes a separate or renewed agreement at the Stockholm Conference within the meaning of Article 31(2) of the Vienna Convention. For the purposes of our examination of Articles 11*bis*(i)(iii) and 11(1)(ii), such an agreement would be relevant only to the extent that these Articles had been modified or amended at the Stockholm Conference.

[66] In *Japan – Alcoholic Beverages*, the Appellate Body described subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention: "… Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognised as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant." (Footnotes omitted). *See* Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8,10,11/AB/R, p. 13.

[67] For example, Australia exempts public performance by wireless apparatus at premises of, *inter alia*, hotels or guest houses. Belgium exempts a work's communication to the public in a place accessible to the public where the aim of the communication is not the work itself, and exempts the performance of a work during a public examination where the purpose is the assessment of the performer. Finland exempts public performance in connection with religious services and education. Finland and Denmark provide for exceptions where a work's performance is not the main feature of the event, provided that no fee is charged and the event is not for profit. New Zealand exempts public performance of musical works at educational establishments. The Philippines exempts public performances for charitable and educational purposes. A similar exception applies in India, where also performances at amateur clubs or societies are exempted. Canadian law provides for exceptions with respect to different exclusive rights for educational, religious or charitable purposes, and also at conventions and fairs. South Africa exempts public performances in the context of demonstrations of radio or television receivers and recording equipment by dealers of or clients for such equipment. (*See* US response to question 16 by the Panel to the United States.) Brazil allows free use of works in commercial establishments for the purpose of demonstration to customers in establishments that market equipment that makes such use possible. (*See* the response by Brazil to question 1 from the Panel to the third parties.)

[68] By enunciating these examples of state practice we do not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention. *See* description by the Appellate Body in its report on *Japan – Alcoholic Beverages*, op.cit., p. 13, cited in footnote 66 above.

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doctrine as a means to allow countries to "maintain" existing national exceptions. It infers from the above quoted statement in the records of the Stockholm Conference that the minor exceptions doctrine is capable of excusing only those exceptions or limitations which existed in the national legislation of a country prior to 1967, when the Stockholm Conference took place.[69] The United States rejects this "grandfathering" theory and the interpretation that the lists of examples found in the records of the Diplomatic Conferences are exhaustive.

6.57 The General Report of the Brussels Conference of 1948 refers to "religious ceremonies, military bands and the needs of the child and adult education" as examples of situations in respect of which minor exceptions may be provided. The Main Committee I Report of the Stockholm Conference of 1967 refers also to "popularization" as one example.[70] When these references are read in their proper context, it is evident that the given examples are of an illustrative character.[71] We also note that the examples given in the reports of the Brussels and Stockholm Conferences are not identical. Furthermore, the examples are given in the context of Article 11(1) of the Berne Convention, but the reports clarify that minor exceptions can also be provided to the exclusive rights conferred under Articles 11*bis*, 11*ter*, 13 and 14, without giving any specific examples. It is also evident that existing minor exceptions vary between different countries. The information presented to us on state practice in respect of minor exceptions in different countries is illustrative of that fact.[72] Furthermore, the academic literature supports the view that these examples of uses in respect of which minor exceptions could be provided are not intended to be exhaustive.[73]

6.58 We note that some of the above-mentioned examples (e.g., religious ceremonies, military bands) typically involve minimal uses which are not carried out for profit. With respect to other examples (e.g., adult and child education and popularization), however an exclusively non-commercial nature of potentially exempted uses is less clear. On the basis of the information provided to us, we are not in a position to determine that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders. On the other hand, non-commercial uses of works, e.g., in adult and child education, may reach a level that has a major economic impact on the right holder. At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed *minor*.[74]

6.59 As regards the coverage of the minor exceptions doctrine in temporal respect, we cannot share the European Communities' view that the coverage was "frozen" in 1967.[75] In our view, the use of the term "*maintain*" in the Stockholm records[76] is not sufficient evidence to substantiate the interpretation

[69] Response to question 11 from the Panel to the European Communities.

[70] *See* the citations in footnote 64 above.

[71] For example, in their preparatory work for the Brussels Conference, the Belgian Government and BIRPI took the view that it would be impossible to list all of the pre-existing exceptions exhaustively in the Convention as they were too varied. Documents de la Conférence Réunie a Bruxelles du 5 au 26 juin 1948, published by BIRPI in 1951, p. 255.

[72] *See* footnote 67 above.

[73] Ricketson notes that "[t]he examples of uses given in the records of the Brussels and Stockholm Conferences are in no way an exhaustive list or determinative of which particular exceptions will be justified". *See* Ricketson, Berne Convention, op.cit., p. 536.

[74] In the literature, it has been argued that such exceptions to the rights protected under the relevant provisions of the Berne Convention must be concerned with minimal use, or use without significance to the author. *See* Ricketson, Berne Convention, op.cit., p. 532-535.

[75] As regards the year 1967 as a suggested cut-off date, we note that the substantive provisions of the Stockholm Act of 1967 have never entered into force. Its substantive provisions were later incorporated into the Paris Act of 1971, which entered into force on 10 October 1974.

[76] Paragraph 210 of the Main Committee I Report of the Stockholm Conference uses the term "maintain". However, the original statement in the General Report of the Brussels Conference of 1948, to

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that countries could justify under the minor exceptions doctrine only those limitations which were in force in their national legislation prior to the year when that Conference was held.

The legal status of the minor exceptions doctrine under the TRIPS Agreement

6.60 Having concluded that the minor exceptions doctrine forms part of the "context" of, at least, Articles 11*bis* and 11 of the Berne Convention (1971) by virtue of an agreement within the meaning of Article 31(2)(a) of the Vienna Convention, which was made between the Berne Union members in connection with the conclusion of the respective amendments to that Convention, we next address the second step of our analysis outlined above. This second step deals with the question whether or not the minor exceptions doctrine has been incorporated into the TRIPS Agreement, by virtue of its Article 9.1[77], together with Articles 1-21 of the Berne Convention (1971) as part of the Berne *acquis*.

6.61 We note that the express wording of Article 9.1 of the TRIPS Agreement neither establishes nor excludes such incorporation into the Agreement of the minor exceptions doctrine as it applies to Articles 11, 11*bis*, 11*ter*, 13 and 14 of the Berne Convention (1971).[78]

6.62 We have shown above that the minor exceptions doctrine forms part of the context, within the meaning of Article 31(2)(a) of the Vienna Convention, of at least Articles 11 and 11*bis* of the Berne Convention (1971). There is no indication in the wording of the TRIPS Agreement that Articles 11 and 11*bis* have been incorporated into the TRIPS Agreement by its Article 9.1 without bringing with them the possibility of providing minor exceptions to the respective exclusive rights. If that incorporation should have covered only the text of Articles 1–21 of the Berne Convention (1971), but not the entire Berne *acquis* relating to these articles, Article 9.1 of the TRIPS Agreement would have explicitly so provided.[79]

6.63 Thus we conclude that, in the absence of any express exclusion in Article 9.1 of the TRIPS Agreement, the incorporation of Articles 11 and 11*bis* of the Berne Convention (1971) into the Agreement includes the entire *acquis* of these provisions, including the possibility of providing minor exceptions to the respective exclusive rights.

6.64 We find confirmation of our interpretation in certain references to the minor exceptions doctrine in the documentation from the GATT Uruguay Round negotiations on the TRIPS Agreement.[80] A TRIPS Negotiating Group document[81] reproduces a document that was prepared by the International Bureau of the WIPO following a decision taken by the Negotiating Group, on 3 March 1988, inviting the Bureau "to prepare a factual document to facilitate an understanding of the

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which the Stockholm records refer, uses the expression "the possibility available to national legislation to make what are commonly called minor reservations".

[77] Article 9.1 of the TRIPS Agreement provides: "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of the Convention or of the rights derived therefrom."

[78] While Article 9.1 does not mention the minor exceptions doctrine, it does not exclude the possibility that this doctrine was incorporated into the TRIPS Agreement as part of the Berne *acquis* together with the above-mentioned provisions to which it applies under the Berne Convention (1971).

[79] In this respect, we refer to the treatment of moral rights under the TRIPS Agreement. Article 9.1 explicitly excludes Members' rights and obligations in respect of the rights conferred under Article 6*bis* of the Berne Convention (1971) and of the rights derived therefrom.

[80] We recall that, according to Article 32 of the Vienna Convention, "recourse may be had to supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 …". We see no need to determine whether the GATT Uruguay Round documentation constitutes "preparatory works " or relate to the "circumstances of … [the] conclusion" of the TRIPS Agreement as annexed to the Agreement Establishing the WTO.

[81] MTN.GNG/NG11/W/24/Rev.1 of 15 September 1988.

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existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property".[82] The Section on the "Scope of Rights" contains the following text on the minor exceptions doctrine:[83]

> "In addition to the limitations explicitly mentioned in the text of the Convention, there is one more possibility for certain exceptions about which there was express agreement at various revision conferences, namely the possibility of minor exceptions to the right of public performance (a concept which is close to the notion of 'fair use' or 'fair dealing'; see item (iii), below)."

6.65 Another TRIPS Negotiating Group document[84] mentions the minor exceptions doctrine as forming part of existing international standards. We are not aware of any record in the Uruguay Round documentation of any country participating in the negotiations challenging or questioning the minor exceptions doctrine being part of the Berne *acquis* on which the TRIPS Agreement was to be built.[85]

6.66 In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. We recall that it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases.[86] We believe that our interpretation of the legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles.

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[82] See GATT document MTN.GNG/NG11/6, paragraphs 39 and 40 and Annex.

[83] Ibid. p. 22.

[84] MTN.GNG/NG11/W/32/Rev.2 of 2 February 1990 contains synoptic tables of proposals tabled in the Group. It contains the first specific proposals on the rights to be conferred and on the permissible limitations, exceptions and compulsory licensing in the area of copyright. The first column in each table sets out the provisions of the international treaties existing at that time corresponding to the proposals made. The Secretariat prepared the content of this column drawing on the above-mentioned document prepared by the International Bureau of WIPO. In the first column of paragraph 5 on limitations, the Secretariat reproduced, in its rendering of the existing international standards, the above-mentioned information provided by WIPO on minor exceptions doctrine. *Ibid*. p. 32.

[85] We find a further confirmation of our interpretation in the negotiating history of Article 9.1 of the TRIPS Agreement. Earlier drafts of that Article referred merely to "the substantive provisions" of the Berne Convention (1971), indicating that the intention was to embody the overall Berne *acquis* rather than just the literal wording of the individual articles. During the negotiations a preference was expressed for identifying these substantive provisions. As a result, these provisions where identified in the final version of the Article as "Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto". It appears that this was done for the sake of clarity, and there is no indication in the records that there was an intention to change the aim of embodying the overall Berne *acquis*.

[86] Appellate Body Report on *Canada – Certain Measures Concerning Periodicals ("Canada – Periodicals")*, adopted on 30 July 1997, WT/DS31/AB/R, p. 19. Appellate Body Report on *European communities – Regime for the Importation, Sale and Distribution of Bananas, ("EC - Bananas III")*, adopted on 25 September 1997, WT/DS27/AB/R, paragraphs 219-222.

In *Guatemala – Cement*, the Appellate Body when discussing the possibility of conflicts between the provisions of the Anti-dumping Agreement and the DSU, stated: "A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them." *See* Appellate Body Report on *Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico ("Guatemala- Cement")*, adopted on 25 November 1998, WT/DS60/AB/R, paragraph 65.

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Subsequent developments

6.67 The United States argues that Article 10 of the WIPO Copyright Treaty ("WCT"), adopted at a Diplomatic Conference on 20 December 1996 organized under the auspices of WIPO, reflects the standard set forth in Article 13 of the TRIPS Agreement. Paragraph (1) of that Article provides a standard for permissible limitations and exceptions to the rights granted to authors under the WCT, while paragraph (2) extends this standard to the application of the provisions of the Berne Convention (1971).[87] In the view of the United States, it becomes clear from the Agreed Statement concerning Article 10 of the WCT that the signatories of the WCT, which include the European Communities and its member States and the United States, commonly recognized the minor exceptions doctrine.[88] In support of its view, the United States also points out that Article 10 of the WCT is based on Article 12 of the Basic Proposal for the 1996 Diplomatic Conference.[89] The commentary in the Basic Proposal explains that the TRIPS Agreement already enunciates the standard of that Article for limitations and exceptions in Article 13 of the TRIPS Agreement, and further states that "[n]o limitation, not even those that belong in the category of minor reservations, may exceed the limits set by the three-steps test".

6.68 The European Communities argues that the WCT has to date been ratified by only a small number of contracting parties and has not yet reached the threshold of thirty ratifications necessary for its entry into force.

6.69 We note that the subsequent developments just mentioned do not constitute a subsequent treaty on the same subject-matter within the meaning of Article 30, or subsequent agreements on the interpretation of a treaty, or subsequent practice within the meaning of Article 31(3). Thus such subsequent developments may be of rather limited relevance in the light of the general rules of interpretation as embodied in the Vienna Convention. However, in our view, the wording of the WCT, and in particular of the Agreed Statement thereto, nonetheless supports, as far as the Berne Convention is concerned, that the Berne Union members are permitted to provide minor exceptions to the rights provided under Articles 11 and 11*bis* of the Paris Act of 1971, and certain other rights. It appears that the objective was not to disallow the provision of such minor exceptions by WCT parties, but rather to make their application subject to the "three step test" contained in Article 10(2) of the WCT.

In *Indonesia – Autos*, the panel noted: "… we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words." (footnotes omitted). *See* Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry ("Indonesia – Autos")*, adopted on 23 July 1998, WT/DS/54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, paragraph 14.28.

[87] Article 10 of the WCT provides:

"1. Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

2. Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

[88] Agreed Statement concerning Article 10 of the WCT reads as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment *limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention*. Similarly these provisions should be understood to permit Contracting Parties *to devise new exceptions and limitations that are appropriate in the digital network environment*." (emphasis added).

[89] Response to question 14 from the Panel to the United States.

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6.70 In paragraph 6.66 we discussed the need to interpret the Berne Convention and the TRIPS Agreement in a way that reconciles the texts of these two treaties and avoids a conflict between them, given that they form the overall framework for multilateral copyright protection. The same principle should also apply to the relationship between the TRIPS Agreement and the WCT. The WCT is designed to be compatible with this framework, incorporating or using much of the language of the Berne Convention and the TRIPS Agreement.[90] The WCT was unanimously concluded at a diplomatic conference organized under the auspices of WIPO in December 1996, one year after the WTO Agreement entered into force, in which 127 countries participated. Most of these countries were also participants in the TRIPS negotiations and are Members of the WTO.[91] For these reasons, it is relevant to seek contextual guidance also in the WCT when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations.

(iv) The scope of Article 13 of the TRIPS Agreement

6.71 As earlier mentioned, at the heart of the US case is Article 13 of the TRIPS Agreement. The United States submits that it clarifies and articulates the scope of the minor exceptions doctrine, which is applicable under the TRIPS Agreement. Having considered the legal status of the minor exceptions doctrine under the TRIPS Agreement, we will later examine the applicability of Article 13 to Articles 11*bis*(1) and 11(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement.[92]

6.72 The language used in Article 13 of the TRIPS Agreement[93] has its origins in the similar language used in Article 9(2) of the Berne Convention (1971),[94] although the latter only applies in the case of the reproduction right.[95]

6.73 A general right of reproduction was not recognized under the Berne Convention until the Stockholm Act of 1967. The main difficulty in the preparation of this amendment was to find an appropriate formula which would allow exceptions to that right. In adopting the present text of

[90] Article 10 of the WCT addresses the WCT's relation to the Berne Convention, but there is no direct connection between the WCT and the TRIPS Agreement. Article 1 of the WCT provides that "[t]his Treaty shall not have any connection with the treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties".

[91] As of 1 March 1999, 13 countries had ratified the WCT. It has 51 signatories, including the European Communities and its member States.

[92] *See* the chapter "The three criteria test under Article 13 of the TRIPS Agreement", beginning with paragraph 6.97 of this report.

[93] Article 13 of the TRIPS Agreement provides:

"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

[94] Article 9(2) of the Berne Convention (1971) provides:

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

[95] The preparatory works to Article 9(2) of the Berne Convention may be illustrative of how the language used was originally intended to be understood. While Article 9(2) may form part of the context of Article 13, preparatory works and negotiating history would, of course, be relevant primarily in the framework Article 32 of the Vienna Convention, e.g., for purposes of confirming an interpretation developed consistent with Article 31 of the Vienna Convention.

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Article 9(2) of the Berne Convention, the Main Committee I of the Stockholm Diplomatic Conference (1967) gave the following guidance on its interpretation:

> "The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."[96]

6.74 Apart from the difference in the use of the terms "permit" and "confine",[97] the main difference between Article 9(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement is that the former applies only to the reproduction right. The wording of Article 13 does not contain an express limitation in terms of the categories of rights under copyright to which it may apply. It states that limitations or exceptions to exclusive rights can only be made if three conditions are met: (1) the limitations or exceptions are confined to certain special cases; (2) they do not conflict with a normal exploitation of the work; and (3) they do not unreasonably prejudice the legitimate interests of the right holder. As both parties agree, these three conditions apply cumulatively; a limitation or an exception is consistent with Article 13 only if it fulfils each of the three conditions.

6.75 The European Communities argues that Article 13 of the TRIPS Agreement applies only to those rights that were added to the TRIPS Agreement, and, therefore, it does not apply to those provisions of the Berne Convention (1971), including its Articles 11(1) and 11*bis*(1), that were incorporated into the TRIPS Agreement by reference.[98]

6.76 In the view of the European Communities, Article 20 of the Berne Convention (1971) speaks against the interpretation of Article 13 as providing a basis for exceptions to the Berne rights incorporated into the TRIPS Agreement, because Article 20 of the Convention only allows "countries of the Berne Union to enter into special agreements among themselves, insofar as such agreements grant to authors more extensive rights than those granted by the (Berne) Convention".[99] In other

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[96] Records of the Intellectual Property Conference of Stockholm. June 11 to July 14, 1967. Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20). As reproduced in the Berne Convention Centenary, p. 197.

[97] Article 9(2) of the Berne Convention (1971) provides that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction", while Article 13 of the TRIPS Agreement provides that "Members shall confine limitations and exceptions to exclusive rights".

[98] *See* EC response to question 10 from the Panel to the European Communities.

[99] The complete text of Article 20 of the Berne Convention (1971) reads:

"The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable."

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words, the European Communities contends that parties to the Berne Convention cannot agree in another treaty to reduce the Berne Convention level of protection.

6.77 Furthermore, the European Communities adds that Article 20 of the Berne Convention (1971) is mirrored in the TRIPS Agreement by Article 2(2), which reads as follows:

> "Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."

6.78 In the alternative to its principal argument, the European Communities contends that, even if Article 13 of the TRIPS Agreement were given a role in the context of exceptions to exclusive rights under the Berne Convention (1971), a principle should be respected according to which the objective of the TRIPS Agreement is to reduce or eliminate existing exceptions, rather than to grant new or extend existing ones. The European Communities refers to the difference in the wording between Article 13 ("Members *shall confine* limitations or exceptions") and Articles 17, 26(2) and 30 of the TRIPS Agreement ("Members *may provide* limited exceptions").[100] We recall, however, that under its principal argument the European Communities takes the view that Article 13 provides exceptions to new rights, rather than reduce the scope of any existing limitations.

6.79 The United States contends that "[t]he text of Article 13 is straightforward and applies to 'limitations or exceptions to exclusive rights'. Not *some* limitations, not limitations to *some* exclusive rights".[101] The United States adds that the application of Article 13 of the TRIPS Agreement to the rights provided under Article 11(1) and 11*bis*(1) of the Berne Convention (1971) does not derogate from the obligations under the Berne Convention in violation of Article 2.2 of the TRIPS Agreement or Article 20 of the Berne Convention, because Article 13 of the TRIPS Agreement articulates the standard applicable to minor exceptions under the Berne Convention (1971) as far as these Articles are concerned.

6.80 In our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement.

6.81 The application of Article 13 of the TRIPS Agreement to the rights provided under Articles 11(1) and 11*bis*(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement need not lead to different standards from those applicable under the Berne Convention (1971), given that we have established that the possibility of providing minor exceptions forms part of the context of these articles. Taking into account this contextual guidance, we will examine the scope for permissible minor exceptions to the exclusive rights in question by applying the conditions of Article 13 of the TRIPS Agreement.

6.82 In regard to the argument of the European Communities that the US interpretation of Article 13 is incompatible with Article 20 of the Berne Convention (1971) and Article 2.2 of the TRIPS Agreement because it treats Article 13 of the TRIPS Agreement as providing a basis for exceptions that would be inconsistent with those permitted under the Berne Convention (1971), we note that the United States is not arguing this but rather that Article 13 clarifies and articulates the standards applicable to minor exceptions under the Berne Convention (1971). Since the EC arguments in relation to these provisions would only be relevant if a finding that would involve inconsistency with the Berne Convention (1971) were being advocated, we do not feel it is necessary to examine them further.

[100] Paragraph 27 of the second written submission by the European Communities.
[101] Paragraph 4 of the oral statement of the United States at the second meeting with the Panel.

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(v) Article 11bis(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement

6.83 Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement relates to the exclusive rights conferred under Article 11*bis*(1), including the communication to the public of a broadcast in the meaning of its subparagraph (iii). It reads as follows:

> "It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

6.84 This provision was inserted into the Rome Act of 1928, when the right of broadcasting was first introduced. At the Brussels Conference of 1948, its scope was extended to cover the additional rights recognized by Article 11*bis*(1), including the rights under Article 11*bis*(1)(iii). Article 11*bis*(2) does not apply to the rights provided under Article 11(1). The reference to "conditions" is usually understood to allow countries to substitute, for the author's exclusive right, a system of compulsory licences,[102] or determine other conditions provided that they are not prejudicial to the right holder's right to obtain an equitable remuneration.[103]

6.85 The European Communities argues that any exception to the rights contained in Article 11*bis*(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement would have to provide for an equitable remuneration to the right holder; this is not the case under Section 110(5) of the US Copyright Act. In this respect, the European Communities refers to the extensive argumentation supporting this interpretation as developed in Australia's third party submission.[104]

6.86 The United States contends that Article 11*bis*(2) has no bearing on Section 110(5); Article 11*bis*(2) merely authorizes a country to substitute a compulsory licence, or its equivalent, for an exclusive right under Article 11*bis*. The United States adds that Article 11*bis*(2) is not related to the minor exceptions doctrine, and does not bear upon the scope of exceptions permissible under that doctrine as it applies under Article 11*bis*.

6.87 We believe that Article 11*bis*(2) of the Berne Convention (1971) and Article 13 cover different situations. On the one hand, Article 11*bis*(2) authorizes Members to determine conditions under which the rights conferred by Article 11*bis*(1)(i-iii) may be exercised. The imposition of such conditions may completely replace the free exercise of the exclusive right of authorizing the use of the rights embodied in subparagraphs (i-iii) provided that equitable remuneration and the author's moral rights are not prejudiced. However, unlike Article 13 of the TRIPS Agreement, Article 11*bis*(2) of the Berne Convention (1971) would not in any case justify use free of charge.

6.88 On the other hand, it is sufficient that a limitation or an exception to the exclusive rights provided under Article 11*bis*(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement meets the three conditions contained in its Article 13 to be permissible. If these three conditions are met, a government may choose between different options for limiting the right in

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[102] *See* e.g. the Guide to the Berne Convention, op.cit., paragraph 11*bis*.15, p. 70.

[103] The European Communities notes that "[i]t would appear that a country could set minimum or precise levels of royalties to be paid for the different uses protected under Article 11*bis* of the Berne Convention. Another way to provide for equitable remuneration could be the introduction of a levy system for the audio/TV equipment purchased by the establishment being allowed to play copyrighted works without authorisations, whereby the proceeds from such a levy system is distributed to the right holders." *See* EC response to question 12 from the Panel to the European Communities.

[104] The written submission of Australia, paragraphs 2.8-2.14, 3.7-3.14, 4.3 and 4.8.

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question, including use free of charge and without an authorization by the right holder. This is not in conflict with any of the paragraphs of Article 11*bis* because use free of any charge may be permitted for minor exceptions by virtue of the minor exceptions doctrine which applies, *inter alia*, also to Article 11*bis*.

6.89 As regards situations that would not meet the above-mentioned three conditions, a government may not justify an exception, including one involving use free of charge, by Article 13 of the TRIPS Agreement. However, also in these situations Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement would nonetheless allow Members to substitute, for an exclusive right, a compulsory licence, or determine other conditions provided that they were not prejudicial to the right holder's right to obtain an equitable remuneration.

6.90 We believe that our interpretation gives meaning and effect to Article 11*bis*(2), the minor exceptions doctrine as it applies to Article 11*bis*, and Article 13. However, in our view, under the interpretation suggested by the European Communities this would not be the case, e.g., in the following situations. If any *de minimis* exception from rights conferred by Article 11*bis*(1)(i-iii) were subject to the requirement to provide equitable remuneration within the meaning of Article 11*bis*(2), no exemption whatsoever from the rights recognized by Article 11*bis*(1) could permit use free of charge even if the three criteria of Article 13 were met. As a result, narrow exceptions or limitations would be subject to the three conditions of Article 13 in addition to the requirement to provide equitable remuneration. At the same time, broader exceptions or limitations which do not comply with the criteria of Article 13 could arguably still be justified under Article 11*bis*(2) as long as the conditions imposed ensure, *inter alia*, equitable remuneration. Such an interpretation could render Article 13 somewhat redundant because narrow exceptions would be subject to all the requirements of Article 13 and Article 11*bis*(2) on a cumulative basis, while for broader exceptions compliance with Article 11*bis*(2) could suffice. Both situations would lead to the result that any use free of charge would not be permissible. These examples are illustrative of situations where the terms and conditions of Article 13, Article 11*bis*(2) and the minor exceptions doctrine would not be given full meaning and effect.

6.91 In our view, Section 110(5) of the US Copyright Act contains exceptions that allow use of protected works without an authorization by the right holder and without charge. Whether these exceptions meet the United States' obligations under the TRIPS Agreement has to be examined by applying Article 13 of the TRIPS Agreement. Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement is not relevant for the case at hand; the United States has not provided a right in respect of the uses covered by the present Section 110(5), the exercise of which would have been subjected to conditions determined in its legislation.

(vi) Summary of limitations and exceptions

6.92 In the light of the foregoing analysis, we conclude that the context of Articles 11 and 11*bis* of the Berne Convention (1971) comprises, within the meaning of Article 31(2)(a) of the Vienna Convention, the possibility of providing minor exceptions to the exclusive rights in question. This minor exceptions doctrine has been incorporated into the TRIPS Agreement, by virtue of its Article 9.1, together with these provisions of the Berne Convention (1971). Therefore, the doctrine is relevant as forming part of the context of Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement.

6.93 As regards the scope of permissible limitations and exceptions under the minor exceptions doctrine, we conclude that the doctrine is primarily concerned with *de minimis* use, but that otherwise its application is not limited to the examples contained in the reports of the Berne Convention revision conferences held in Brussels and Stockholm, to exclusively non-commercial uses or to exceptions in national legislation that existed prior to 1967. However, we note that the reports of the Brussels and

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Stockholm Conferences are inconclusive about the precise scope of exceptions that can be provided in national legislation.

6.94 We conclude that Article 13 of the TRIPS Agreement applies to Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement, given that neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement.

6.95 We also conclude that Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement allows Members to substitute a compulsory licence for an exclusive right under Article 11*bis*(1), or determine other conditions provided that they are not prejudicial to the right holder's right to obtain an equitable remuneration. Article 11*bis*(2) is not relevant for the case at hand, because the United States has not provided a right in respect of the uses covered by the present Section 110(5), the exercise of which would have been subjected to conditions determined in its legislation.

6.96 We now proceed to applying the three conditions contained in Article 13 of the TRIPS Agreement to the exemptions contained in Section 110(5) of the US Copyright Act in relation to Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement.

2. The three criteria test under Article 13 of the TRIPS Agreement

(a) General introduction

6.97 Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (1) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder.[105] The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to "redundancy or inutility".[106] The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed. Both parties agree on the cumulative nature of the three conditions. The Panel shares their view. It may be noted at the outset that Article 13 cannot have more than a narrow or limited operation. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature. The narrow sphere of its operation will emerge from our discussion and application of its provisions in the paragraphs which follow.

6.98 In the following, we will first explore the interpretation of the first condition of Article 13 in general terms in the light of the arguments made by the parties. We will then examine, in turn, subparagraphs (B) and (A) of Section 110(5) of the US Copyright Act of 1976, as amended by the Fairness in Music Licensing Act of 1998, that contain, respectively, the business and homestyle exemptions. We will discuss the business exemption of subparagraph (B) first because most of the arguments raised by the parties focus on it. After that, we will similarly explore the interpretation of the second and third conditions and apply them to subparagraphs (B) and (A) of Section 110(5).

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[105] *See* the text of the Article in paragraph 6.31 and in footnote 93 above. As we noted in paragraph 6.72 above, the wording of Article 13 derives largely from Article 9(2) of the Berne Convention (1971) which applies, however, to reproduction rights only. Given the similarity of the wording, we consider that the preparatory works of Article 9(2) of the Berne Convention and its application in practice may be of contextual relevance in interpreting Article 13 of the TRIPS Agreement.

[106] Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p. 23.

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6.99 The parties have largely relied on similar factual information in substantiating their legal arguments under each of the three conditions of Article 13. We are called upon to evaluate this information from different angles under the three conditions, which call for different requirements for justifying exceptions or limitations. We will look at the defined and limited scope of the exemptions at issue under the first condition, and focus on the degree of conflict with normal exploitation of works under the second condition. In relation to the third condition, we will examine the extent of prejudice caused to the legitimate interests of the right holder in the light of the information submitted by the parties.

6.100 In providing such factual information, the United States has focused on describing the immediate and direct impact on copyright holders caused by the introduction of the exemptions into its law; this can be characterized as the *actual* effects of the exemptions. The United States argues that while both actual losses and potential losses may be relevant to the analysis, the key is a realistic appraisal of the conditions that prevail in the market; the only way to avoid the danger of arbitrariness is to base the analysis on realistic market conditions.[107]

6.101 The European Communities emphasizes the importance of taking into account the way that the exemptions affect the right holders' opportunities to exercise their exclusive rights as well as the indirect impact of the exemptions; this can be characterized as the *potential* effects of the exemptions. We will address below the question to what extent we should focus on the actual impact on the right holder and to what extent we should also take into account the potential impact.

(b) "Certain special cases"

(i) General interpretative analysis

6.102 In invoking the exception of Article 13, as an articulation and clarification of the minor exceptions doctrine, the United States claims that both subparagraphs (A) and (B) of Section 110(5) meet the standard of being confined to "certain special cases".

6.103 The United States submits that the fact that the TRIPS Agreement does not elaborate on the criteria for a case to be considered "special" provides Members flexibility to determine for themselves whether a particular case represents an appropriate basis for an exception.[108] But it acknowledges that the essence of the first condition is that the exceptions be well-defined and of limited application.[109]

6.104 In the view of the European Communities, an exception has to be well-defined and narrow in scope to meet the requirements under the first condition. In the EC's view, in the case at hand, such significant numbers of establishments are excepted from the duty to pay fees for the use of exclusive rights under subparagraph (A) and (B) of Section 110(5) that the exemptions contained therein constitute a rule rather than an exception.[110]

6.105 The European Communities argues that, in the light of the wording of the first condition in Article 9(2) of the Berne Convention (1971), which forms part of the context of Article 13, an exemption should serve a "special purpose". For the European Communities, in the case of Section 110(5), no such special public policy or other exceptional circumstance exists that would make it inappropriate or impossible to enforce the exclusive rights conferred by Articles 11 and 11*bis* of the Berne Convention (1971). In the EC view, the subparagraphs of Section 110(5) do not pursue legitimate public policy objectives.

[107] US second oral statement, paragraph 18.
[108] US first written submission, paragraph 24.
[109] US second written submission, paragraph 29.
[110] EC first oral statement, paragraph 66ff and second written submission, paragraph 31.

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6.106 In the US view, if the purpose of an exception is relevant at all, the TRIPS Agreement only requires that an exception has a specific policy objective. It does not impose any requirement as to the legitimacy of the policy objectives that a particular country might consider special in the light of its own history and national priorities.

6.107 We start our analysis of the first condition of Article 13 by referring to the ordinary meaning of the terms in their context and in the light of its object and purpose. It appears that the notions of "exceptions" and "limitations" in the introductory words of Article 13 overlap in part in the sense that an "exception" refers to a derogation from an exclusive right provided under national legislation in some respect, while a "limitation" refers to a reduction of such right to a certain extent.

6.108 The ordinary meaning of "certain" is "known and particularised, but not explicitly identified", "determined, fixed, not variable; definitive, precise, exact".[111] In other words, this term means that, under the first condition, an exception or limitation in national legislation must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.

6.109 We also have to give full effect to the ordinary meaning of the second word of the first condition. The term "special" connotes "having an individual or limited application or purpose", "containing details; precise, specific", "exceptional in quality or degree; unusual; out of the ordinary" or "distinctive in some way".[112] This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition ("no conflict with a normal exploitation"), an exception or limitation should be the opposite of a non-special, i.e., a normal case.

6.110 The ordinary meaning of the term "case" refers to an "occurrence", "circumstance" or "event" or "fact".[113] For example, in the context of the dispute at hand, the "case" could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors.

6.111 As regards the parties' arguments on whether the public policy purpose of an exception is relevant, we believe that the term "certain special cases" should not lightly be equated with "special purpose".[114] It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article. We also recall in this respect that in interpreting other WTO rules, such as the national treatment clauses of the GATT and the GATS, the Appellate Body has rejected

[111] The New Shorter Oxford English Dictionary ("Oxford English Dictionary"), Oxford (1993), p. 364.
[112] Oxford English Dictionary, p. 2971.
[113] Oxford English Dictionary, p. 345.
[114] We note that the term "special purpose" has been referred to in interpreting the largely similarly worded Article 9(2) of the Berne Convention (1971). *See* Ricketson, The Berne Convention, op.cit., p. 482. We are ready to take into account "teachings of the most highly qualified publicists of the various nations" as a "subsidiary source for the determination of law". We refer to this phrase in the sense of Article 38(d) of the Statute of the International Court of Justice which refers to such "teachings" (or, in French "la doctrine") as "subsidiary means for the determination of law." But we are cautious to use the interpretation of a term developed in the context of an exception for the reproduction right for interpreting the same terms in the context of a largely similarly worded exception for other exclusive rights conferred by copyrights.

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interpretative tests which were based on the subjective aim or objective pursued by national legislation.[115]

6.112 In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition.

6.113 In the case at hand, in order to determine whether subparagraphs (B) and (A) of Section 110(5) are confined to "certain special cases", we first examine whether the exceptions have been clearly defined. Second, we ascertain whether the exemptions are narrow in scope, *inter alia*, with respect to their reach. In that respect, we take into account what percentage of eating and drinking establishments and retail establishments may benefit from the business exemption under subparagraph (B), and in turn what percentage of establishments may take advantage of the homestyle exemption under subparagraph (A). On a subsidiary basis, we consider whether it is possible to draw inferences about the reach of the business and homestyle exemptions from the stated policy purposes underlying these exemptions according to the statements made during the US legislative process.[116]

(ii) The business exemption of subparagraph (B)

6.114 As noted above, the United States argues that the essence of the first condition of Article 13 of the TRIPS Agreement is that exceptions be well-defined and of limited application. It claims that the business exemption of subparagraph (B) meets the requirements of the first condition of Article 13, because it is clearly defined in Section 110(5) of the US Copyright Act by square footage and equipment limitations.[117]

6.115 In the US view, if at all the purpose of an exception is relevant, the first condition only requires that the exception has a specific policy objective, but it does not impose any requirements on the policy objectives that a particular country might consider special in the light of its own history and national priorities. As regards the business exemption, the United States claims that the specific policy objective pursued by this exemption is fostering small businesses and preventing abusive tactics by CMOs.[118]

6.116 The European Communities contends that the business exemption is too broad in its scope to pass as a "certain special case", given the large number of establishments which potentially may benefit from it. For the European Communities, it is irrelevant that the size of establishments and the type of equipment are clearly defined, when the broad scope of the business exemption turns an exception into the rule.

6.117 It appears that the European Communities does not dispute the fact that subparagraph (B) is clearly defined in respect of the size limits of establishments and the type of equipment that may be

[115] *See* Appellate Body Report on *Japan – Alcoholic Beverages*, op.cit., p. 19-23, for the rejection of the so-called "aims and effects" test in the context of the national treatment clause of Article III of GATT 1994. *See* also the Appellate Body Report on *EC – Bananas III*, op.cit., paragraphs 241, 243, 246, for the rejection of the "aims-and-effects" test in the context of the national treatment clause of Article XVII of GATS.

[116] We discuss the business exemption of subparagraph (B) first because most of the arguments raised by the parties focus on this exception. In turn, we then examine the homestyle exemption in its current form as contained in subparagraph (A).

[117] US second written submission, paragraph 29.

[118] *Ibid*.

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used by establishments above the applicable limits.[119] The primary bone of contention between the parties is whether the business exemption, given its scope and reach, can be considered as a "special" case within the meaning of the first condition of Article 13.

6.118 The Congressional Research Service ("CRS") estimated in 1995 the percentage of the US eating and drinking establishments and retail establishments that would have fallen at that time below the size limits of 3,500 square feet and 1,500 square feet respectively. Its study found that:

(d) 65.2 per cent of all eating establishments;

(e) 71.8 per cent of all drinking establishments; and

(f) 27 per cent of all retail establishments

would have fallen below these size limits.[120]

6.119 The United States confirms these figures as far as eating and drinking establishments are concerned.[121]

6.120 We note that this study was made in 1995 using the size limit of 3,500 square feet for eating and drinking establishments, and the size limit of 1,500 square feet for retail establishments, while the size limits under subparagraph (B) now are 3,750 square feet for eating and drinking establishments and 2,000 square feet for retail establishments. Therefore, in our view, it is safe to assume that the actual percentage of establishments which may fall within the finally enacted business exemption in the Fairness in Music Licensing Act of 1998 is higher than the above percentages.

6.121 The United States has also submitted estimates by the National Restaurant Association (NRA) concerning its membership.[122] According to these estimates, 36 per cent of its table service restaurant members (i.e., those with sit-down waiter service) are of a size less than 3,750 square feet, and approximately 95 per cent of its fast-food restaurant members are of a size less than 3,750 square feet.[123] We are not able to fully reconcile the 1995 CRS estimates with those of the NRA because we have not been provided with information on how representative the NRA membership is of all restaurants in the United States, and on the proportion of table-service restaurants in relation to fast-food restaurants among its membership. Therefore, we limit ourselves to stating that the NRA figures do not seem to contradict the estimates of the CRS study of 1995.

6.122 In 1999, Dun & Bradstreet, Inc. ("D&B") was requested by ASCAP to update the 1995 CRS study based on 1998 data and the criteria in the 1998 Amendment.[124] The European Communities

[119] We recall that the beneficiaries of the business exemption are divided into two categories: establishments other than food service or drinking establishments ("retail establishments"), and food service and drinking establishments. In each category, establishments under certain size limit (2,000 and 3,750 square feet, respectively) are exempted regardless of the type of equipment they use. If the size of an establishment is above the applicable limit, the exemption applies provided that the establishment does not exceed the limits set for the equipment used. For details, *see* paragraphs 2.10 and 2.14 of Section II on Factual Aspects of this Report.

[120] *See* also paragraph 2.11 above.

[121] Exhibit US-16.

[122] US reply to question 9 by the Panel to the United States and confidential exhibit US-18.

[123] *See* also paragraph 2.13 above.

[124] *See* also paragraph 2.12 and Exhibit EC-7. According to the European Communities, the 1998/1999 D&B's "Dun's Market Identifying Market Profile" is a database of more than 6.5 million US businesses, based on square footage. The European Communities explains that the figures of the D&B studies comprise bars, restaurants, tea-rooms, snackbars, etc. and retail stores. However, other sectors, e.g. hotels, financial service outlets, estate property brokers, other types of service providers, in which a number of establishments are likely to be exempted as well, were not taken into account.

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explains that the methodology used by the D&B in 1998/1999 was identical to the methodology used in the analysis which the D&B prepared in 1995 for the CRS during the legislative process that eventually led to the adoption of the Fairness in Music Licensing Act. The D&B study of 1999[125] concludes that approximately 73 per cent of all drinking, 70 per cent of all eating, and 45 per cent of all retail establishments in the United States are entitled under subparagraph (B), without any limitation regarding equipment, to play music from radio and television on their business premises without the consent of the right holders.[126]

6.123 We note that while the United States does not confirm the figures of the 1999 D&B study, it has used them, for the sake of argument, as a basis for its calculations on possible losses suffered by EC right holders as a result of the subparagraph (B) exemption.[127]

6.124 In view of the vagueness of the explanation available to us of the methodology used for the 1999 D&B study,[128] we are not in a position to recalculate exactly the results and trends of this study. But it appears that the results of the 1999 D&B study are largely consistent with the results and trends of the 1995 CRS study.

6.125 Referring to these studies, the European Communities points out that these 70 per cent of eating and drinking establishments and 45 per cent of retail establishments are all potential users of the business exemption, because they can at any time, without permission of the right holders, begin to play amplified music broadcasts.[129]

6.126 The United States contends that even if 70 per cent of all eating and drinking establishments and 45 per cent of all retail establishments are implicated by the size limits under subparagraph (B) after the 1998 Amendment, many of these establishments would have to be subtracted for various reasons. These include (i) establishments that do not play music at all; (ii) those that would turn off the music if they became liable to pay fees; (iii) those that play music from sources other than the radio or television, such as tapes, CDs, jukeboxes or live performances; (iv) establishments that were

[125] According to the information submitted by the European Communities, the number of establishments contained in the D&B database in 1998 were as follows:

(a) 7,819 drinking establishments of a square footage below 3,750 square feet which amounts to 73 per cent of all US drinking establishments filed in the D&B database;

(b) 51,385 eating establishments of a square footage below 3,750 square feet which amounts to 70 per cent of all US eating establishments filed in the D&B database;

(c) 65,589 retail establishments of a square footage below 2,000 square feet or 45 per cent of all US retail establishments filed in the D&B database.

In addition, D&B estimated the total figures as follows:

(a) 49,061 drinking establishments of a square footage below 3,750 square feet which amounts to 85 per cent of all US drinking establishments filed in the D&B database;

(b) 192,692 eating establishments of a square footage below 3,750 square feet which amounts to 68 per cent of all US eating establishments filed in the D&B database;

(c) 281,406 retail establishments of a square footage below 2,000 square feet or 42 per cent of all US retail establishments filed in the D&B database. *See* Exhibit EC-7.

[126] The European Communities calculates that the number of eating, drinking and retail establishments that fall below the size limits of subparagraph (B), compared to the number of establishments that fall below the size of the restaurant that was operated by Mr. *Aiken*, has increased by 437 per cent, 540 per cent, and 250 per cent, respectively. While we do not wish to accept or reject the particular percentage figures of these estimates, we note that there is a magnitude of difference in the coverage between the original homestyle exemption and the new business exemption.

[127] US second submission, paragraphs 33-48.

[128] Exhibit EC-7.

[129] Cf. the discussion on actual and potential effects in paragraphs 184ff below.

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not licensed prior to the enactment of the business exemption in 1998; (v) establishments that would take advantage of group licensing arrangements such as the one between the NLBA and the CMOs.[130]

6.127 We agree with the European Communities that it is the scope in respect of potential users that is relevant for determining whether the coverage of the exemption is sufficiently limited to qualify as a "certain *special* case". While it is true, as the United States argues, that some establishments might turn off the radio or television if they had to pay fees, other establishments which have not previously played music might do the opposite, because under the business exemption the use of music is free. Some establishments that have used recorded music may decide to switch to broadcast music in order to avoid paying licensing fees. It is clear that, in examining the exemption, we have to also consider its impact on the use of other substitutable sources of music. Consequently, we do not consider the US calculations of establishments to be deducted from the CRS or D&B estimates as relevant for ascertaining the potential scope of the business exemption in relation to the first condition of Article 13.

6.128 We refer to our discussion concerning the third condition of Article 13, in which context we will examine in more detail the relevance of the US arguments concerning the five types of subtractions that would need to be made from the above percentage figures, and the exemption's likely effects on the licensing of other sources of music.[131] In that context, we will also address the US argument that many establishments were not licensed before the enactment of the business exemption and that many establishments covered by subparagraph (B) would be likely subscribers to the group licensing agreement between the NLBA and the CMOs.

6.129 The United States does not appear to make a distinction between, on the one hand, the eating and drinking or retail establishments whose size is within the applicable limits of subparagraph (B), and, on the other hand, larger establishments that may still use music for free if they comply with the applicable equipment limitations (e.g., concerning loudspeakers per room or screen size).[132] We have not been provided with information concerning the absolute numbers or the proportion of these larger establishments qualifying under the business exemption. Suffice it to say that the percentage of all US eating, drinking and retail establishments that may fall within the coverage of subparagraph (B) could be even higher than the above figures or estimates suggest.

6.130 The United States further notes that the prohibitions against charging admission fees and retransmission in indent (iii) and (iv) of subparagraph (B) limit the field of application of the business exemption. The European Communities contends that these prohibitions have no potential whatsoever to limit the impact of the exemption. We have not been presented with information on whether these prohibitions significantly reduce the number of establishments that could otherwise qualify for the exemption. In view of this fact, we recall our general considerations about the allocation of the ultimate burden of proof for invoking exceptions.

6.131 We note that, according to its preparatory works, Article 11*bis*(iii) of the Berne Convention (1971) was intended to provide right holders with a right to authorize the use of their works in the types of establishments covered by the exemption contained in Section 110(5)(B). Specifically, the preparatory works for the 1948 Brussels Conference indicate that the establishments that were intended to be covered were places "above all, where people meet: in the cinema, in restaurants, in tea rooms, railway carriages …". The preparatory works also refer to places such as

[130] We discuss the US calculations under the third condition of Article 13 in the subsection entitled "The alternative calculations by the parties of losses suffered by right holders" in paragraphs 6.252ff below.

[131] These include, e.g., CDs, tapes, jukeboxes or live music. Music played on radio and television is probably more interchangeable with recorded music than with live music performance. However, the fact that there is a different degree of elasticity of substitution does not mean that the effect of substitution between different sources of music is negligible.

[132] *See* Section II on Factual Aspects, paragraph 2.14.

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factories, shops and offices.[133] We fail to see how a law that exempts a major part of the users that were specifically intended to be covered by the provisions of Article 11*bis*(1)(iii) could be considered as a *special* case in the sense of the first condition of Article 13 of the TRIPS Agreement.

6.132 We are aware that eating, drinking and retail establishments are not the only potential users of music covered by the exclusive rights conferred under Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971). The United States has mentioned, *inter alia*, conventions, fairs and sporting events as other potential users of performances of works in the meaning of the above Articles. However, we believe that these examples of other potential users do not detract from the fact that eating, drinking and retail establishments are among the major groups of potential users of the works in the ways that are covered by the above-mentioned Articles.

6.133 The factual information presented to us indicates that a substantial majority of eating and drinking establishments and close to half of retail establishments are covered by the exemption contained in subparagraph (B) of Section 110(5) of the US Copyright Act. Therefore, we conclude that the exemption does not qualify as a "certain special case" in the meaning of the first condition of Article 13.

6.134 The European Communities warns that the potential coverage of both exemptions contained in Section 110(5) could become even larger because subparagraphs (A) and (B) could arguably exempt the transmission of musical works over the Internet. Given that we have found that the business exemption does not meet the first condition of Article 13 regardless of whether it potentially implicates transmission of works over the Internet, we see no need to address this question in the context of subparagraph (B). However, we will take up this question when we examine the homestyle exemption of subparagraph (A) in relation to the first condition of Article 13.

(iii) The homestyle exemption of subparagraph (A)

6.135 We examine now whether the homestyle exemption in subparagraph (A), in the form in which it is currently in force in the United States, is a "certain special case" in the meaning of the first condition of Article 13 of the TRIPS Agreement.

6.136 The United States submits that the exemption of subparagraph (A) is confined to "certain special cases", because its scope is limited to the use involving a "homestyle" receiving apparatus. In the US view, in the amended version of 1998 as well, this is a well-defined fact-specific standard. The essentially identical description of the homestyle exemption in the original Section 110(5) of 1976 was sufficiently clear and narrow for US courts to reasonably and consistently apply the exception – including square footage limitation since the *Aiken* case – in a number of individual decisions. For the United States, the fact that judges have weighed the various factors slightly differently in making their individual decisions is simply a typical feature of a common-law system.

6.137 The European Communities contends that the criteria of the homestyle exemption in subparagraph (A) are ambiguously worded because the expression "a single receiving apparatus of a kind commonly used in private homes" is in itself imprecise and a "moving target" due to technological development. Also the variety of approaches and factors used by US courts in applying the original version of the homestyle exemption are proof for the European Communities that the wording of subparagraph (A) of Section 110(5) is vague and open-ended.

[133] Documents de la Conférence Réunie a Bruxelles du 5 au 26 juin 1948, published by BIRPI in 1951, p. 266. In discussing this provision, the Guide to the Berne Convention refers to "cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.", op.cit., paragraph 11*bis*.11, p. 68. (For a more complete quote *see* footnote 33 above).

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Beneficiaries of the homestyle exemption

6.138 The wording of the amended version of Section 110(5)(A) is essentially identical to the wording of Section 110(5) in its previous version of 1976, apart from the introductory phrase "except as provided in subparagraph (B)". Therefore, we consider that the practice as reflected in the judgements rendered by US courts after 1976 concerning the original homestyle exemption may be regarded as factually indicative of the reach of the homestyle exemption even after the 1998 Amendment.

6.139 We recall that in *Twentieth Century Music Corp. v. Aiken*,[134] the Court held that an owner of a small fast food restaurant was not liable for playing music by means of a radio with outlets to four speakers in the ceiling. The size of the shop was 1,055 square feet (98m^2), of which 620 square feet (56m^2) were open to the public. In the evolution of case law, subsequent to the inclusion of the original homestyle exemption in the Copyright Act of 1976 in reaction to the *Aiken* judgement, US courts have considered a number of factors to determine whether a shop or restaurant could benefit from the exemption.[135] These factors have included: (i) physical size of an establishment in terms of square footage (in comparison to the size of the *Aiken* restaurant); (ii) extent to which the receiving apparatus was to be considered as one commonly used in private homes; (iii) distance between the receiver and the speakers; (iv) number of speakers; (v) whether the speakers were free-standing or built into the ceiling; (vi) whether, depending on its revenue, the establishment was of a type that would normally subscribe to a background music service; (vii) noise level of the areas within the establishment where the transmissions were made audible or visible; and (viii) configuration of the installation. In some federal circuits, US courts have focused primarily on the plain language of the homestyle exemption that refers to "a single receiving apparatus of a kind commonly used in private homes".

6.140 The European Communities emphasizes that in some US court cases large chain store corporations were found to be exempted provided that each branch shop met the criteria of the exemption, e.g., in respect of the size of the establishment and the equipment used by it, regardless of the ownership and the economic size or corporate structure of the chain store corporation.[136] It is our understanding that the European Communities does not argue that the ability of a corporate chain to pay or the number of individual stores in joint ownership or under the control of the chain store corporation should be a decisive factor for refusing to grant the exemption to a particular branch store. However, the European Communities cautions that these US court decisions are illustrative of a judicial trend towards broadening the homestyle exemption of 1976 in recent years.

6.141 The United States responds that, in applying Section 110(5) of the Copyright Act of 1976, only three US court judgements have found that a defendant was entitled to take advantage of the exemption. It also contends that only two US court judgements (*Claire's Boutiques* and *Edison Bros.*[137]) dealt with the applicability of the exemption to particular branch shops of chain stores.

6.142 We note that the parties have submitted quantitative information on the coverage of subparagraph (A) with respect to eating, drinking and other establishments. The 1995 CRS study found that:

(a) 16 per cent of all US eating establishments;

[134] *See* paragraph 2.6 of the section on factual aspects above.

[135] According to the European Communities, US Courts have never favourably applied the homestyle exemption to an eating or drinking establishment of more than 1,500 square feet of total space, nor to establishments using more than four loudspeakers.

[136] Broadcast Music, Inc. v. Claire's Boutiques Inc., US Court of Appeals for the Seventh Circuit, N° 91-1232. 11 December 1991. *See* Exhibit EC-6.

[137] Broadcast Music, Inc. v. Edison Bros. Stores Inc., US Court of Appeals for the Eight Circuit, N° 91-2115, 13 January 1992. *See* Exhibit EC-5.

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(b) 13.5 per cent of all US drinking establishments; and

(c) 18 per cent of all US retail establishments

were as big as or smaller than the *Aiken* restaurant (1,055 square feet of total space), and could thus benefit from the homestyle exemption. These figures are not disputed between the parties. The United States expressly confirms these figures as far as eating and drinking establishments are concerned.[138]

6.143 We believe that from a quantitative perspective the reach of subparagraph (A) in respect of potential users is limited to a comparably small percentage of all eating, drinking and retail establishments in the United States.

6.144 We are mindful of the above-mentioned EC argument alleging a judicial trend towards broadening the homestyle exemption of 1976 in recent years. We cannot exclude the possibility that in the future US courts could establish precedents that would lead to the expansion of the scope of the currently applicable homestyle exemption as regards covered establishments. But we also note that since 1976 US courts have in the vast majority of cases applied the homestyle exemption in a sufficiently consistent and clearly delineated manner. Given the sufficiently consistent and narrow application practice of the homestyle exemption of 1976, we see no need to hypothesise whether at some point in the future US case law might lead to a *de facto* expansion of the homestyle exemption of 1998.

Homestyle equipment

6.145 We note that what is referred to as homestyle equipment (i.e., "a single receiving apparatus of a kind commonly used in private homes") might vary between different countries, is subject to changing consumer preferences in a given country, and may evolve as a result of technological development. We thus agree in principle with the European Communities that the homestyle equipment that was used in US households in 1976 (when the original homestyle exemption was enacted) is not necessarily identical to the equipment used in 1998 (when US copyright legislation was amended) or at a future point in time. However, we recall that the term "*certain* special case" connotes "known and particularised, but not explicitly identified". In our view, the term "homestyle equipment" expresses the degree of clarity in definition required under Article 13's first condition. In our view, a Member is not required to identify homestyle equipment in terms of exceedingly detailed technical specifications in order to meet the standard of clarity set by the first condition. While we recognize that homestyle equipment may become technologically more sophisticated over time, we see no need to enter into speculations about potential future developments in the homestyle equipment market. At any rate, we recall that our factual determinations are invariably limited to what currently is being perceived as homestyle equipment in the US market.

Musical works covered by subparagraph (A)

6.146 We have noted[139] the common view of the parties that the addition of the introductory phrase "except as provided in subparagraph (B)" to the homestyle exemption in the 1998 Amendment should be understood by way of an *a contrario* argument as limiting the coverage of the exemption to works other than "nondramatic" musical works.[140] As regards musical works, the currently applicable version of the homestyle exemption is thus understood to apply to the communication of music that is

[138] US reply to question 9(a) by the Panel to the United States and a letter from the NRA of 18 November 1999, confidential exhibit US-18.

[139] *See* paragraph 2.7.

[140] *See* the second written submission by the United States (paragraph 3) and the second written submission by the European Communities and their member States (paragraph 7).

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part of an opera, operetta, musical or other similar dramatic work when performed in a dramatic context. All other musical works are covered by the expression "nondramatic" musical works, including individual songs taken from dramatic works when performed outside any dramatic context. Subparagraph (B) would, therefore, apply for example to an individual song taken from a musical and played on the radio. Consequently, given the common view of the parties, the operation of subparagraph (A) is limited to such musical works as are not covered by subparagraph (B), for example a communication of a broadcast of a dramatic rendition of the music written for an opera, operetta, musical or other similar works.

6.147 While taking this position on the interpretation of subparagraph (A), the European Communities has, however, cautioned that US courts might read a broader coverage into subparagraph (A) at a future point in time.[141] In view of the common understanding of the parties in the current dispute, and given the EC responses to our questions about the scope of its claims, we see no need to speculate whether in the future subparagraph (A) could be interpreted by US courts to cover musical works other than those considered as "dramatic".

6.148 In practice, this means that most if not virtually all music played on the radio or television is covered by subparagraph (B). Subparagraph (A) covers, in accordance with the common understanding of the parties, dramatic renditions of operas, operettas, musicals and other similar dramatic works. We consider that limiting the application of subparagraph (A) to the public communication of transmissions embodying such works, gives its provisions a quite narrow scope of application in practice.

Internet transmissions

6.149 As we noted in paragraph 2.15 above, the types of transmissions covered by both subparagraphs of Section 110(5) include original broadcasts over the air or by satellite, rebroadcasts by terrestrial means or by satellite, cable retransmissions of original broadcasts, and original cable transmissions or other transmissions by wire. The provisions do not distinguish between analog and digital transmissions.

6.150 The European Communities presumes that, given its open-ended wording, subparagraph (A) may apply to the public communication of musical works transmitted using new technologies such as computer networks (e.g., the Internet), the importance of which increases from day to day.[142]

6.151 The United States emphasizes that, in general, neither subparagraph of Section 110(5) exempts communication over a digital network. In its view, the transmission of works over a computer network involves numerous incidents of reproduction and could also implicate distribution rights. Therefore, Internet users would have to seek a licence for the reproduction and possibly for the distribution of works. The United States further developed its argumentation by adding that it was unclear whether the performance aspect of an Internet transmission would be covered by either subparagraph of Section 110(5).[143] It stated, however, that if an FCC-licensed broadcaster itself streams its signals over the Internet, the performance aspect of the broadcast might fall within the exemption.

6.152 Whether or not an establishment would need an authorization for the reproduction or distribution of musical works, in the situations envisaged under Section 110(5), does not in our view

[141] Second written submission by the European Communities and their Member States, paragraph 8.

[142] For example, an FCC-licensed radio (or TV) broadcaster parallels its over-the-air transmissions on the Internet (as an audio back-up to his web-site). These programmes are received by a PC connected with a number of loudspeakers in a bar or other establishment meeting all the conditions set out in Section 110(5) of the US Copyright Act.

[143] US reply to question 6(a) by the Panel to the United States.

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detract from the fact that an authorization is required for the exploitation of protected works in respect of the exclusive rights protected under Articles 11(1)(ii) or 11*bis*(1)(iii) of the Berne Convention (1971).

6.153 In the light of the parties' arguments, we cannot exclude the possibility that the homestyle exemption might apply to the communication to the public of works transmitted over the Internet. But we also note that, based on the information provided to us by the parties, there seems to be no experience to date of the application of the homestyle exemption in its original or amended form to the transmission of "dramatic" musical works over the Internet. In these circumstances, we cannot see how potential repercussions in the future could affect our conclusions concerning subparagraph (A) at this point in time in relation to the first condition of Article 13 of the TRIPS Agreement. But we also do not wish to exclude the possibility that in the future new technologies might create new ways of distributing dramatic renditions of "dramatic" musical works that might have implications for the assessment of subparagraph (A) as a "certain special case" in the meaning of the first condition of Article 13.

Other considerations

6.154 The European Communities contends that neither subparagraph of Section 110(5) discloses a "valid" public policy or other exceptional circumstance that makes it inappropriate or impossible to enforce the exclusive rights conferred.

6.155 A US Congress House Report explained Section 110(5) of the Copyright Act of 1976: "The basic rationale of this clause is that secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed". "[The clause] would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus … into the equivalent of a commercial sound system."[144] A subsequent Conference Report elaborated on the rationale by noting that the intent was to exempt a small commercial establishment "which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[145]

6.156 The United States further explains that the policy purpose justifying subparagraph (A) is the protection of small "mom and pop" businesses which "play an important role in the American social fabric" because they "offer economic opportunities for women, minorities, immigrants and welfare recipients for entering the economic and social mainstream".

6.157 We recall our considerations above that we reject the idea that the first condition of Article 13 requires us to pass a value judgement on the legitimacy of an exception or limitation. However, we also observed that stated public policy purposes could be of subsidiary relevance for drawing inferences about the scope of an exemption and the clarity of its definition. In our view, the statements from the legislative history indicate an intention of establishing an exception with a narrow scope.

6.158 Finally, we recall our conclusion that the context of Articles 11 and 11*bis* of the Berne Convention (1971) as incorporated into the TRIPS Agreement allows for the possibility of providing minor exceptions to the exclusive rights in question; i.e. the intention was to allow exceptions as long as they are *de minimis* in scope.

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[144] Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Congress, 2nd Session 87 (1976), Exhibit US-1. *See* section on Factual Aspects, paragraph 2.5.

[145] Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 9th Congress, 2nd Session 75 (1976), Exhibit US-2. *See* also footnote 11 to paragraph 2.5 above.

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6.159 Taking into account the specific limits imposed in subparagraph (A) and its legislative history, as well as in its considerably narrow application in the subsequent court practice on the beneficiaries of the exemption, permissible equipment and categories of works, we are of the view that the homestyle exemption in subparagraph (A) of Section 110(5) as amended in 1998 is well-defined and limited in its scope and reach. We, therefore, conclude that the exemption is confined to certain special cases within the meaning of the first condition of Article 13 of the TRIPS Agreement.

(iv) Need to examine the other two conditions

6.160 Having concluded that subparagraph (B) of Section 110(5) does not comply with the first condition of Article 13 of the TRIPS Agreement, we could, therefore, conclude that the business exemption does not satisfy the requirements of Article 13, given that its three conditions are cumulative. Thus it would appear that subparagraph (B) is in violation of Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971), as incorporated into the TRIPS Agreement by reference in Article 9.1, and not justified by Article 13. Nevertheless, we continue our analysis of the other conditions of Article 13 in relation to subparagraph (B) for the reasons discussed below.

6.161 Given our conclusion that subparagraph (A) of Section 110(5) does comply with the first condition of Article 13 of the TRIPS Agreement, it is necessary for us to examine subparagraph (A) also in relation to the subsequent conditions of the Article. We note that the two subparagraphs are closely related and their respective fields of operation overlap in respects other than the categories of works covered. In the light of this, we consider, in performing our task to examine the matter referred to the DSB and to make such findings as will assist the DSB in making recommendations or in giving rulings,[146] it is appropriate to address the several other fundamental arguments made by the parties with respect to subparagraph (B) that relate to its consistency with the other two conditions of Article 13 of the TRIPS Agreement.[147]

6.162 In continuing our analysis of the second and third conditions of Article 13 with respect to the business exemption in subparagraph (B), we note the statements of the Appellate Body on "judicial economy" in the dispute on *United States – Shirts and Blouses*.[148] In a subsequent dispute on *Australia – Measures Affecting the Importation of Salmon*, the Appellate Body focuses on the need for panels to address all claims and/or measures necessary to secure a positive solution to a dispute and adds that providing only a partial resolution of the matter at issue would be false judicial economy.[149] It is in the spirit of the Appellate Body's statements in *Australia – Salmon* that we will

[146] *See* Article 7 of the DSU.

[147] A GATT panel has held that a finding of violation does not necessarily preclude the panel's consideration of other legal claims where correction of the violation will not necessarily eliminate the basis of the complainant's other legal claims. *See* Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted on 25 January 1990, BISD 37S/86, 126, paragraph 142.

[148] In *United States – Shirts and Blouses*, the Appellate Body stated:

"Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. …". (Footnotes omitted). *See* Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, adopted 23 May 1997, WT/DS33/AB/R, p.18.

[149] In *Australia – Salmon*, the Appellate Body stated:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in

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continue our analysis of the business exemption in relation to the other conditions of Article 13. We now proceed to examine the compatibility of subparagraph (A), as well as of subparagraph (B), with the other two conditions of Article 13 of the TRIPS Agreement.

(c) "Not conflict with a normal exploitation of the work"

(i) General interpretative analysis

6.163 The United States claims that both subparagraphs (A) and (B) of Section 110(5) do "not conflict with a normal exploitation of the work" in the meaning of the second condition of Article 13 of the TRIPS Agreement. The European Communities contests that. We will first address the interpretation of this second condition of Article 13 in general, and then examine the business and homestyle exemptions in turn.

6.164 In interpreting the second condition of Article 13, we first need to define what "exploitation" of a "work" means. More importantly, we have to determine what constitutes a "normal" exploitation, with which a derogation is not supposed to "conflict".

6.165 The ordinary meaning of the term "exploit" connotes "making use of" or "utilising for one's own ends".[150] We believe that "exploitation" of musical works thus refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works.

6.166 We note that the ordinary meaning of the term "normal" can be defined as "constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional …".[151] In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of "normal".

6.167 If "normal" exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 would be left devoid of meaning. Therefore, "normal" exploitation clearly means something less than full use of an exclusive right.[152]

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order to ensure effective resolution of disputes to the benefit of all Members." (Footnotes omitted). *See* the Appellate Body Report on *Australia – Measures Affecting the Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, paragraph 223.

[150] Oxford English Dictionary, p. 888.

[151] Oxford English Dictionary, p. 1940.

[152] In the context of exceptions to reproduction rights under Article 9(2) of the Berne Convention (1971) – whose second condition is worded largely identically to the second condition of Article 13 of the TRIPS Agreement – the Main Committee I of the Stockholm Diplomatic Conference (1967) stated:

"If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use." *See* the Records of the Intellectual Property Conference

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6.168 In the US view, it is necessary to look to the ways in which an author might reasonably be expected to exploit his work in the normal course of events, when one determines what constitutes a normal exploitation. In this respect, it is relevant that Article 13 does not refer to particular specific rights but to "the work" as a whole. This implies that, in examining an exception under the second condition, consideration should be given to the scope of the exception *vis-à-vis* the panoply of all the rights holders' exclusive rights, as well as *vis-à-vis* the exclusive right to which it applies. In its view, the most important forms of exploitation of musical works, namely, "primary" performance and broadcasting, are not affected by either subparagraph of Section 110(5). The business and homestyle exemptions only affect what the United States considers "secondary" uses of broadcasts, and that too, subject to size and equipment limitations. In the US view, right holders normally obtain the main part of their remuneration from "primary" uses and only a minor part from "secondary" uses.

6.169 The European Communities rejects the idea that there could be a hierarchical order between "important" and "unimportant" rights under the TRIPS Agreement. For the European Communities, there are no "secondary" rights and the exclusive rights provided for in Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) are all equally important separate rights.[153]

6.170 The United States itself clarifies that it does not imply that a legal hierarchy exists between different exclusive rights conferred under Articles 11, 11*bis* or any other provision of the Berne Convention (1971) and that a country cannot completely eliminate an exclusive right even if that right be economically unimportant. But it takes the view that when a possible conflict with a normal exploitation of the work is analysed, it is relevant whether the exception applies to one or several exclusive rights. Similarly, the degree to which the exception affects a particular exclusive right is also relevant for the analysis of the second condition of Article 13.

6.171 It is true, as the United States points out, that Article 13 refers to a normal exploitation of "the work." However, the TRIPS Agreement and the Berne Convention provide exclusive rights in relation to the work. These exclusive rights are the legal means by which exploitation of the work, i.e., the commercial activity for extracting economic value from the rights to the work, can be carried out. The parties do not in principle question that the term "works" should be understood as referring to the "exclusive rights" in those works.[154] In our view, Article 13's second condition does not explicitly refer *pars pro toto* to exclusive rights concerning a "work" given that the TRIPS Agreement (or the Berne Convention (1971) as incorporated into it) confers a considerable number of exclusive rights to all of which the exception clause of Article 13 may apply. Therefore, we believe that the "work" in Article 13's second condition means all the exclusive rights relating to it.

6.172 While we agree with the United States that the degree to which an exception affects a particular right is relevant for our analysis under the second condition, we emphasize that a possible conflict with a normal exploitation of a particular exclusive right cannot be counter-balanced or justified by the mere fact of the absence of a conflict with a normal exploitation of another exclusive right (or the absence of any exception altogether with respect to that right), even if the exploitation of the latter right would generate more income.

6.173 We agree with the European Communities that whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually. We recall that this dispute primarily concerns the exclusive right under Article 11*bis*(1)(iii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement, but also the exclusive right under

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of Stockholm, 11 June – 14 July 1967. Report on the Work of the Main Committee I (Substantive Provisions of the Berne Convention: Articles 1- 20. As reproduced in the Berne Convention Centenary, p. 197.

[153] See also the written submission of Australia, paragraph 3.8.

[154] These rights include, *inter alia*, the rights of public performance and broadcasting as well as the right of communication to the public in the meanings of Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971).

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Article 11(1)(ii). In our view, normal exploitation would presuppose the possibility for right holders to exercise separately all three exclusive rights guaranteed under the three subparagraphs of Article 11*bis*(1), as well as the rights conferred by other provisions, such as Article 11, of the Berne Convention (1971). If it were permissible to limit by a statutory exemption the exploitation of the right conferred by the third subparagraph of Article 11*bis*(1) simply because, in practice, the exploitation of the rights conferred by the first and second subparagraphs of Article 11*bis*(1) would generate the lion's share of royalty revenue, the "normal exploitation" of each of the three rights conferred separately under Article 11*bis*(1) would be undermined. [155]

6.174 An individual analysis of the second condition for each exclusive right conferred by copyright is in line with the GATT/WTO dispute settlement practice. One panel found that GATT non-discrimination clauses do not permit balancing more favourable treatment under some procedure against a less favourable treatment under others.[156] As another panel put it, an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment.[157] While these cases involved the GATT non-discrimination clauses, we believe that the general principle embodied therein is *mutatis mutandis* relevant to the issue at hand.

6.175 We also note that the amplification of broadcast music will occur in establishments such as bars, restaurants and retail stores for the commercial benefit of the owner of the establishment.[158] Both parties agree on the commercial nature of playing music even when customers are not directly charged for it. It may be that the amount yielded from any royalty payable as a consequence of this exploitation of the work will not be very great if one looks at the matter in the context of single establishments. But it is the accumulation of establishments which counts. It must be remembered

[155] Moreover, we need to keep in mind that the exclusive rights conferred by different subparagraphs of Articles 11*bis* and 11 need not necessarily be in the possession of one and the same right holder. An author or performer may choose not to license the use of a particular exclusive right but to sell and transfer it to another natural or juridical person. If it were permissible to justify the interference into one exclusive right with the fact that another exclusive right generates more revenue, certain right holders might be deprived of their right to obtain royalties simply because the exclusive right held by another right holder is more profitable.

Our view that exclusive rights need to be analysed separately for the purposes of the second condition is also corroborated by the licensing practices between CMOs and broadcasting organizations in the United States and the European Communities. These practices do not appear to take into account the potential additional audience created by means of a further communication by loudspeaker of a broadcast of a work within the meaning of Article 11*bis*(1)(iii), i.e. no fees are collected from broadcasters for the additional audiences. *See* EC and US responses to question 4 by the Panel to both parties.

[156] The Panel on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (adopted on 25 September 1997, WT/DS27/ECU/GUA/HND/MEX/USA, paragraph 7.239 and footnote 446) referred to the Panel on *United States – Denial of Most-favoured Nation Treatment as to Non-rubber Footwear from Brazil:*

"Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such balancing were accepted, it would entitle a contracting party to derogate from the most-favourable nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation." (Adopted on 19 June 1992, BISD 39S/128, 151, paragraph 6.10).

[157] The Panel on *EEC – Bananas III* also referred to the Panel on *United States – Section 337 of the Tariff Act of 1930* for the principle that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment". (Adopted on 7 November 1989, BISD 36S/345, 388, paragraph 5.16).

See also Panel Report on *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131, 169, paragraph 98.

[158] We note that US court cases and the legislative history of Section 110(5) suggest that restaurants and other establishments play music in order to attract customers with a view to enhance turnover and profit. (*See* Press Release by the NLBA, Exhibit US-7.)

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that a copyright owner is entitled to exploit each of the rights for which a treaty, and the national legislation implementing that treaty, provides. If a copyright owner is entitled to a royalty for music broadcast over the radio, why should the copyright owner be deprived of remuneration which would otherwise be earned, when a significant number of radio broadcasts are amplified to customers of a variety of commercial establishments no doubt for the benefit of the businesses being conducted in those establishments. We also note that although, in a sense, the amplification which is involved is additional to and separate from the broadcast of a work, it is tied to the broadcast. The amplification cannot occur unless there is a broadcast. If an operator of an establishment plays recorded music, there is no legislative exception to the copyright owners' rights in that regard. But the amplification of a broadcast adds to the broadcast itself because it ensures that a wider audience will hear it. Clearly Article 11*bis*(iii) contemplates the use which is in question here by conferring rights on copyright owners in respect of the amplification of broadcasts.

6.176 That leaves us with the question of how to determine whether a particular use constitutes a normal exploitation of the exclusive rights provided under Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971). In academic literature, one approach that has been suggested would be to rely on "the ways in which an author might reasonably be expected to exploit his work in the normal course of events".[159]

6.177 The main thrust of the US argumentation is that, for judging "normal exploitation", Article 13's second condition implies an economic analysis of the degree of "market displacement" in terms of foregone collection of remuneration by right owners caused by the free use of works due to the exemption at issue.[160] In the US view, the essential question to ask is whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exemption. Under this test, uses from which an owner would not ordinarily expect to receive compensation are not part of the normal exploitation.

6.178 In our view, this test seems to reflect the empirical or quantitative aspect of the connotation of "normal", the meaning of "regular, usual, typical or ordinary". We can, therefore, accept this US approach, but only for the empirical or quantitative side of the connotation. We have to give meaning and effect also to the second aspect of the connotation, the meaning of "conforming to a type or standard". We described this aspect of normalcy as reflecting a more normative approach to defining normal exploitation, that includes, *inter alia*, a dynamic element capable of taking into account technological and market developments. The question then arises how this normative aspect of "normal" exploitation could be given meaning in relation to the exploitation of musical works.

6.179 In this respect, we find persuasive guidance in the suggestion by a study group, composed of representatives of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property ("BIRPI"), which was set up to prepare for the Revision Conference at Stockholm in 1967 ("Swedish/BIRPI Study Group"). In relation to the reproduction right, this Group suggested to allow countries:

> "[to] limit the recognition and the exercising of that right, for specified purposes and *on the condition that these purposes should not enter into economic competition with these works*" in the sense that *"all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.*"[161] (emphasis added).

[159] Ricketson, The Berne Convention, op.cit., p. 483.
[160] US reply to question 17 by the Panel to both parties.
[161] Document S/1: Berne Convention; Proposals for Revising the Substantive Copyright Provisions (Articles 1-20). Prepared by the Government of Sweden with the assistance of BIPRI, p. 42.

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6.180 Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.

6.181 In contrast, exceptions or limitations would be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not enter into economic competition with non-exempted uses. In this respect, the suggestions of the Swedish/BIRPI Study Group are useful:

> "In this connection, the Study Group observed that, on the one hand, it was obvious that *all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors*; exceptions that might restrict the possibilities open to the authors in these respects were unacceptable. On the other hand, it should not be forgotten that *domestic laws already contained a series of exceptions in favour of various public and cultural interests* and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent."[162] (emphasis added).

6.182 We recall that the European Communities proposes to measure the impact of exceptions by using a benchmark according to which, at least, all those forms of use of works that create an economic benefit for the user should be considered as normal exploitation of works. We can accept that the assessment of normal exploitation of works, from an empirical or quantitative perspective, requires an economic analysis of the commercial use of the exclusive rights conferred by the copyrights in those works. However, in our view, not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with a normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test of the second condition and Article 13 might be left devoid of meaning, because normal exploitation would be equated with full use of exclusive rights.

6.183 We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

6.184 In developing a benchmark for defining the normative connotation of normal exploitation, we recall the European Communities' emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point in time, given that, in its view, it is the potential effect that determines the market conditions.

6.185 We note that a consideration of both actual and potential effects when assessing the permissibility of the exemptions would be consistent with similar concepts and interpretation standards as developed in the past GATT/WTO dispute settlement practice. For example, proof of actual trade effects has not been considered an indispensable prerequisite for a finding of inconsistency with the national treatment clause of Article III of GATT where there was a potentiality of adverse effects on competitive opportunities and equal competitive conditions for foreign products (in comparison to like domestic products).[163] We wish to express our caution in interpreting

[162] *Ibid*., p. 41.

[163] The Working Party Report on *Brazilian Internal Taxes* noted in the context of the GATT national treatment clause that "the absence of imports from contracting parties during any period of time that might be selected for examination would not necessarily be an indication that they had no interest in exports of the

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provisions of the TRIPS Agreement in the light of concepts that have been developed in GATT dispute settlement practice. But we also recall that, e.g., in the dispute *EC – Bananas III*, the panel and the Appellate Body introduced concepts, as developed in dispute settlement practice under Article III of GATT, into the national treatment clause of Article XVII of GATS whose wording is based on the GATT national treatment clause and interpretations developed in GATT dispute settlement practice.[164] Given that the agreements covered by the WTO form a single, integrated legal system, we deem it appropriate to develop interpretations of the legal protection conferred on intellectual property right holders under the TRIPS Agreement which are not incompatible with the treatment conferred to products under the GATT, or in respect of services and service suppliers under the GATS, in the light of pertinent dispute settlement practice.

6.186 Therefore, in respect of the exclusive rights related to musical works, we consider that normal exploitation of such works is not only affected by those who actually use them without an authorization by the right holders due to an exception or limitation, but also by those who may be induced by it to do so at any time without having to obtain a licence from the right holders or the CMOs representing them. Thus we need to take into account those whose use of musical works is free as a result of the exemptions, and also those who may choose to start using broadcast music once its use becomes free of charge.

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product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account. These members of the working party therefore took the view that the provision of … Article III … were equally applicable whether imports from other contracting parties were substantial, small or non-existent." *See* Report of the Working Party on *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, 185.

The statement that proof of actual trade effects was not an indispensable prerequisite for a finding of GATT-inconsistency was followed by a number of subsequent panels, *inter alia*, in the dispute on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 158, paragraph 5.1.9. *See* also Panel Report on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, 270/271, paragraph 5.6; Panel Report on *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131, 169, paragraph 98.

These and other panels, including in *Italian Discrimination Against Imported Agricultural Machinery* (adopted on 23 October 1958, BISD 7S/60, 64, paragraph 12) and in *Canada – Administration of the Foreign Investment Review Act* (adopted on 7 February 1984, BISD 30S/140, 159-161, paragraphs 5.8-5.10), interpreted the national treatment standard, which prohibits *de jure* as well as *de facto* discrimination, as protecting the equality in competitive opportunities and as prohibiting any laws or regulations which might adversely modify conditions of competition between foreign and like domestic products.

Panels dealing with the prohibition of quantitative restrictions or prohibitions similarly found that Article XI of GATT protected conditions of competition and that an import restriction was prohibited regardless of whether it actually impeded imports. *See* Panel Report on *EEC – Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, adopted on 25 January 1990, BISD 37S/86, 130, paragraph 150. *See* also Panel Report on *Japanese Measures on Imports of Leather*, adopted on 15/16 May 1984, BISD 31S/94, 113, paragraph 55.

In the dispute *Japan – Taxes on Alcoholic Beverages* (adopted on 1 November 1996, WT/DS8,10,11/AB/R, p. 16), the Appellate Body upheld the concepts of equality of competitive conditions and equal competitive relationship between foreign and like domestic products. In the dispute *Korea – Taxes on Alcoholic Beverages* (adopted on 17 February 1999, WT/DS75,84/AB/R, paragraphs 125-131), the Appellate Body confirmed the absence of a trade effects test under the national treatment clause and the principle that Article III of GATT protects expectations as to competitive opportunities.

[164] Paragraph 2 of Article XVII of GATS draws on the interpretation developed by a GATT panel with respect to Article III:4 of GATT. *See* Panel Report on *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, 386, paragraph 5.11.

Paragraph 3 of Article XVII of GATS draws on the interpretation developed in the Panel Report on *Italian Discrimination of Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, 63, paragraph 12.

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6.187 We base our appraisal of the actual and potential effects on the commercial and technological conditions that prevail in the market currently or in the near future.[165] What is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences. Thus, while we do not wish to speculate on future developments, we need to consider the actual and potential effects of the exemptions in question in the current market and technological environment.

6.188 We do acknowledge that the extent of exercise or non-exercise of exclusive rights by right holders at a given point in time is of great relevance for assessing what is the normal exploitation with respect to a particular exclusive right in a particular market. However, in certain circumstances, current licensing practices may not provide a sufficient guideline for assessing the potential impact of an exception or limitation on normal exploitation. For example, where a particular use of works is not covered by the exclusive rights conferred in the law of a jurisdiction, the fact that the right holders do not license such use in that jurisdiction cannot be considered indicative of what constitutes normal exploitation. The same would be true in a situation where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights.

6.189 Both parties are of the view that the "normalcy" of a form of exploitation should be analysed primarily by reference to the market of the WTO Member whose measure is in dispute, i.e., the US market in this dispute. The European Communities is also of the view that comparative references to other countries with a similar level of socio-economic development could be relevant to corroborate or contradict data from the country primarily concerned.[166] We note that while the WTO Members are free to choose the method of implementation, the minimum standards of protection are the same for all of them.[167] In the present case it is enough for our purposes to take account of the specific conditions applying in the US market in assessing whether the measure in question conflicts with a normal exploitation in that market, or whether the measure meets the other conditions of Article 13.

(ii) The business exemption of subparagraph (B)

6.190 The United States contends that the business exemption does not conflict with a normal exploitation of works for a number of reasons. First, in view of the great number of small eating, drinking and retail establishments, individual right holders or their CMOs face considerable administrative difficulties in licensing all these establishments. Given that the market to which the business exemption applies was never significantly exploited by the CMOs, the US Congress merely codified the *status quo* of the CMOs' licensing practices. Second, a significant portion of the establishments exempted by the new business exemption had already been exempted under the old homestyle exemption. Thus owners of copyrights in nondramatic musical works had no expectation of receiving fees from the small eating, drinking or retail establishments covered by the latter exemption. Third, even if subparagraph (B) had not been enacted, many of the establishments eligible for that exemption would have been able to avail themselves of an almost identical exemption under the group licensing agreement between the NLBA and ASCAP, the BMI and SESAC ("US CMOs"). For these reasons, the United States assumes that, even before the 1998 Amendment, right holders would not have normally expected to obtain fees from these establishments. The United States believes that the number of establishments, that would not have been entitled to take advantage of the original homestyle exemption of 1976 or the NLBA agreement and thus were newly exempted under subparagraph (B), is small. Viewed against the panoply of exploitative uses available to copyright

[165] Appellate Body Report on *Korea – Taxes on Alcoholic Beverages*, adopted on 17 February 1999, WT/DS75,84/AB/R, paragraphs 125-131. *See* also Report of the Working Party on *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, 185. Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 158, paragraph 5.19.

[166] EC and US responses to question 14 by the Panel to both parties.

[167] In this regard, the United States refers to Article 1.1 of the TRIPS Agreement, which provides that Members "shall be free to determine the appropriate method of implementing the provisions of this Agreement".

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owners under US copyright law,[168] in the US view, the residual limitation on some secondary uses of broadcast works does not rise to the level of a conflict with normal exploitation.

6.191 The European Communities responds that administrative difficulties in licensing a great number of small establishments do not excuse the very absence of the right, because there can be enforcement of only such rights as are recognized by law. It also points out that the use of recorded music is not covered by the exemptions. Arguing that this differentiation is difficult to justify, it contends that, to the extent the licensing of a great number of establishments meets insurmountable difficulties, then such difficulties should occur independently of the medium used. It also notes that the EC CMOs are successfully licensing a great number of small businesses without encountering insurmountable obstacles, whereas the US CMOs due to the lack of legal protection have not developed the necessary administrative structure to licence small establishments.

6.192 In response to a question from the Panel, the United States clarifies that it does not argue that administrative difficulties in licensing small establishments are more severe with respect to broadcast music as opposed to CDs or live music. Part of the rationale for this distinction is rather an historical one.[169]

6.193 In relation to its statement that the market to which the business exemption applies was never significantly exploited by the CMOs, the United States submitted information concerning the number and percentage of establishments that were licensed in the past by the CMOs.[170] The United States explains that, in considering the original homestyle exemption of Section 110(5), the US Congress found that, prior to 1976, the majority of beneficiaries of the then contemplated exemption were not licensed.[171] As regards the situation between the entry into force of the 1976 Copyright Act and the 1998 Amendment, the United States refers to the information provided by the NRA.[172] Based on the US Census Bureau data for 1996 and a number of its own studies, the NRA estimates that 16 per cent of table service restaurants and 5 per cent of fast food restaurants were licensed by the CMOs at that time in the United States. According to the NRA estimates based on the Census Bureau data, there was approximately the same number of table service and fast food restaurants in the United States.[173] Averaging these percentage figures, the United States concludes that approximately 10.5 per cent of restaurants were licensed by the CMOs.

6.194 In this context, the United States refers to the testimony of the President of ASCAP before the US Congress in 1997.[174] Based on the total number of ASCAP restaurants licensees[175] and the total number of restaurants estimated by the NRA on the basis of the Census Bureau data,[176] the United

[168] Exhibit US-14.
[169] US response to question 7 from the Panel to the United States.
[170] US response to question 10 from the Panel to the United States.
[171] House Report (1976), Exhibit US-1.
[172] Letter, dated 18 November 1999, from the NRA to the USTR. Confidential exhibit US-18.
[173] Based on the Census Bureau data, the NRA estimates that there were 183,253 table service restaurants and 185,891 quick-service restaurants in the United States. Based on this data and a number of its own surveys, it estimates that 16% (28,000-31,000) table service restaurants and 5% (8,000-10,000) quick service restaurants were licensed in the same period by CMOs. *See* US response to question 10(b) from the Panel to the United States.
[174] Written statement by the President of ASCAP, Ms. Marilyn Bergman, dated 31 July 1997, to the Subcommittee on Courts and Intellectual Property, House Judiciary Committee. Exhibit US-20.
[175] In her testimony before Congress in 1997, the President of ASCAP stated that "the total number of ASCAP restaurant licensees does not exceed 70,000". Exhibit US-20, p. 177. In her testimony, she also complained that "[t]here exists a massive non-compliance problem by tens of thousands of restaurants". Exhibit US 20, p. 175.
[176] The NRA estimated on the basis of the Census Bureau data that there were a total of 369 144 table and quick-service restaurants in the United States. Confidential exhibit US-18.

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States estimates that ASCAP did not license more than 19 per cent of restaurants at that time. This, in its view, also indicates a relatively low level of licensing of such establishments.

6.195 We recall that, in its study of November 1995,[177] the CRS estimated that the size of 16 per cent of eating establishments 13.5 per cent of drinking establishments and 18 per cent of retail establishments did not exceed at that time the size of the *Aiken* restaurant, i.e. 1,055 square feet. These establishments could benefit from the exemption under the original Section 110(5), subject to equipment limitations. The United States gives two estimates of the number of licensed restaurants at that time: on the one hand, 10.5 per cent of restaurants were licensed by the CMOs,[178] and, on the other hand, 19 per cent of restaurants were licensed by ASCAP.[179] The United States also estimates that 74 per cent of all restaurants play some kind of music.[180]

6.196 Even when we deduct the share of the restaurants that were potentially exempted under the original homestyle exemption, we can agree with the United States that these figures indicate a relatively low level of licensing of restaurants likely to play music. However, as we noted above, whether or not the CMOs fully exercise their right to authorize the use of particular exclusive rights, or choose to collect remuneration for particular uses, or from particular users can, in our view, not necessarily be fully indicative of "normal exploitation" of exclusive rights. In considering whether the 1998 Amendment conflicts with normal exploitation, the fact that it does not generally change the licensing practices in relation to those establishments that were already exempted under the old homestyle exemption is not relevant; it is evident that due to the pre-existing homestyle exemption such establishments could not be licensed. Below, we will address separately, whether the homestyle exemption as contained in the amended Section 110(5) conflicts with normal exploitation.

6.197 The restaurants that were licensed by the CMOs before the 1998 Amendment were presumably mostly restaurants which were above the *Aiken* size limits (or did not meet the equipment limits for smaller restaurants). The two US estimates of the share of licensed restaurants (10.5 and 19 per cent) read together with the US estimate of the share of restaurants that play some kind of music (74 per cent) imply that many restaurants, that were above the *Aiken* size limits and that were likely to play music, appear not to have been licensed. This tends to indicate that amongst similar users some paid licence fees while others did not. We have not been provided with any evidence that it would be considered normal to expect remuneration from some but not other similarly situated users.

6.198 We do not find the argument compelling, according to which an exception that codifies an existing practice by the CMOs of not licensing certain users should be presumed not to conflict with normal exploitation, as it would not affect right holders' current expectations to be remunerated. In our understanding, this would equate "normal exploitation" with "normal remuneration" practices existing at a certain point in time in a given market or jurisdiction. If such exceptions were permissible *per se*, any current state and degree of exercise of an exclusive right by right holders could effectively be "frozen". In our view, such argumentation could be abused as a justification of any exception or limitation since right holders could never reasonably expect remuneration for uses which are not covered by exclusive rights provided in national legislation. Logically, no conflict with normal exploitation could be construed. The same would apply where a low level of exercise of an exclusive right would be due to lack of effective or affordable means of enforcement of that right. In other words, the licensing practices of the CMOs in a given market at a given time do not define the minimum standards of protection under the TRIPS Agreement that have to be provided under national legislation.

[177] *See* paragraph 2.11.
[178] US response to question 10(b) by the Panel to the United States, paragraph 1.
[179] US response to question 10(b) by the Panel to the United States, paragraph 2.
[180] US response to question 11(b) by the Panel to the United States.

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6.199 The United States draws attention to a proposal by the US CMOs to amend Section 110(5).[181] In 1995, the CMOs set forth a substitute text for the bill[182] that was pending in Congress at that time. The CMO proposal suggested a square footage limit of 1,250 square feet and specific equipment limitations of no more than four loudspeakers and two television screens not greater than 44 inches. With respect to other matters, the CMOs said in their proposal that it was possible and desirable to leave them for a negotiated settlement with user associations.[183] The CMO proposal represented a modest expansion of the original homestyle exemption.[184]

6.200 There may be a variety of reasons and motivations why CMOs, coalitions of small businesses or other interest groups make legislative proposals to a national parliament. Certain proposals might form part of a larger package deal with elements that are more or less favourable for particular groups involved in the process. It is not our task to second-guess such motivations or bargaining strategies. Our terms of reference are limited to examining the consistency of the currently applicable Section 110(5), which was eventually enacted, with the substantive standards of the TRIPS Agreement. In carrying out our mandate, we have to interpret the phrase "not conflict with a normal exploitation" on the basis of the criteria of Article 31 of the Vienna Convention and examine subparagraph (B) in the light of an objective standard. Therefore, we do not consider the legislative proposal by the US CMOs as relevant for interpreting the second condition of Article 13. A proposal made during the legislative proceedings by the CMOs cannot be held against them nor be used to determine treaty obligations.

6.201 The United States also submits that, in the absence of a legislative solution at that time, the US CMOs signed a private group licensing agreement with the NLBA in October 1995 ("NLBA Agreement"). The CMOs offered to extend the agreement to the National Restaurant Association (NRA) and other members of the coalition advocating an extension of the exemption in the law. The agreement exempts establishments affiliated with the NLBA from paying licensing fees for the performance of music by the radio or television, if the establishment is smaller than 3,500 square feet, or bigger and complies with certain limitations on equipment. The United States emphasizes that the scope of the exemptions in this voluntarily negotiated group licensing agreement is largely identical to the legislation that, three years later, in 1998, became the Fairness in Music Licensing Act. [185]

6.202 The European Communities contends that the CMOs tried to negotiate such group licensing agreements in order to prevent even less favourable legislation from being enacted. The European Communities compares this to a situation where a right owner will be more inclined to grant a contractual licence on relatively unfavourable terms in a country where it is easy to obtain a compulsory licence than in a country where it is difficult to obtain a compulsory licence. Furthermore, in its view, the US reference to private agreements is circular in nature. It is only after the legislator has established a legal framework that private economic operators can start to act within this framework. In other words, only when a law stipulates a public performance right can parties usefully agree on a licensing contract. Where a law contemplates free use, there is no reason for a licensing contract as there is no right to license in the first place.

6.203 We note that the United States was not in a position to provide a copy of the NLBA Agreement to the Panel, because the NLBA considered it to contain business proprietary

[181] US first written submission, paragraph 11.
[182] H.R. 789, Exhibit US-4.
[183] Letter of 24 July 1995 to the Honourable Carlos Moorhead from ASCAP, BMI, Inc. and SESAC, Inc., Exhibit US-5.
[184] US first written submission, paragraph 11.
[185] For details, *see* US first written submission, paragraphs 12 and 13.

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information.[186] Therefore, in considering the relevance of the NLBA Agreement for the issues at hand, we have had to rely on other indirect information provided to us by the parties.

6.204 While we recognize similarities between the terms of the NLBA Agreement and the provisions of the finally passed version of the business exemption in subparagraph (B), we also notice differences. The NLBA Agreement appears to be a comprehensive performing rights licensing package, the terms of which go beyond the issues addressed in the business exemption as it was then pending or later enacted. For example, the agreement is administered by the NBLA against a small portion of the collected licence fees. Small establishments qualifying for an exemption under the agreement have to apply for an "exemption licence" from the NLBA for a fee of US$30 per year. Thus, the agreement can be characterized as a form of exercise of exclusive rights by the grant of "exemption licences" to small eating and drinking establishments against the payment of a small flat-rate fee.[187] Furthermore, under the agreement, the CMOs and the NLBA commit themselves to work together to provide value-added packages for those who choose the group agreement. In announcing the agreement, the NBLA strongly urged its members to acquire a licence under the agreement.[188] This course of action by the NLBA was likely to induce a larger number of restaurants to voluntarily subscribe to the group licence than concerted efforts by the CMOs to license individual restaurants.[189]

6.205 It is one thing to have a practice such as the NLBA Agreement. Right holders do not need to exploit their rights, or they may do so for a nominal fee or no fee. It is another thing to pass legislation preventing the exercise of a right, which a country is obliged, under a treaty binding it, to afford to the nationals of the other parties to the treaty. Individual or group licensing arrangements result from negotiations between parties, not from governmental imposition. They may, subject to the terms agreed between the parties, be extended, modified or terminated at will. While the NLBA arrangement may evolve in response to market developments affecting the normal exploitation of works, the statutory business exemption cannot evolve similarly since it prevents the market from developing or distorts it. We note that Article 13, including its second condition, sets forth an objective test for permissible exceptions to exclusive rights. In assessing whether a statutory exemption meets that test, a comparison between its provisions and the terms and conditions of a group licensing arrangement such as the one between the NLBA and the US CMOs is not pertinent.

6.206 We recall that a substantial majority of eating and drinking establishments and close to half of retail establishments are eligible to benefit from the business exemption. This constitutes a major potential source of royalties for the exercise of the exclusive rights contained in Articles 11(1)*bis*(iii)

[186] *See* US response to the question 1(c) from the Panel to the United States.

[187] In comparison, we note that the Australian Performing Rights Association grants complimentary licences to certain small establishments. *See* Australia's response to question 2 by the Panel to the third parties.

[188] The information above is based on the NLBA News, April 1997, Exhibit US-6, and "Music Licensing Agreement with ASCAP, BMI & SESAC for NLBA members; NLBA announces the deal of the century", Exhibit US-7. According to the United States, the fee for an exemption licence is currently US$50.

[189] We cannot exclude the possibility that terms of the NLBA Agreement could have been influenced by the Bill pending in the US Congress at the time when the agreement was concluded. However, we believe it is irrelevant for the purposes of our examination of Article 13's second condition whether, as noted by the United States, ASCAP praised the private group licensing agreement and called it a fair compromise, stating that it would benefit small businesses while ensuring that the rights of rights holders would be protected. Likewise, it is irrelevant for the purposes of our examination of that condition whether, as noted by the European Communities, ASCAP and the BMI condemned the Fairness in Music Licensing Act of 1998 in a press release at the occasion of its passage by US Congress. (The EC refers to a joint press release by ASCAP and BMI, Exhibit EC-14: "With this music licensing legislation, which seizes the private property of copyright owners, the US Government has severely penalised American songwriters, composers and publishers … The earnings of songwriters, composers and publishers have been reduced by tens of millions of dollars annually.") We note that right holders or their CMOs are not prevented from enforcing their rights because of legislative proposals or comments thereon made by them.

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and 11(1)(ii) of the Berne Convention (1971), as demonstrated by the figures of the D&B studies referred to under our analysis of the first condition of Article 13.

6.207 We recall that subparagraph (B) of Section 110(5) exempts communication to the public of radio and television broadcasts, while the playing of musical works from CDs and tapes (or live music) is not covered by it. Given that we have not been provided with reasons other than historical ones for this distinction, we see no logical reason to differentiate between broadcast and recorded music when assessing what is a normal use of musical works.

6.208 It is true, as the United States notes, that many of these establishments might not play music at all, or play recorded or live music. According to NLBA surveys,[190] among its member establishments 26 per cent use CDs or tapes, 18 per cent rely on background music services, 37 per cent have live music performances, while 28 per cent play radio music.[191] The United States estimates that overall approximately 74 per cent of US restaurants play music from various sources. The United States provided estimates also by the NRA concerning its membership on the percentage of restaurants that play the radio or use the television; these figures are not reproduced here, given that this information was provided to the United States in confidence.[192] From this data, the United States assumes that no more than 44 per cent of licensing fees can be attributed to radio music.[193]

6.209 We note that the parties agree that the administrative challenges for the CMOs related to the licensing of a great number of small eating, drinking and retail establishments do not differ depending on the medium used for playing music. We believe that the differentiation between different types of media may induce operators of establishments covered by subparagraph (B) to switch from recorded or live music, which is subject to the payment of a fee, to music played on the radio or television, which is free of charge. This may also create an incentive to reduce the licensing fees for recorded music so that users would not switch to broadcast music.

6.210 Right holders of musical works would expect to be in a position to authorize the use of broadcasts of radio and television music by many of the establishments covered by the exemption and, as appropriate, receive compensation for the use of their works. Consequently, we cannot but conclude that an exemption of such scope as subparagraph (B) conflicts with the "normal exploitation" of the work in relation to the exclusive rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971).

6.211 In the light of these considerations, we conclude that the business exemption embodied in subparagraph (B) conflicts with a normal exploitation of the work within the meaning of the second condition of Article 13.

(iii) The homestyle exemption of subparagraph (A)

6.212 The United States argues that the homestyle exemption, even before nondramatic musical works were removed from its scope through the 1998 Amendment, was limited to the establishments that were not large enough to justify a subscription to a commercial background music service.[194] As noted in the House Report (1976), the United States Congress intended that this exemption would merely codify the licensing practices already in effect. The original homestyle exemption of 1976

[190] US response to question 11(b) by the panel to the United States.

[191] Letter from NLBA of 18 November 1999, confidential exhibit US-17.

[192] We find that the designation as confidential of such statistical information does not assist us in discharging of our responsibility to make findings that will best enable the DSB to perform its dispute settlement functions. However, given our findings on the compatibility of the business exemption with the second condition of Article 13, including our considerations on substitution effects between various sources of music, the information in question is not essential for our findings.

[193] US response to question 11(b) by the panel to the United States.

[194] US Congress Conference Report (1976), Exhibit US-2, referred to in paragraph 2.5 above.

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was intended to affect only those establishments that were not likely otherwise to enter into a licence, or would not have been licensed under the practices at that time. The United States contends that subparagraph (A) of the amended Section 110(5) does not conflict with the expectation of right holders concerning the normal exploitation of their works.

6.213 As regards the permissible equipment, we note that, according to the House Report (1976), the purpose of the exemption in its original form was to exempt from copyright liability "anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use". "[The clause] would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system."[195] We also recall the rationale behind the homestyle exemption as expressed in the legislative history relating to its original version: "The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed."[196]

6.214 In other words, the provision is intended to define the borderline between two situations: a situation where one listens to the radio or watches the television – this is clearly not covered by the scope of copyright and, hence, outside normal exploitation of works – and a situation where one uses appropriate equipment to cause a new public performance of music contained in a broadcast or other transmission. This borderline is defined by laying emphasis on "turning on an ordinary receiver", albeit that members of the public might also hear the transmission.

6.215 As regards the beneficiaries of the homestyle exemption, we note that its legislative history reveals the intention that the exemption should affect only those establishments that were not likely otherwise to enter into a licence, or would not have been licensed under the practices at that time. As pointed out above, according to the 1995 CRS study, the number of establishments that were as big or smaller than the *Aiken* restaurant and could benefit from the homestyle exemption is limited to a comparatively small percentage of all eating, drinking and retail establishments in the United States.[197]

6.216 The United States argues that the homestyle exemption of 1998 is even less capable of being in conflict with normal exploitation of works because its scope is now limited to works other than nondramatic musical works. While a collective licensing mechanism for nondramatic musical works exists in the United States, there is no such mechanism for "dramatic" musical works and there is little or no direct licensing by individual right holders of the establishments in question. Therefore, in the US view, authors might not reasonably expect to exploit "dramatic" musical works in the normal course of events through licensing public performances or communications thereof to the establishments that may invoke subparagraph (A).

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[195] These quotations are from the Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Congress, 2nd Session 87 (1976), as reproduced in Exhibit US-1. The Report adds that "[f]actors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance". The factors to consider in applying the exemption are largely based on the facts of a case decided by the United States Supreme Court immediately prior to the passage of the 1976 Copyright Act, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). In *Aiken*, the Court held that an owner of a small fast food restaurant was not liable for playing music by means of a radio with outlets to four speakers in the ceiling; the size of the shop was 1,055 square feet (98 m^2), of which 620 square feet (56 m^2) were open to the public. The Report describes the factual situation in *Aiken* as representing the "outer limit of the exemption".

[196] See the House Report (1976), Exhibit US-1, referred to in paragraph 2.5 above.

[197] More specifically, the 1995 CRS study found that 16 per cent of all US eating establishments, 13.5 per cent of all US drinking establishments and 18 per cent of all US retail establishments were as big or smaller than the *Aiken* restaurant (1,055 square feet of total space). See above paragraphs 2.11 and 6.142.

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6.217 We recall that it is the common understanding of the parties that the operation of subparagraph (A) is limited, as regards musical works, to the public communication of transmissions embodying dramatic renditions of "dramatic" musical works, such as operas, operettas, musicals and other similar dramatic works. Consequently, performances of, e.g., individual songs from a dramatic musical work outside a dramatic context would constitute a rendition of a nondramatic work and fall within the purview of subparagraph (B).

6.218 It is our understanding that the parties agree that the right holders do not normally license or attempt to license the public communication of transmissions embodying dramatic renditions of "dramatic" musical works in the sense of Article 11*bis*(1)(iii) and/or 11(1)(ii). We have not been provided with information about any existing licensing practices concerning the communication to the public of broadcasts of performances of dramatic works (e.g., operas, operettas, musicals) by eating, drinking or retail establishments in the United States or any other country. In this respect, we fail to see how the homestyle exemption, as limited to works other than nondramatic musical works in its revised form, could acquire economic or practical importance of any considerable dimension for the right holders of musical works.

6.219 Therefore, we conclude that the homestyle exemption contained in subparagraph (A) of Section 110(5) does not conflict with a normal exploitation of works within the meaning of the second condition of Article 13.

(d) "Not unreasonably prejudice the legitimate interests of the right holder"

(i) General interpretative analysis

6.220 The United States defines "prejudice [to] the legitimate interests of the right holder" in terms of the economic impact caused by subparagraphs (A) and (B) of Section 110(5). In the US view, while the second condition of Article 13 of the TRIPS Agreement looks to the degree of market displacement caused by a limitation or exception, the "unreasonable prejudice" standard measures how much the right holder is harmed by the effects of the exception. Given that any exception to exclusive rights may technically result in some degree of prejudice to the right holder, the key question is whether that prejudice is unreasonable.[198]

6.221 The European Communities submits that the legitimate interests of a right holder consist in being able to prevent all instances of a certain use of his or her work protected by a specific exclusive right undertaken by a third party without his or her consent. The legitimate interests include, at a minimum, all commercial uses by a third party of the right holder's exclusive rights. For the European Communities, both empirical and normative elements are relevant for the examination of the third condition of Article 13. In practice, economic prejudice to right holders should be assessed primarily on the basis of the economic effects in the country applying the exception. In the EC's view, it is sufficient to demonstrate the potentiality to prejudice; it is not necessary to quantify the actual financial losses suffered by the right holders concerned.

6.222 We note that the analysis of the third condition of Article 13 of the TRIPS Agreement implies several steps. First, one has to define what are the "interests" of right holders at stake and which attributes make them "legitimate". Then, it is necessary to develop an interpretation of the term "prejudice" and what amount of it reaches a level that should be considered "unreasonable".

6.223 The ordinary meaning of the term "interests"[199] may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a

[198] Guide to the Berne Convention, op.cit., pp. 55-56, paragraph 9.8.

[199] Further meanings: "The fact or relation of having a share or concern in, or a right to, something, especially by law; a right or title, especially to a (share in) property or a use or benefit relating to property", "a

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concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of "interests" is not necessarily limited to actual or potential economic advantage or detriment.

6.224 The term "legitimate" has the meanings of

> "(a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper;
>
> (b) normal, regular, conformable to a recognized standard type."

Thus, the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.

6.225 We note that the ordinary meaning of "prejudice" connotes damage, harm or injury.[200] "Not unreasonable" connotes a slightly stricter threshold than "reasonable". The latter term means "proportionate", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", or "of a fair, average or considerable amount or size".[201]

6.226 Given that the parties do not question the "legitimacy" of the interest of right holders to exercise their rights for economic gain, the crucial question becomes which degree or level of "prejudice" may be considered as "unreasonable". Before dealing with the question of what amount or which kind of prejudice reaches a level beyond reasonable, we need to find a way to measure or quantify legitimate interests.

6.227 In our view, one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders. It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights. That is not to say that legitimate interests are necessarily limited to this economic value.[202]

6.228 In examining the second condition of Article 13, we have addressed the US argument that the prejudice to right holders caused by the exemptions at hand are minimal because they already receive royalties from broadcasting stations. We concluded that each exclusive right conferred by copyright, *inter alia*, under each subparagraph of Articles 11*bis* and 11 of the Berne Convention (1971), has to be considered separately for the purpose of examining whether a possible conflict with a "normal exploitation" exists.[203]

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financial share or stake in something;", "a thing which is to the advantage of someone, a benefit, an advantage", "the relation of being involved or concerned as regards potential detriment or advantage", "a thing that is of some importance to a person, company, state etc."; Oxford English Dictionary, p. 1393.

[200] "Harm, damage or injury to a person or that results from a judgement or action, especially one in which his/her rights are disregarded." Oxford English Dictionary, p. 2333.

[201] Oxford English Dictionary, p. 2496.

[202] Panel Report on *Canada – Patent Protection of Pharmaceutical Products*, adopted on 7 April 2000, WT/DS114/R, paragraphs 7.60ff. We note, however, the difference in wording between Articles 13 and 30 of the TRIPS Agreement. The latter also refers to "taking account of the legitimate interests of third parties".

[203] We also recall from our examination of Article 13's second condition that we were not presented with evidence of licensing arrangements between CMOs and broadcasting organizations, concerning mainly the exclusive rights of Article 11*bis*(1)(i) or (ii), that would make allowance for the additional communication to the public in the meaning of Article 11*bis*(1)(iii) by, e.g., the categories of establishments covered by the subparagraphs of Section 110(5). We believe that we have to analyse whether the exemptions in question cause unreasonable prejudice to the legitimate interests of right holders similarly in respect of each exclusive right.

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6.229 The crucial question is which degree or level of "prejudice" may be considered as "unreasonable",[204] given that, under the third condition, a certain amount of "prejudice" has to be presumed justified as "not unreasonable".[205] In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.

Legitimate interests of right holders of EC, US and third-country origin

6.230 We note the EC argument that, in respect of all conditions of Article 13, the effect on all right holders from all WTO Members must be taken into account. For the European Communities, the specific impact on EC right holders is not at issue at this stage of the dispute settlement process, but could become relevant only in the context of Article 22 of the DSU concerning compensation or the suspension of concessions or other obligations equivalent to nullification or impairment suffered. The United States has limited its estimations of the economic impact of subparagraph (B) to the actual losses caused by it to the EC right holders.

6.231 This raises the question who may enforce the legitimate interests of right holders of various WTO Members in panel proceedings within the WTO dispute settlement system.[206] In *EC – Bananas III*, the Appellate Body agreed with the panel that no DSU provision contains a requirement that a complaining party show its legal interest as a prerequisite for requesting a panel.[207] This rejection of a

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Our view is confirmed by the fact that, as we pointed out when examining the second condition of Article 13, particular exclusive rights conferred by the subparagraphs of Articles 11 and 11*bis* in relation to one and the same work may be held by different persons. *See* EC and US replies to question 4 from the Panel to both parties.

[204] The term used in the French version of the Berne Convention is "*injustifié*". According to Article 37(1)(c) of the Berne Convention, both the English and the French text of the Convention are equally authentic, but "in case of differences of opinion on the interpretation of the various texts, the French text shall prevail".

However, Article 37 of the Berne Convention has not been incorporated into the TRIPS Agreement. To the extent that Articles 1–21 of the Berne Convention have been incorporated into the TRIPS Agreement by virtue of its Article 9.1, the general rule of Article XVI of the Agreement Establishing the WTO applies, i.e., that the English, French and Spanish versions of the covered agreements are equally authentic.

Article 33 of the Vienna Convention on the Law of Treaties stipulates that treaties which are authentic in several languages should be interpreted harmoniously, i.e., presuming that expressions in the treaty have the same meaning in all authentic languages.

[205] In respect of what could be the dividing line between "unreasonable" and "not unreasonable" prejudice, we consider the explanation of the Guide to the Berne Convention to be of persuasive value. It states in the context of the third condition of Article 9(2) of the Berne Convention, which is worded almost identically to Article 13 of the TRIPS Agreement but refers to exceptions to the reproduction right:

"Note that it is not a question of prejudice or no: all copying is damaging to some degree …". The paragraph goes on to discuss whether photocopying "prejudices the circulation of the review", whether it "might seriously cut in on its sales" and says that "[i]n cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration)." *See* the Guide to the Berne Convention, paragraph 9.8.pp. 55-56. We do not believe that in this respect the benchmark has to be substantially different for reproduction rights, performance rights or broadcasting rights in the meanings of Articles 9, 11 or 11*bis* of the Berne Convention (1971).

[206] In addressing the question of effects on right holders from the European Communities, the United States and other WTO Members, we note that Article 1.3 of the TRIPS Agreement provides that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members. …". For the purposes of this dispute, this provision means that the United States is required to observe the obligations of the TRIPS Agreement with respect to nationals of all other WTO Members including, but not limited to, EC nationals.

[207] Appellate Body Report on *EC – Bananas III*, op.cit., paragraph 132. The Appellate Body also agreed with the panel's statement that "with the increased interdependence of the global economy, … Members have greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly." *See* paragraph 136, citing from the Panel Reports on *EC – Bananas III*, paragraph 7.50.

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"legal interest" requirement does not necessarily imply that, in the context of the third condition of Article 13, prejudice to the legitimate interests of right holders other than EC right holders should be relevant. But we cannot find any indication in the express wording of the third condition of Article 13 that the assessment of whether the prejudice caused by an exception or limitation to the legitimate interests of the right holder is of an unreasonable level should be limited to the right holders of the Member that brings forth the complaint. For such a limitation to exist, the third condition of Article 13 would have to refer exclusively to the right holders who are nationals of the complaining party, not to "the right holder" as such.

6.232 We also refer to the explanation on the difference between the panel and Appellate Body proceedings and the enforcement process within the WTO dispute settlement system given by the Arbitrators, acting pursuant to Article 22.6 of the DSU, in the US/EC arbitration on the suspension of concessions in *Bananas III*.[208] An assessment of the impact of a WTO-inconsistent measure on an individual Member in terms of nullification or impairment is relevant under Article 22.6 of the DSU when compensation or suspension of concessions or other obligations has to be estimated in equivalence to the nullification or impairment suffered from a WTO-inconsistent measure which has not been brought into WTO-compliance within a reasonable period of time.

6.233 In this case, both parties have provided estimations on the market share of music of EC right holders. The European Communities submits that at least 25 per cent of all music played in the United States belongs to EC copyright owners. This figure is based on an industry estimate according to which the United Kingdom performing artists had a 23 per cent share of the US record sales in 1988. The European Communities appears to imply that this figure concerning United Kingdom performing artists would be indicative of the share due to EC composers and other copyright holders of the royalties collected for the amplification of music transmissions. The European Communities adds that another way to estimate EC authors' market share is to look at the royalty distributions by the US CMOs. The European Communities gives a figure, provided by ASCAP for 1998, indicating what percentage of its total distributions were paid to EC right holders; this figure is not reproduced here, given that the figure was given to the European Communities in confidence.[209]

6.234 The United States disagrees with the EC's implication that 25 per cent of royalties collected in the United States are due to EC right holders. According to the United States, a 1998 internal EC analysis of the economic effect of the homestyle exemption on EC right holders estimated that just 6.2 per cent of ASCAP revenues were distributed to all foreign CMOs, and that just 5.6 per cent of BMI

[208] The Arbitrators explained: "The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU." *See* the Decision by the Arbitrators on *EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 of the DSU*, adopted on 19 April 1998, WT/DS27/ARB, paragraph 6.10.

[209] EC Response to question 5 from the Panel to the European Communities. Again we find that the EC's designation as confidential of such information does not assist us in discharging our responsibility to make findings that will best enable the DSB to perform its dispute settlement functions. However, given that our assessment of whether the prejudice caused by the exemptions of Section 110(5) to the legitimate interests of the right holder is of an unreasonable level is not exclusively limited to EC right holders, the exact figure is not essential for our findings.

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revenues were due to all foreign CMOs.[210] Obviously, the percentage payable to the EC collecting societies would be significantly less than these figures for total payments to all foreign CMOs.[211]

6.235 We take note of these estimations, which are illustrative of the market conditions. However, given our considerations above, our assessment of whether the prejudice, caused by the exemptions contained in Section 110(5), to the legitimate interests of the right holder is of an unreasonable level is not limited to the right holders of the European Communities.

Summary of the general interpretative analysis

6.236 We will now examine subparagraphs (B) and (A) of Section 110(5) in the light of these general considerations. What is at stake in our examination of the third condition of Article 13 of the TRIPS Agreement is whether the prejudice caused by the exemptions to the legitimate interests of the right holder is of an unreasonable level. We will consider the information on market conditions provided by the parties taking into account, to the extent feasible, the actual as well as the potential prejudice caused by the exemptions, as a prerequisite for determining whether the extent or degree of prejudice is of an unreasonable level. In these respects, we recall our consideration above that taking account of actual as well as potential effects is consistent with past GATT/WTO dispute settlement practice.[212]

(ii) The business exemption of subparagraph (B)

6.237 The European Communities focuses on an analysis of the potential economic effects of subparagraph (B) on the legitimate interests of right holders. It argues that the unreasonableness of the prejudice caused to the right holder becomes fully apparent when 73 per cent of all drinking establishments, 70 per cent of all eating establishments and 45 per cent of all retail establishments are unconditionally covered by the business exemption, while the rest of the establishments may also be exempted under conditions which are easy to meet. In its view, the denial of protection has been turned into the rule and protection of the exclusive right has become the exception.[213]

6.238 The United States does not focus on questioning the correctness of these figures that indicate the percentage of US eating, drinking and retail establishments that fall within the size limits of subparagraph (B). Taking these figures as a starting-point for alternative calculations, the United States, however, contends that they are not useful for estimating the economic impact or prejudice caused by subparagraph (B) to right holders, because they fail to account for many relevant factors that determine whether a right holder would be economically prejudiced at all by the business exemption. In order to obtain a reasonable estimate of the number of establishments from which copyright owners have truly lost revenue as a result of the business exemption, the United States subtracts from these figures those establishments that:

(i) do not play music at all;

(ii) rely on music from some source other than radio or TV (such as tapes, CDs, commercial background music services, jukeboxes, or live music);

(iii) were not licensed prior to the passage of the 1998 amendment and which the CMOs would not be able to license anyway;

[210] The United States refers to the Examination Procedure Regarding the Licensing of Music Works in the United States of America. European Commission, 23 February 1998. *See* US second written submission, paragraph 34.

[211] US response to question 12 from the Panel to the United States.

[212] *See* paragraph 6.185 and footnotes 163-165 above.

[213] *See* paragraphs 2.11-2.13, 6.118-6.122 and 6.142 above for more detailed discussions on the estimations of the establishments exempted by subparagraphs (A) and (B) of Section 110(5).

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(iv) would take advantage of the NLBA agreement, whose terms are practically identical to subparagraph (B), if the statutory exemption were not available; and

(v) would prefer to simply turn off the music rather than pay the fees demanded by the CMOs.

The United States concedes that it is impossible to estimate these figures, but assumes that there is ample reason to believe that they represent a substantial number of establishments.

6.239 We examine the relevance of these factors, beginning with the first, second and the fifth factors, and then the third and fourth factors. In this context, we recall that, while both parties have to adduce evidence supporting their legal and factual arguments, it is the United States that bears the ultimate burden of proof that Section 110(5) meets all three conditions of Article 13 of the TRIPS Agreement.

No music or music from another source

6.240 In detailing its first, second and fifth reduction factor, the United States provides estimates on the percentages of restaurants that use various sources of music, which we have summarized in paragraph 6.208 above. We agree that it is possible that some establishments that currently play broadcast music might decide to stop doing so, if they were required to pay fees to CMOs representing right holders in the absence of an exemption. But it is also evident that establishments that currently play recorded music may at any time decide to switch to music broadcast over the air or transmitted by cable in order to avoid paying licensing fees. Also, some establishments that do not play any music at all may start to use broadcast music, given that the only cost would be that of acquiring a sound system. Similarly, if amplified broadcast music would not be free of charge due to subparagraph (B) of Section 110(5), operators of establishments covered by that provision that currently use such broadcast music might switch to recorded music, to commercial background music services or to live music performances. Furthermore, an exemption that makes the use of music from one source free of charge is likely to affect, not only the number of establishments that opt for sources of music that require the payment of a licensing fee, but also the price for which the protected sources of music can be licensed.

6.241 It appears that the use of recorded music or commercial background music services can be easily replaced by the amplification of music transmitted over the air or by cable. Digital broadcasts and cable transmissions are increasing the supply of different types of music transmissions. The fact that one source of music is free of charge while another triggers copyright liability may have a significant impact on which source of music the operators of establishments choose, and on how much they are willing to pay for protected music. Therefore, in addition to the right holders' loss of revenue from the users that were newly exempted under subparagraph (B) of Section 110(5), the business exemption is also likely to reduce the amount of income that may be generated from restaurants and retail establishments for the use of recorded music or commercial background music services.

6.242 Although these considerations do not render irrelevant the statistics and estimations on the numbers and percentages of establishments that may play music from different sources or no music at all, it is clear that such statistics and estimations have to be considered with the *caveat* that, although they may reflect realities at a given point in time, they do not take into account the substitution between various sources of music that is likely to take place in the longer term.

Establishments not licensed before the 1998 Amendment and the NLBA Agreement

6.243 As to its third reduction factor, the United States submitted information concerning past licensing practices of establishments covered by Section 110(5). As regards the situation before the

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1976 Copyright Act, the United States notes that, in considering the original homestyle exemption of Section 110(5), the US Congress found that prior to 1976 the majority of beneficiaries of the then contemplated exemption were not licensed. As regards the situation between the entry into force of the 1976 Copyright Act and the 1998 Amendment, the United States gives two estimates, one according to which approximately 10.5 per cent of restaurants were licensed by the CMOs, and second according to which ASCAP licensed 19 per cent of restaurants at that time. In its view, these figures indicate a relatively low level of licensing of establishments. We also recall the November 1995 estimate by the CRS that 16 per cent of eating establishments, 13.5 per cent of drinking establishments and 18 per cent of retail establishments were at that time below the size of the *Aiken* restaurant, i.e. 1,055 square feet.[214] In addition, the United States estimates that 74 per cent of all restaurants play some kind of music.[215]

6.244 Based on these statistics about past licensing practices and ASCAP's revenue collection, the United States submits that the likely impact of the amended Section 110(5) on the revenues collected earlier by the CMOs from such establishments is likely to be minimal.[216] ASCAP collects 14 per cent of its total revenues from general licensees, including eating, drinking and retail establishments. Much of this revenue is from the public performance of live or recorded music, rather than broadcast music. Based on the data provided by the NLBA and NRA, the United States estimates that radio music accounts for a maximum of 28–44 per cent of revenues from eating and drinking establishments; this 28–44 per cent of 14 per cent is equivalent to 3.9–6.2 per cent of total revenues. The United States reduces this figure further because not all restaurants and bars are eligible for the Section 110(5) exemptions. The United States adds that, even using the EC figure indicating that 70 per cent of all US restaurants are exempted under subparagraph (B), it appears that the exemption for radio music will have a maximum effect on revenues of 2.7–4.3 per cent.

6.245 The EC's main contention against the reduction factors applied by the United States to its estimates of potential prejudice is that actual distributions to right holders, past licensing practices and revenue collected or foregone by the CMOs in the past or at present are not representative of the potential economic effect of subparagraph (B), because collection practices of the CMOs are a function of the legal protection of the relevant exclusive rights.

6.246 More specifically, the European Communities points out that the long-standing exceptions to copyright protection (i.e., prior to 1976, the *Aiken* decision, the passage of the homestyle exemption of the 1976 Copyright Act, subsequent court decisions in *Claire's Boutique* and *Edison Bros.*[217]) render the actual royalty collection practices of the CMOs in the past unrepresentative for measuring losses to right holders. In the EC view, this assessment is corroborated by the fact that, since the 1995 group licensing agreement between the US CMOs and the NLBA entered into force, no licensing fees have been collected from exempted establishments with a square footage below 3,500. These include 65 per cent of all eating and 72 per cent of all drinking establishments.[218]

6.247 We recall our conclusion that in the application of the three conditions of Article 13 to an exemption in national law, both actual and potential effects of that exception are relevant. As regards the third condition in particular, we note that if only actual losses were taken into account, it might be possible to justify the introduction of a new exception to an exclusive right irrespective of its scope in situations where the right in question was newly introduced, right holders did not previously have

[214] We note that the size of 1,055 of square feet is not contained in the original or revised text of the homestyle exemption but derives from the *Aiken* judgement. *See* paragraph 2.6 above.

[215] The above figures are discussed in more detail in the context of our examination of the second condition of Article 13 in paragraphs 6.208 and US reply to question 11(b) by the Panel to the United States.

[216] US reply to question 11(d) by the Panel to the United States.

[217] Broadcast Music, Inc. v. Claire's Boutiques Inc., US Court of Appeals for the Seventh Circuit, N° 91-1232, 11 December 1991. *See* Exhibit EC-6. Broadcast Music, Inc. v. Edison Bros. Stores Inc., US Court of Appeals for the Eight Circuit, N° 91-2115, 13 January 1992. *See* Exhibit EC-5.

[218] *See* EC first oral statement, paragraph 37.

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effective or affordable means of enforcing that right, or that right was not exercised because the right holders had not yet built the necessary collective management structure required for such exercise. While under such circumstances the introduction of a new exception might not cause immediate additional loss of income to the right holder, he or she could never build up expectations to earn income from the exercise of the right in question. We believe that such an interpretation, if it became the norm, could undermine the scope and binding effect of the minimum standards of intellectual property rights protection embodied in the TRIPS Agreement.[219]

6.248 We recall our consideration, in relation to the second condition of Article 13, of the relatively low level of licensing, before the 1998 Amendment, of restaurants above the *Aiken* size limits that were likely to play music. We concluded that, without further evidence, the fact that some similarly situated users were licensed, while others were not, could not be taken as an indication of normal exploitation. As regards the third condition of Article 13, we have not been provided with any persuasive arguments why the legitimate interests of the right holder would differ in respect of those similarly situated users that are currently licensed and those that are not; neither have we been given any persuasive explanation why some of these users were licensed and others not.

6.249 Therefore, in considering the prejudice to the legitimate interests of right holders caused by the business exemption, we have to take into account not only the actual loss of income from those restaurants that were licensed by the CMOs at the time that the exemption become effective, but also the loss of potential revenue from other restaurants of similar size likely to play music that were not licensed at that point.

6.250 As to the fourth US reduction factor, we note that we have already addressed the US argument about the similarity between the 1998 Amendment and the group licensing agreement reached between the CMOs and the NLBA in 1995 in our discussion of the second condition of Article 13. In that context, we noted that a private agreement constitutes a form of exercising exclusive rights and is by no means determinative for assessing the compliance of an exemption provided for in national law pursuant to international treaty obligations.[220]

Summary of the relevance of the above factors

6.251 Consequently, we caution against attributing too much relevance to the factors proposed by the United States for reducing the EC figures intended to indicate the potential prejudice in relation to eating, drinking or retail establishments, and, accordingly, for the determination of the level of prejudice caused by the business exemption to the legitimate interests of right holders. At the same time, we recognize the difficulty of quantifying the economic value of potential prejudice. Most of the factual information on the current US licensing market provided by the parties relates to the immediate actual losses to the right holders; in particular, both parties have provided us with detailed calculations of the loss of income to the right holders resulting from the 1998 Amendment. Keeping in mind our conclusion that such figures cannot alone be determinative for the assessment of the level of prejudice suffered by right holders, we will now examine these calculations.

The alternative calculations by the parties of losses suffered by right holders

6.252 The United States estimates that the maximum annual loss to EC right holders of distributions from the largest US collecting society, ASCAP, as a result of the Section 110(5) exemption, is in the range of $294,113 to $586,332. Applying the same analysis, it estimates that the loss from the second largest society, BMI, is $122,000. In its calculation of ASCAP's distributions, the United States takes

[219] In comparison, we recall that in relation to the second condition, we noted that a low level of licensing cannot be determinative of normal exploitation to the extent that it results from lack of legal protection or of effective or affordable means of enforcement.

[220] *See* paragraphs 6.204-6.205 above.

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as a starting-point the total royalties paid to EC right holders by ASCAP. Second, it reduces the amount attributable to general licensing (i.e. licensing of commercial background music services, and a wide variety of licensees, including conventions and sports arenas, as well as restaurants, bars and retail establishments). Third, it makes a deduction to account for licensing revenue from general licensees that do not meet the statutory definition of an "establishment". Fourth, it deducts from the general licensing revenue the portion that is due to music from sources other than radio or television (e.g., tapes, CDs, commercial background music services, jukeboxes, live performances); and fifth, it reduces this amount to account for licensing revenue from general licensing of eating, drinking or retail establishments which play the radio but do not meet the size and equipment limitations of subparagraph (B) and thus do not qualify for the business exemption. The complete calculation and the US comments thereon can be found in the second written submission and in the second oral statement of the United States.[221]

6.253 The European Communities estimates that the annual loss to all right holders amounts to $53.65 million. The EC calculation takes as the starting-point the number of establishments that may qualify for the exception. Second, the European Communities makes a reduction from that number using the US hypotheses that 30.5 per cent of all eating and drinking establishments with a surface area below 3,750 square feet actually play music from the radio. Third, it applies to the remaining establishments the appropriate licensing fees selected from the licensing schedules of ASCAP[222] and BMI.[223] The complete calculation and related comments can be found in paragraphs 39-45 of the second oral statement by the European Communities, which is reproduced in Attachment 1.6 to this report.[224]

6.254 Overall, we consider that neither estimate is devoid of relevance for the purposes of estimating whether prejudice caused by subparagraph (B) to the legitimate interests of right holders amounts to a level that could be deemed unreasonable. The difference between the results of these two calculations can, to an extent, be explained by differences in the starting points and the parameters used for the calculations. The calculations use also a number of similar assumptions. We highlight below some of these differences and similarities.

6.255 The US estimate can be characterized as a "top-down" approach, which takes as its starting-point ASCAP's and the BMI's average total distributions of domestic income for the years 1996-1998. We recall that the United States estimates that only 10.5-19 per cent of restaurants were licensed at that time. Hence, this calculation based on the pre-existing collection does not take into account the potential income from establishments that were already covered at that time by the old homestyle exemption or from the larger restaurants that used music but were not licensed at that time.

6.256 The EC calculation can, in turn, be characterized as a "bottom-up" approach. It takes as its starting point the total number of restaurants and retail establishments that fall under the size limits of

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[221] *See* US second written submission, paragraphs 33-48, and US second oral statement, paragraphs 29-42, reproduced in Attachments 2.5 and 2.6 to this report.

[222] *See* excerpt in Exhibit EC-26.

[223] *See* excerpt in Exhibit EC-27.

[224] In response to question 4 from the Panel to the European Communities requesting information or estimations on the revenues collected by the EC collecting societies, the European Communities was only able to provide information in regard to the Irish Music Rights Organisation (IMRO). As Ireland represents approximately one per cent of the EC population, the European Communities suggests to multiply the Irish figures by hundred in order to obtain an estimate for the EC CMOs in their entirety.

We recall our view that our analysis should focus primarily on the US market, but that information from other countries might be useful for a comparative analysis of the US market. We regret that the European Communities and its member States were not in a position to provide us with more meaningful data. We do not believe that information from a single EC member State which would have to be extrapolated with a multiplier of 100 for the entire EC territory can be useful for the task before us.

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the exemption; then it applies to those establishments the lowest ASCAP and BMI licence fees, assuming a 100 per cent compliance rate among the establishments concerned.

6.257 The EC calculation covers all right holders, while the US calculation covers only the EC right holders' share. The United States estimates that this share is between 5 and 13.7 per cent of ASCAP's distributions of domestic income, and 8.15 per cent of the BMI's distributions.

6.258 Both calculations make a number of reductions from the above starting points based on estimations. In the absence of more detailed information from ASCAP, the United States estimates that 50 per cent of ASCAP's general licensing revenue is derived from the establishments covered by the business exemption. Based on the NRA and NLBA surveys, the United States estimates that 30.5 per cent of the establishments covered by the exemption play radio; the European Communities also uses this figure. Averaging the NRA estimations of the percentage of restaurants that meet the size limits, and the D&B study on the equivalent percentage of retail establishments, the United States estimates that 52.1 per cent of all establishments fall below the size limits of the business exemption.

6.259 Neither calculation takes into account the distributions of the third US CMO, SESAC, or music played on the television. The calculations do not attempt to estimate the losses from establishments above the size limits of subparagraph (B) of Section 110(5), which however comply with the respective equipment limitations. It appears that neither party assumes that these factors would essentially change the outcome of their estimations.

6.260 We note that both calculations include many estimations and assumptions. The fact that neither party was in a position to provide more direct information on the revenues collected from the establishments affected by the business exemption does not facilitate the estimation of the immediate effect of the exemption in terms of annual losses to the right holders.

6.261 One of the major differences between the calculations is that the US calculation takes into account the loss of income only from those establishments that were not already exempted under the old homestyle exemption and were actually paying licence fees. Given our considerations on the potential impact of the exemption, we are of the view that the loss of potential income from other users of music is also relevant.

6.262 In addition, the United States indicates a number of reasons why it considers that its five-step calculation is conservative. It assumes that 30.5 per cent of the licensing revenue is attributable to radio-playing, because 30.5 per cent of establishments play the radio, although these establishments might play music from multiple sources. Furthermore, the United States assumes that the 65.5 per cent of restaurants and the 45 per cent of retail establishments that meet the square footage limits account for 65 per cent or 45 per cent of the losses to right holders; but it adds that the small establishments that qualify for the exemptions are likely to represent a smaller proportion of the licensing revenue. The United States does not argue that these considerations would change the outcome of its estimation to an essential degree.

6.263 The United States also submits that its calculation does not take into account steps that ASCAP and the BMI might take to minimize any impact of the 1998 Amendment (e.g., focusing licensing resources exclusively on larger stores that generally pay larger fees, or by charging more for the playing of music from CDs and tapes). In the US view, the analysis should also take into account the limited resources of the CMOs and the small percentage of the market actually licensed by the CMOs. In the light of the certainty provided by the precise limitations of the business exemption contained in subparagraph (B), the CMOs can now efficiently redirect their licensing resources toward those establishments not eligible for the business exemption, and thus compensate for any minor prejudice they might suffer. The United States refers to an ASCAP statement of its intent to "reverse the effects" of the 1998 Amendment by redirecting its licensing resources toward

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establishments not covered by subparagraph (B) as well as by generating additional income by encouraging the use of live and recorded music, for which there is no exemption.[225]

6.264 In our view, this line of argument is irrelevant for the issue before us, i.e., whether subparagraph (B) complies with Article 13's third condition. If we were to find that subparagraph (B) does not meet the conditions for invoking the exception of Article 13, there is no rule in WTO law compelling another Member or private parties affected by a Member's WTO-inconsistent measure to take steps to remedy any actual, or reduce the potential, nullification or impairment caused.

6.265 We recall that the ultimate burden of proof concerning whether all of the conditions of Article 13 are met lies with the United States as the Member invoking the exception. In the light of our analysis of the prejudice caused by the exemption, including its actual and potential effects, we are of the view that the United States has not demonstrated that the business exemption does not unreasonably prejudice the legitimate interests of the right holder.

6.266 Accordingly, we conclude that the business exemption of subparagraph (B) of Section 110(5) does not meet the requirements of the third condition of Article 13 of the TRIPS Agreement.

(iii) The homestyle exemption of subparagraph (A)

6.267 The United States submits that the economic effect of the original homestyle exemption of Section 110(5) of 1976 was minimal. Its intent was to exempt from liability small shop and restaurant owners whose establishments would not have justified a commercial licence. Given that such establishments are not a significant licensing market, they could not be significant sources of revenue for right holders. Where no licences would be sought or issued in the absence of an exception, there was literally no economic detriment to the right holder from an explicit exception. Exempted establishments with small square footage and elementary sound equipment are the least likely to be aggressively licensed by the CMOs and licensing fees for these establishments would likely be the lowest in the range.[226] Given their size and that the playing of music is often incidental to their services, these establishments are among those most likely simply to turn off the radio if pressed to pay licensing fees. The 1998 Amendment has only decreased the economic relevance of the exemption by reducing its scope to "dramatic" musical works. Therefore, in the US view, the homestyle exemption as contained in subparagraph (A) of Section 110(5) does not prejudice the legitimate interests of the right holder.

6.268 The European Communities responds that the vast body of case law on the pre-1998 homestyle exemption makes it clear that very significant economic interests were at stake. Already under the *Aiken* scenario,[227] a considerable number of US establishments were covered by the exemption. According to the European Communities,[228] the *Aiken* surface limitations were doubled by US Courts before the 1998 Amendment.[229]

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[225] "A critical element of our plan will be to aggressively license those eligible establishments that have withheld royalty payment and to promote the value of live and mechanical music to a large number of newly targeted establishments." *See* ASCAP, Playback, October-November-December 1998, p. 2, Exhibit US-13.

[226] *See* Judiciary Committee Hearing, letter from Marilyn Bergman, ASCAP President and Chairman of the Board, pp. 175-186. *See* US first written submission, paragraph 34.

[227] According to the 1995 CRS study, 13.5 per cent, 16 per cent and 18 per cent of all US drinking, eating and retail establishments were covered by the exemption. *See* paragraphs 2.11 and 6.142 above.

[228] The European Communities initially raised its concerns that if the Courts might after the 1998 Amendment use in subparagraph (A), the surface categories set out in subparagraph (B), the coverage of subparagraph (A) is likely to be similar or even identical to the coverage of subparagraph (B) and that, in practical terms, this means that at least one half of all US service establishments are likely to be covered by the

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6.269 We recall our discussion concerning the legislative history of the original homestyle exemption in connection with the first and second conditions of Article 13. In particular, as regards the beneficiaries of the exemption, the Conference Report (1976) elaborated on the rationale of the exemption by noting that the intent was to exempt a small commercial establishment "which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[230] We also recall the estimations on the percentages of establishments covered by the exemption.[231] Moreover, the exemption was applicable to such establishments only if they use homestyle equipment. The House Report (1976) noted that "[the clause] would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system."[232] In this respect, we refer to our discussion on permissible equipment as well as the applicability of the exemption to Internet transmissions in connection with the first and second conditions of Article 13.

6.270 Furthermore, we recall the common understanding of the parties that the operation of the homestyle exemption as contained in the 1998 Amendment has been limited, as regards musical works, to the public communication of transmissions embodying dramatic renditions of "dramatic" musical works (such as operas, operettas, musicals and other similar dramatic works). We have not been presented with evidence suggesting that right holders would have licensed or attempted to license the public communication, within the meaning of Article 11(1)(ii) or 11*bis*(1)(iii) of the Berne Convention (1971), of broadcasts of performances embodying dramatic renditions of "dramatic" musical works either before the enactment of the original homestyle exemption or after the 1998 Amendment. We also fail to see how communications to the public of renditions of entire dramatic works could acquire such economic or practical importance that it could cause unreasonable prejudice to the legitimate interests of right holders.

6.271 We note that playing music by the small establishments covered by the exemption by means of homestyle apparatus has never been a significant source of revenue collection for CMOs. We recall our view[233] that, for the purposes of assessing unreasonable prejudice to the legitimate interests of right holders, potential losses of right holders, too, are relevant. However, we have not been presented with persuasive information suggesting that such potential effects of significant economic or practical importance could occur that they would give rise to an unreasonable level of prejudice to legitimate interests of right holders. In particular, as regards the exemption as amended in 1998 to exclude from its scope nondramatic musical works, the European Communities has not explicitly claimed that the exemption would currently cause any prejudice to right holders.

6.272 In the light of the considerations above, we conclude that the homestyle exemption contained in subparagraph (A) of Section 110(5) does not cause unreasonable prejudice to the legitimate interests of the right holders within the meaning of the third condition of Article 13.

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subparagraph (A) exemption. Given that the European Communities has not further substantiated this hypothetical about future jurisprudence, we abstain from addressing this argument any further.

[229] *See* EC first oral statement, paragraph 74. The European Communities also notes that, while it is irrelevant for the question of unreasonable prejudice to look at the degree of aggressiveness of licensing activities by CMOs, the US assertion that the establishments exempted under subparagraph (A) are least likely to be aggressively licensed by the CMOs is in contradiction with the US statement that the CMOs have used harassment and abusive tactics in the licensing practice.

[230] Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Congress., 2nd Session 75 (1976), as reproduced in Exhibit US-2.

[231] *See* paragraphs 2.11 and 6.142 above.

[232] Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Congress, 2nd Session 87 (1976), as reproduced in Exhibit US-1.

[233] *See* paragraph 6.185, footnotes 163-165 and paragraph 6.237 above.

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VII. CONCLUSIONS AND RECOMMENDATIONS

7.1 In the light of the findings in paragraphs 6.92-6.95, 6.133, 6.159, 6.211, 6.219, 6.266 and 6.272 above, the Panel concludes that:

(a) Subparagraph (A) of Section 110(5) of the US Copyright Act meets the requirements of Article 13 of the TRIPS Agreement and is thus consistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

(b) Subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

7.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement.

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ANNEX I

(WT/DS160/5 of 16 April 1999)

UNITED STATES – SECTION 110(5) OF US COPYRIGHT ACT

Request for the Establishment of a Panel by the European Communities and their Member States

The following communication, dated 15 April 1999, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have asked me to submit the following request on behalf of the European Communities and their Members States for consideration at the next meeting of the Dispute Settlement Body.

Section 110(5) of the United States Copyright Act, as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998, exempts, under certain conditions, the communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes (sub-paragraph A) and, also under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a non dramatic musical work intended to be received by the general public (subparagraph B) from obtaining an authorisation to do so by the respective right holder. In practice this means that Section 110(5) of the US Copyright Act permits under certain circumstances, the playing of radio and television music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.

However, Article (9)1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights contained in Annex 1C to the Agreement Establishing the World Trade Organization (hereafter the "TRIPS Agreement") obliges WTO Members to comply with Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (hereafter the "Berne Convention").

Article 11bis(1) of the Berne Convention, as revised by the Paris Act of 1971 grants the authors of literary and artistic works, including musical works, the exclusive right of authorising not only the broadcasting and other wireless communication of their works, but also the public communication of a broadcast of their works by loudspeaker or any other analogous instrument. Article 11(1) of the same Convention grants the authors of musical works the exclusive right of authorising the public performance of their works, including such public performance by any means or process, and any communication to the public of the performance of their works.

As a consequence of the above, Section 110(5) of the United States Copyright Act appears to be inconsistent with the United States' obligations under the TRIPS Agreement, including, but not limited to, Article 9(1) of the TRIPS Agreement.

In a communication dated 26 January 1999 (WT/DS160/1-IP/D/16) the European Communities and their Member States requested consultations with the United States of America pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of

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Disputes contained in Annex 2 of the WTO Agreement (hereafter "the DSU"). Such consultations, which were held on 2 March 1999 in Geneva, have allowed a better understanding of the respective positions, but have not led to a satisfactory resolution of the dispute.

Accordingly, the European Communities and their Member States request the establishment of a panel pursuant to Article 6 of the DSU and Article 64:1 of the TRIPS Agreement to examine the matter in the light of the relevant provisions of the TRIPS Agreement and to find that the United States of America fails to conform to the obligations contained in the TRIPS Agreement, including, but not limited to, Article 9(1) of the TRIPS Agreement, and thereby nullifies or impairs the benefits accruing directly or indirectly to the European Communities and their Member States under the TRIPS Agreement.

The European Communities and their Member States request that the panel be established with the standard terms of reference as provided for in Article 7 of the DSU.

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ANNEX II

(WT/DS160/6 of 6 August 1999)

UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT

Constitution of the Panel Established
at the Request of the European Communities

Note by the Secretariat

1. At its meeting on 26 May 1999, the DSB established a panel pursuant to the request by the European Communities (WT/DS160/5), in accordance with Article 6 of the DSU (WT/DSB/M/62).

2. At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference are the following:

> "To examine, in light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS160/5, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

3. On 27 July 1999, the European Communities made a request, with reference to paragraph 7 of Article 8 of the DSU, to the Director-in-charge to determine of the composition of the Panel. Paragraph 7 of Article 8 provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

4. On 6 August 1999, the Director-in-charge composed the Panel as follows:

Chairperson:	Carmen Luz Guarda
Members:	Arumugamangalam V. Ganesan
	Ian F. Sheppard

5. Brazil, Australia, Canada, Japan and Switzerland reserved their rights as third parties to the dispute.

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ATTACHMENT 1.1

FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

(5 October 1999)

Table of Contents

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I. INTRODUCTION

1. The European Communities and their member States (hereinafter EC/MS) bring this complaint against the United States of America (US) because they consider that certain aspects of the US legislation relating to the protection of copyrighted works are incompatible with the US' obligations stemming from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

2. While Section 106 Copyright Act gives the right holder of a copyrighted work the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work and to perform the copyrighted work publicly, Section 110(5) Copyright Act provides for two exemptions from copyright protection, which in simple terms can be summarised as follows:

- Under Subsection A, anybody is allowed to perform in his business premises for the enjoyment of customers under certain conditions, without the consent of the copyright holder, copyrighted works other than nondramatic compositions such as plays, operas or musicals from radio or television (TV) transmissions;

- Under Subsection B, anybody is allowed to perform in his business premises for the enjoyment of customers, "nondramatic music" by communicating radio or TV transmissions without the consent of the copyright owner in cases where a certain surface is not exceeded without any practical limitation or above that surface limit by respecting certain conditions as to the number of loudspeakers used.

3. In the view of the EC/MS these US measures are in violation of the US' obligations under the WTO-TRIPS Agreement. In particular, the US measures are incompatible with Article 9(1) TRIPS together with Articles 11(1) and 11*bis*(1) of the Berne Convention and cannot be justified under any express or implied exception or limitation permissible under the Berne Convention or under TRIPS. These measures cause prejudice to the legitimate rights of copyright owners, thus nullifying and impairing the rights of the EC/MS.

4. The EC/MS would also like to mention that several senior US government officials, which have testified before the US Congress during the legislative process which led to the present version of Section 110(5) Copyright Act, have expressed the view that the extension of the scope of this provision would violate the US' obligations under TRIPS and the Berne Convention.[1,2,3]

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[1] The Register of Copyrights stated on 17 July 1997 in Congress (copy of the entire statement on international aspects attached – Exhibit EC-11) that: *"The Copyright Office believes that several of the expanded exemptions, if passed in their current form, would lead to claims by other countries that the United States was in violation of its obligations under the Berne Convention for the Protection of Literary and Artistic Works, incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") of the Uruguay Round of GATT"*.

[2] At the same occasions, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks stated that: "*Our trading partners are likely to allege that several of the changes to the copyright law proposed in Section 2 of the proposed bill may be inconsistent with our obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPS Agreement") administered by the World Trade Organisation. If H.R. 789 is enacted, and we undermine the rights of copyright owners of musical works to perform their works in public, in particular at a restaurant or bar as envisioned by Section 2(a) and at the establishments covered by Section 2(c), we are seriously concerned that they will claim that we are in violation of our international commitments under both the Berne Convention and the TRIPS Agreement, the latter of which contains a similar right under Article 14(3)"* (copy of the entire statement on international aspects attached – Exhibit EC-12).

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5. The EC/MS' economic interests in this matter are significant. According to a study to which the EC/MS will refer to under Part IV, approximately 70% of all drinking and eating establishments and 45% of all retail establishments in the US can play without limitation radio or TV music without the consent of the copyright owner. This demonstrates clearly the potential of Section 110(5) Copyright Act to cause very significant losses of licensing income.

II. PROCEDURAL HISTORY

6. The so-called "homestyle exemption", which textually corresponds to the present subsection A of Section 110(5) Copyright Act, was already contained in the Copyright Act of 1976 which entered into force on 1 January 1978. Subsection B was added to the Copyright Act in October 1998 by the "Fairness in Music Licensing Act". The practical result of the latter amendment consists in a significant extension of the scope of the exemption from copyright protection as compared to the previous "homestyle" exemption.

7. The US notified their laws and regulations governing the protection of intellectual property rights (IPRs) to the TRIPS Council[4] on the basis of Article 63(2) TRIPS and the relevant guidelines[5] adopted by the TRIPS Council. At its meeting of July 1996, the US copyright legislation, together with the copyright legislation of other industrialised WTO Members, was subject to a review carried out in the TRIPS Council in which the EC/MS *inter alia* asked a number of questions to the US concerning copyright protection in the area of copyrighted works to which the US replied in writing.[6]

8. On the bilateral level the EC/MS raised their concerns by means of several diplomatic demarches at various levels, including the political level. Unfortunately, it proved impossible to make any progress to resolve the issues in this way.

9. By a communication dated 26 January 1999[7], the EC/MS requested consultations pursuant to Article 4 DSU and Article 64 TRIPS in conjunction with Article XXII GATT 1994.

10. By communications dated 11 and 12 February 1999 Australia[8] and Canada[9] expressed their desire to join the consultations pursuant to Article 4 (11) DSU. By a communication dated 15 February 1999, Switzerland[10] did likewise. All three requests were accepted by the US.[11]

11. Consultations between the EC/MS and the US were held in Geneva on 2 March 1999. Canada participated in these consultations. Prior to the consultations, the EC/MS submitted to the US a number of written questions, to most of which the US replied orally. These consultations did not, however, lead to a satisfactory resolution of the matter.

12. By a communication dated 15 April 1999[12], the EC/MS requested the establishment of a Panel pursuant to Article 64(1) TRIPS and Articles 4(7) and 6(1) DSU. The US refused the establishment of a Panel at the meeting of the DSB on 28 April 1999. At the DSB meeting held on 26 May 1999, the Panel was established.

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[3] For the sake of accuracy, it has to be mentioned that the statements referred to under point 4 have been made on the basis of an earlier proposal (H.R. 789 attached as Exhibit EC-13) which provided for slightly wider exception than the one contained in the present Section 110(5) Copyright Act.

[4] WTO Doc. IP/N/1/USA/C/1 and 2.

[5] WTO Doc. IP/C/M/7.

[6] WTO Doc. IP/Q/USA/1.

[7] WTO Doc. WT/DS/160/1.

[8] WTO Doc. WT/DS/160/4.

[9] WTO Doc. WT/DS/160/2.

[10] WTO Doc. WT/DS/160/3.

[11] Note from the Permanent Mission of the United States to the WTO dated 31 March 1999.

[12] WTO Doc. WT/DS/160/5.

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13. The terms of reference of the Panel are the following:

> "To examine in light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS 160/5 the matter referred to the DSB by the EC/MS in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[13]

14. Five WTO Members have notified under Article 10(2) DSU their interest in the matter before the panel. These third parties are Australia, Brazil, Canada, Japan and Switzerland.[14]

III. PROTECTION OF COPYRIGHTED WORKS AND THE EXCEPTIONS THERETO UNDER THE US COPYRIGHT ACT

1. Historical background: Section 110(5) Copyright Act before the 1998 amendment ("the homestyle exemption")

15. Under Section 106 Copyright Act (1976), the right holder of a work has the exclusive right to reproduce the work, prepare derivative works and distribute copies of the work. Under Section 106(4) of said Act, the owner of copyright has also the exclusive right *"to perform the copyrighted work publicly"*.

16. In order fully to understand the exemptions contained in the present version of Section 110(5), it is essential to consider its previous version. Prior to 1999, Section 110(5) only consisted of the current Subsection A (minus the words "*except as provided in subparagraph (B)*"). Subsection B was added to the statute in October 1998 by the "Fairness in Music Licensing Act". The 1976 version of Section 110(5) was generally referred to as "the homestyle exemption". It reads as follows:

> *"Notwithstanding the provisions of Section 106, the following are not infringements of copyright:*
>
> *(5) communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:*
>
> *(a) a direct charge is made to see or hear the transmission, or*
>
> *(b) the transmission thus received is further retransmitted to the public."*

17. In broad terms, the homestyle exemption covered the use of a "homestyle" radio or TV in a shop, a bar, a restaurant or any other place frequented by the public. The exemption did *not* apply to venues playing tapes, CD's or other mechanical music.

18. The *ratio legis* of the homestyle exemption goes back to the 1975 US Supreme Court case *Twentieth Century Music Corp. v. Aiken.*.[15] Mr Aiken was the owner of a small fast-food restaurant who operated a radio with outlets to four speakers in the ceiling. This installation received the

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[13] WTO Doc. WT/DS/160/6.
[14] WTO Doc. WT/DS/160/6.
[15] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (Exhibit EC-1).

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transmission of various radio stations which included protected musical works. At that time it was believed that the 1931 *Jewell-Lasalle* Supreme Court ruling[16] meant that a business establishment had to obtain a licence to pick up a broadcast and in order to legally communicate it to the public. However, Mr Aiken had no licence from the right holders of the copyrighted works that were broadcast through the radio on his premises. The Supreme Court exempted Aiken from liability under the 1909 Copyright Act (which is the predecessor of the 1976 Act), as, according to the Court, what he was doing could not be considered as *"performing"* within the meaning of said Act.[17]

19. However, in the Copyright Act (1976), the new definition of *"perform"* clearly covered what Mr Aiken had been doing. In order to keep the "Aiken" activities permissible without the consent of the right holder, a specific provision has been inserted into the Copyright Act to provide users with an exemption from copyright liability.

20. In order to qualify for the exemption, the transmission must be received on *"a single receiving apparatus of a kind commonly used in private homes"*. The benefit of the exemption is lost if a direct charge is made to see or hear the transmission or if the transmission is retransmitted to the public.

21. An important question arises as to what is to be considered *"a single receiving apparatus of a kind commonly used in private homes"*. Technology is under constant evolution and the "household radio" technology of the 70's has been superseded several times, having as a practical effect that the scope of the homestyle exemption has continuously been extended.

22. Although it is clear that, in practice, the homestyle exemption has applied in the past and continues to apply at present primarily to radio and TV broadcasts, and satellite and cable TV, the wording of Section 110(5) Copyright Act (1976) appears in view of the EC/MS to be also applicable to a wider range of transmissions, including computer networks and the internet.[18]

23. The scope of Section 110(5) (in its "homestyle" version) has evolved over the years. At the time of the adoption of the Copyright Act (1976), the intention of the US Congress appeared to be that the scope of the exemption should be narrow and apply only to small commercial establishments "where mom is behind the counter and dad does the cashier".[19] However, the Congressional intent was rather ambiguous, as indicated by the following passage: that *"(i)t applies to performances and displays of <u>all</u> types of works, and its purpose is to exempt from copyright liability <u>anyone</u> who merely turns on, <u>in a public place</u>, an ordinary radio or TV* (…)".[20]

---

[16] Buck v. Jewell-Lasalle Realty Co. 283 U.S. 191 (1931).

[17] Under Section 101 US Copyright Act to <u>perform</u> a work means *"to recite, render, play, dance or act it, either directly or by means of any device or process"*, while to <u>transmit</u> a performance or <u>display</u> it is *"to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"*.

[18] We will come back to this issue when discussing Article 110(5)(B) Copyright Act below.

[19] Compare also reply by the US administration to questions by Canada and the EC/MS within the TRIPS Council, 30 October 1996, WTO Doc. IP/Q/USA/1 at p. 12 with a reference to H.R. Rep. N°1476, 94th Congress, 2d Session 87 (1976) (<u>Exhibit EC-2</u>) *"The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. (…). [T]he Committee considers [the particular fact situation of Aiken] to represent the outer limit of the exemption, and believes that the line should be drawn at this point. Thus the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or TV equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial sound system installed or converts a standard home receiving apparatus (…) into the equivalent of a commercial sound system"*.

[20] See H.R. Rep. N° 1476, 94th Congress, 2d Session 86 (1976) (<u>Exhibit EC-3</u>).

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24. According to the statements by the US authorities made in connection with this case, US Courts have also interpreted this provision narrowly: if the receiving equipment and loudspeakers were too sophisticated and powerful, the exemption would not apply.[21] In fact, when looking closely at the vast litigation on Section 110(5) Copyright Act (1976), one does not come to the same conclusion. In these 20 years of litigation, two periods can be distinguished.

25. Until the early 90's, the main elements that Courts took into consideration in this respect were:[22]

- the physical size of the establishment (in terms of square footage, e.g. by comparing with the size of Aiken's[23] restaurant);
- the economic significance of the establishment;
- the number of speakers;
- whether the speakers were free standing or built into the ceiling;
- whether, depending on its revenue, the establishment was of a type that would normally subscribe to a background music service;
- the noise level of the areas within the establishment where the transmissions were made audible;
- the extent to which the receiving apparatus was to be considered as one commonly used in private homes; and
- the configuration of the installation.

As a result of the ambiguous statutory language of Section 110(5) Copyright Act (1976), the selective use of these criteria during a decade of litigation has given rise to a certain degree of inconsistency of the case law.[24]

26. In recent years, rather than to look at the legislative history of Section 110(5) Copyright Act (1976) and the intention of the legislator, Courts started to focus more on the plain text of the homestyle exemption, resulting in a broader interpretation of the exemption. As a result of this, large chain store corporations were found to be exempt from applying for a licence and paying a licence fee. *Edison*[25] and *Claire's Boutiques*[26] are illustrative decisions which were taken by two different Federal Appeal Courts one month from each other.

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[21] Reply by the US authorities to questions by Canada and the EU within the TRIPS Council, 30 October 1996, WTO Doc. IP/Q/USA/1 at p. 12.

[22] A non-exhaustive list of relevant Court cases applying the Section 110(5) exemption is attached as Exhibit EC-4.

[23] See under footnote 15 above.

[24] It appears from the analysis of US case law on the homestyle exemption that, although surface was not the only criterion used for the application, no Court has ever favourably applied it to an eating or drinking establishment with more than 1500 square feet of total space (the Aiken restaurant was 1,055 square feet). In the same vein, the homestyle exemption does not appear to have been applied by Courts to establishments using more than 4 speakers.

[25] BMI v. Edison Bros. Stores Inc., US Court of Appeals for the Eight Circuit, N° 91-2115, January 13, (Exhibit EC-5). In the early 80's, Edison Brothers, an important chain retail store, reached an understanding with a major US collecting society (BMI) on a "radio policy" designed to exempt its more than 1500 stores from copyright liability. The terms of the arrangement were as follows: (a) only two speakers may

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27. The core question in both cases was whether in the case of a large nation-wide company, with annual revenues of several hundred million dollars and with a large number of outlets, each outlet using a single receiver of a kind commonly used in private homes, Section 110(5) Copyright Act (1976) was still applicable.[27] In both cases the Courts' answers were in the affirmative. According to the Courts, the only relevant factors in assessing the applicability of the exemption are the quantity and the quality of the receiving apparatus used in a particular premise. The physical size of the establishment qualifying for the exemption, the ownership and/or the corporate structure of the establishment or any other factor considered in previous case law were declared irrelevant with regard to the application of the homestyle exemption.

28. In the early nineties, a coalition of business associations started active lobbying of Congress members in order to secure both a clarification of Section 110(5) and a widening of its scope. The coalition's efforts rapidly bore fruit. As from 1995 several bills were introduced in the US House of Representatives and in the US Senate aimed at significantly extending the scope of the homestyle exemption.

29. On 6 and 7 October 1998, a bill, entitled Fairness in Music Licensing Act , was adopted by, respectively, the US House of Representatives and the US Senate. The bill consisted of adding a new Subsection B to Section 110(5) of the US Copyright Act, while the wording of the homestyle exemption remains unchanged under Subsection A. It was signed by the President on 27 October 1998, and entered into force on 26 January 1999.

2. Current scope and application of Section 110(5) of the US Copyright Act

30. Section 110(5) now contains two distinct exemptions: the so-called "homestyle exemption" under Subsection A modified as to the kind of works covered and a new exemption under Subsection B (sometimes referred to as the "business exemption").

(a) Subsection A

31. The exact meaning and scope of the "homestyle" exemption, now under Subsection A of Section 110(5), after the adding of Subsection B to the statute, and preceded by the expression *"except as provided for in subparagraph (B)"*, appears to be as follows.

While Section 110(5) Copyright Act applied to all kinds of copyrighted works before the 1998 amendment, apparently, Section 110(5)(A) Copyright Act is now intended to exclude from its scope "nondramatic musical works" and continues to apply to all other types of works, including e.g. plays, sketches, operas, operettas, musicals, because Section 110(5)(A) Copyright Act refers to "works" in general, while the scope of Subsection B is expressly limited to "nondramatic musical works".

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be attached to a radio receiver, (b) the speakers must be placed within 15 feet of the receiver, (c) speakers that are built into walls must not be used, only portable speakers are allowed, (d) only the radio may be played, no tapes or records. In order to comply with this policy, Edison Brothers made a considerable investment. In 1988, BMI adopted a new policy concluding that the exemption of Section 110(5) could never apply to chain stores, no matter what kind of equipment was used. However, Edison Brothers successfully challenged this interpretation before Court. This has led an important number of large chain stores to adapt their music installation in order to benefit from the exemption. Some of these chains even cancelled their subscription to background music from other sources than radio.

[26] BMI v. Claire's Boutiques Inc., US Court of Appeals for the Seventh Circuit, N° 91-1232, December 11, 1991 (Exhibit EC-6). This case also opposed right holders and a chain store corporation, the factual and legal situation was similar to the Edison case.

[27] Both in Edison and Claire's Boutiques, each store was fully owned and centrally managed by Edison Inc. and Claire's Boutique Inc. No franchising system was applied. The Claire's Boutique Stores had an individual surface between 861 and 2,000 square feet. Edison stores had an individual surface per outlet between 800 and 1,200 square feet.

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32. What has been said on Section 110(5) Copyright Act (1976) above continues to apply to subsection A of the current Section 110(5) Copyright Act with the proviso that the scope of this provision has apparently been limited by excluding nondramatic musical works which are now dealt with in Section 110(5)(B) Copyright Act. However, given that the limitations on the size of the establishment have been greatly relaxed in subsection B, it is doubtful whether Courts will uphold the limit on the size of the establishment, which they have set in the case law on Section 110(5) Copyright Act (1976).[28]

(b) Subsection B

33. Subsection B of Section 110(5) Copyright Act reads as follows:

> *"Notwithstanding the provisions of Section 106, the following are not infringements of copyright :*
>
> *(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or TV broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if -*
>
> *(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs had less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and -*
>
> *(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or*
>
> *(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;*
>
> *(ii) in the case of a food service or drinking establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and*

[28] Compare footnote 22.

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> *(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or*
>
> *(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space ;*
>
> *(iii) no direct charge is made to see or hear the transmission or retransmission;*
>
> *(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and*
>
> *(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed."*

(ba) Exempted uses

34. The exemption contained in Section 110(5)(B) Copyright Act covers transmissions or retransmissions embodying a performance[29] or display[30] of a nondramatic musical work intended to be received by the general public, originated from a radio or TV broadcast station licensed as such by the Federal Communications Commission. This basically covers a situation which appears similar to the one covered by the homestyle exemption, *i.e.* establishments which are open to the public may play radio or TV on their premises for the enjoyment of their customers without the consent of the right owners.

35. A last difference is that Subsection B does not apply to "works" in general but only to "nondramatic musical works", *i.e.* songs, and not to operas, operettas, musicals.

36. While the former "homestyle exemption" and the present Subsection A limit the exemption to the use of a single receiving apparatus commonly used in private homes, this condition is completely absent in Subsection B for cases where the establishment does not exceed a certain size. For all larger establishments the "homestyle" requirement has been replaced by much less stringent conditions in relation to the audio or TV equipment which can be used.

37. Moreover, *retransmissions* which were not expressly exempted under Section 110(5) Copyright Act (1976) are now expressly exempted. Under the US Copyright Act, to "transmit" a program means "to communicate it by any device or process whereby images or sounds are received beyond the place where they are sent".[31] Consequently, to "retransmit" a program means to further transmit a transmission, as is for example the case with cable TV operators, who receive TV signals

---

[29] Under Section 101 Copyright Act to perform a work means to recite, render, play, dance or act, either directly or by means of any device or process.

[30] Under Section 110 Copyright Act to display a work means to show a copy of it either directly or indirectly by means of any device.

[31] Section 101 Copyright Act.

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and retransmit them to their subscribers, or with satellites, which receive the earth-to-satellite signals and retransmit them to the earth.

38. Most TV programmes in the US are transmitted either by over-the-air broadcast or by cable or satellite. Therefore, the express inclusion of this transmission mode makes TV programmes fully subject to the exceptions in all forms of transmission.

39. It is presumed that Section 110(5)(B) Copyright Act applies in a case of public communication of musical works involving new technologies such as computer networks (e.g. Internet) in view of the wording of this provision. This transmission mode, the importance of which increases from day to day, is now subject to the exemption from copyright protection.[32]

(*bb*) *Exempted users*

40. For the application of the exemption to the establishments other than food service or drinking establishments, the following conditions apply:

- if the establishment has less than 2,000 gross square feet (= 186 square meters), the exemption applies without any further condition, i.e. any audio equipment also of a professional character and any number of loudspeakers can be used;

- if the establishment has more than 2,000 gross square feet of space, the exemption applies under the following conditions:

    - if the performance is by audio means only, it may be communicated by means of a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room;

    - if the performance or display is by audiovisual means:

        - any visual portion of the performance may be communicated by a maximum of 4 audiovisual devices, of which not more than one may be located in any one room. Moreover such devices should not have a diagonal screen size larger than 55 inches;

        - any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

41. For food service or drinking establishments[33], the following even more generous conditions apply:

- if the establishment has less than 3,750 gross square feet (= 348 square meters) of space (excluding parking space) the exemption applies without conditions, i.e. any kind of

---

[32] The following example is mentioned as an illustration of a situation in which this becomes relevant: an FCC-licensed radio (or TV) broadcaster parallels its over-the-air transmissions on the internet (as an audio back-up to his web-site). These programmes are received by a PC connected with a number of loudspeakers in a bar or other establishment meeting all the conditions set out in Section 110(5)(B) Copyright Act.

[33] Which are defined in Section 101 Copyright Act amended by Section 205 of the Fairness in Music Licensing Act as : "*restaurant, inn, bar, tavern or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is non-residential is used for that purpose, and in which nondramatic musical works are performed publicly*".

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audio(-visual) equipment, including professional equipment and any number of loudspeakers may be used;

- if the establishment has more than 3,750 gross square feet of space, the exemption applies under the following conditions:

  - if the performance is by audio means only, it may be communicated by means of a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room;

  - if the performance or display is by audiovisual means:

    - any visual portion of the performance may be communicated by a maximum of 4 audiovisual devices, of which not more than one may be located in any one room. Moreover such devices should not have a diagonal screen size larger than 55 inches;

    - any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

42. The exemption applies to "*establishments*" which are now defined by Section 101 of the US Copyright Act (upon amendment by Section 205 of the Fairness in Music Licensing Act) as "*a store, shop or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is non-residential is used for that purpose and in which nondramatic musical works are performed publicly*". This definition also reconfirms the findings of the two Circuit Courts referred to above[34] in relation to Section 110(5) Copyright Act (1976) that in order to meet the copyright exception each individual store, shop or place of business has to be looked at individually, it being irrelevant if a company operates several thousand such places of business all over the US.

(bc) General conditions

43. *No direct charge must be made to the public to see or hear the transmission or retransmission*. This condition also applies to the homestyle exemption. However, this condition has no potential whatsoever to limit the exception, because the operator of the establishment remains completely free to amortise the acquisition and operating costs of the audio(-visual) equipment by charging his customers for the goods and services sold accordingly.

44. *The transmission or retransmission may not be further transmitted beyond the establishment where it is received*. Further transmission or retransmission would of course imply that a new audience is reached, and would thus be a further communication to the public. Thus also this condition has in practice no potential to limit the exception in any meaningful manner.

45. *The transmission or retransmission must be licensed by the copyright owner of the work performed*. This means that the original broadcaster must be properly licensed by the right holder. Given that virtually all radio or TV stations in the Unites States are licensed by performing rights organisations, this condition is also unlikely to have any practical effect to limit the scope of the exemption.

[34] Compare footnotes 25 and 26.

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(c) Summary

46. The exemptions from copyright protection contained in Article 110(5) Copyright Act can be summarised as follows:

As far as copyrighted works excluding nondramatic musical works are concerned, anybody in the US can play such works from radio or TV on his business premises for the enjoyment of his customers without the consent of the copyright owner. The only condition in the law which has the potential to somewhat reduce the benefit of the exception from applying to all business premises in the US, consists in requiring that a single apparatus of a kind commonly found in private homes be used, without defining in the law what is meant by this. The other conditions are unlikely to have any limiting effect in practice.

47. As to nondramatic musical works, anybody can play such works originating from radio or TV in his establishment for the enjoyment of his customers without the consent of the copyright holder. In case the establishment being below a certain size (3,750 square feet for restaurants and bars and 2,000 square feet for all other establishments), no further conditions apply with a potential to limit the number of exempted establishments. In case the premises exceed these size limits, there exist some rather generous limitations in relation mainly to the number of loudspeakers which can be used. In any event, the use of professional equipment is perfectly permissible.

IV. QUANTITATIVE EFFECTS ON COPYRIGHT OWNERS

48. In order to illustrate the scope of the exception, as far as the establishments referred to under Section 110(5)(B) Copyright Act are concerned, and on which no limitations as to the audio(-visual) equipment used exist, the following figures are instructive.

49. On the basis of a 1998 Dun & Bradstreet's "Dun's Market Identifiers Market Profile"[35,36], which is a data base containing information, *inter alia* on square footage, of more than 6,5 million US businesses, the following can be said:

In 1998, the following number of establishments were contained in the D&B database (this was also the approach by the CRS in 1995), while the total figures as estimated by D&B are given in brackets:

- 7,819 (49,061) drinking establishments of a square footage below 3,750 square feet (= 73 % (85 %) of all US drinking establishments filed in the D&B database);

- 51,385 (192,692) eating establishments of a square footage below 3,750 square feet (= 70 % (68 %)of all US eating establishments filed in the D&B database);

- 65,589 (281,406) retail establishments of a square footage below 2,000 square feet (=45 % (42 %) of all US retail establishments filed in the D&B database).

50. These figures comprise bars, restaurants, tea-rooms, snackbars, etc. and retail stores. However, other sectors in which a number of establishments are likely to be exempted as well were not taken into account (for example: hotels, financial service outlets, estate property brokers, other types of service providers).

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[35] Further explanations and the data provided by Dun & Bradstreet are contained in Dun's Market Identifiers Market Profiles (Exhibit EC-7).

[36] The 1995 figures of this data base were used by the US Congress Research Service to establish in 1996 the number of establishments in certain size categories to be covered by the new law.

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51. To put the results of these data otherwise approximately 70% of all drinking and eating establishments in the US and 45% of all retail establishments in the US are entitled under Section 110(5) Copyright Act, without any limitation, to play music from the radio and TV on their business premises for the enjoyment of their customers without the consent of the copyright owners thus depriving the latter of a significant source of licensing income.

52. All other - larger - establishments are of course benefiting from the exception under Section 110(5)(B) Copyright Act, if they meet the very lenient conditions as to the number of permissible loudspeakers.

V. INCOMPATIBILITY OF THE US LEGISLATION WITH ITS OBLIGATIONS UNDER THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

1. Short Negotiating History of the TRIPS Agreement[37]

53. At the Ministerial Conference which launched the Uruguay Round of Multilateral Trade Negotiations at Punta del Este, Uruguay in September 1986, TRIPS was included into the negotiation agenda as one of the so-called new topics. Multilateral rulemaking in the IPR area had been so far dominated by the World Intellectual Property Organisation (WIPO) which administers or co-administers practically all important conventions in this area. There existed at the outset different views between industrialised countries, who wished to achieve a comprehensive coverage of all intellectual property rights and developing countries (LDCs) who wanted to limit work to a Code against trade in counterfeit goods.

54. During the negotiating process the view of those who pursued a comprehensive approach prevailed. This had as a consequence that practically all existing IPRs were included in TRIPS. To start with the principles of national treatment and most favoured nation treatment (the latter being a novelty in the area of IPRs) were stipulated. The most important WIPO conventions (the Paris Convention covering industrial property rights and the Berne Convention covering copyright as well as the Washington Treaty for the protection of semiconductor topographies) were included by reference, also to make these conventions subject to an efficient dispute settlement system. Furthermore extensive rules for the enforcement of the substantive IPR standards were provided, which constituted an absolute novelty for international IPR rulemaking.

55. The so-called Dunkel text on TRIPS of December 1991 became almost verbatim part of the Final Act adopted at the Marrakech Ministerial Conference in April 1994 which successfully concluded the Uruguay Round Negotiations. The provisions of TRIPS became fully applicable to non-developing country Members of the WTO from 1 January 1996 (Article 65(1) TRIPS).

2. Copyright protection under TRIPS

56. The substantive provisions for the protection of copyright (including related rights) are contained in Section 1 of Part II, i.e. Articles 9-14 of the TRIPS Agreement. Article 9 stipulates the principle that WTO Members have to comply with the substantive provisions of the Berne Convention (its Articles 1 to 21) and reiterates the basic principle of copyright protection, i.e. protection extends only to expressions and not to ideas, methods of operation or mathematical concepts.

57. Article 12 of the Agreement provides minimum standards for the term of protection of copyrighted works. The term of protection for many works is the life of the author plus 50 years.

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[37] For a detailed report of the negotiating history of TRIPS see Gervais, The TRIPS Agreement: Drafting History and Analysis, London 1998, pp 3-28.

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58. Article 9(2) of the Berne Convention bans the imposition of limitations on, or exceptions to, the reproduction right except in special cases when such limits or exceptions do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Article 13 TRIPS, which has also to be read together with Article 20 Berne Convention, makes this provision also applicable to all other exclusive rights in copyright and related rights, thus narrowly circumscribing the limitations and exceptions that WTO member countries may impose.

3. Section 110(5) Copyright Act in the light of Article 9(1) TRIPS together with Article 11*bis* (1) and 11(1) Berne Convention

59. For ease of presentation, both Subsections of Section 110(5) Copyright Act will be dealt with together for the legal analysis.

(a) Article 9(1) TRIPS

60. This provision reads :

> *"Members shall comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto…"*

This provision has as a consequence that the obligations contained in Articles 1 through 21 of the Berne Convention have become part of the obligations under TRIPS and are fully subject to the WTO dispute settlement system[38,39]

(b) Article 11*bis* (1) Berne Convention

61. The provision which is of particular relevance for the case at hand is Article 11*bis*(1) Berne Convention which reads:

> *"(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:*
>
> *(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
>
> *(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other that the original one;*
>
> *(iii) the public communication by loudspeaker or any analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."*

62. Article 11*bis* was introduced into the Berne Convention at the occasion of the Rome Revision (1928), and further elaborated by the Brussels Revision (1948) in a period where public communication by loudspeakers, radio etc. had become a very important means of communication.

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[38] Compare Gervais, The TRIPS Agreement, Drafting History and Analysis, 1998, at p. 72.

[39] See also Message from the President of the Unites States transmitting the Uruguay Round Trade Agreements, texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, 103d Congress, 2d Session, House Document 103-316, Vol. 1, p. 981, September 1994 (Exhibit EC-8).

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Such a means of communication was clearly similar to the public performance of a work, except that it increased the potential audience.

63. Each of the uses described in Article 11*bis*(1)(i) to (iii) Berne Convention is to be considered as a separate use, which requires a separate authorisation for each such use by the owner of the copyright.[40] It is Article 11*bis*(1)(iii) Berne Convention which is the relevant provision for the case of hand.

64. There can be no doubt that communications to the public not only emanating from radio broadcasts but also from TV are covered by Article 11*bis* Berne Convention.[41] There can also be no doubt that under Article 2 Berne Convention[42] that musical works, dramatic, dramatic-musical or other musical works qualify as literary and artistic works. Thus it can be concluded that the works for which Section 110(5) Copyright Act (in both alternatives) denies protection, are protected works under Articles 11*bis* and 2 Berne Convention.

65. While the term public communication[43] has not been defined in the Berne Convention, the Programme for the Brussels Revision[44] provides some guidance as to what is meant by public communication:

> *"…above all where people meet in the cinema, in restaurants, in tea rooms…"*

66. While Subsection A of Section 110(5) Copyright Act refers expressly to *"…performance or display of a work by the public reception…"*, also the communication of a musical work in an establishment to its customers as described in Subsection B of Section 110(5) Copyright Act constitutes a public communication in the sense of Article 11*bis*(1) Berne Convention.[45]

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[40] The underlying reasoning for this is explained in WIPO, Guide to the Berne Convention, 1978, at pp 68-69*: "The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.*

11bis.12. The Convention's answer is « no ». Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1)(ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinking his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.

11bis.13. Music has already been used as an example, but the right clearly covers all other works as well-plays, operettas, lectures and other oral works. Nor is it confined to entertainment; instruction is no less important. What matters is whether the work which has been broadcast is then publicly communicated by loudspeaker or by some analogous instrument e.g., a television screen.

11bis.14. Note that the three parts of this right are not mutually exclusive but cumulative, and come into play in all the cases foreseen by the Convention."

[41] Compare OMPI / WIPO, Guide to the Berne Convention, 1978, p. 66 (Exhibit EC-9).

[42] Compare OMPI / WIPO, Guide to the Berne Convention, 1978, p. 14 (Exhibit EC-10).

[43] The term "communication to the public" is synonymous.

[44] Comments in Programme for the Brussels Conference: Documents 1948, at pp 266 et seq.

[45] Both acts are also clearly covered by the definition given by US domestic law under Section 101 Copyright Act, which defines public performance or display of a work as: *"(…)To perform or display a work publicly means: (1) to perform or display at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public capable of receiving the*

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67. Under Article 11*bis*(1) Berne Convention, the public communication has to be "by loudspeaker or any other analogous instrument". In this context, it is irrelevant whether the loudspeakers are incorporated in the radio or TV set or other apparatus (including for example a computer) or if they are separate. It is obvious that the communication to the public envisaged in Section 110(5) Copyright Act covers the case that the musical works are played over loudspeakers to the customers of the businesses. In any event, music transmitted over radio or TV can only be made audible by means of some sort of loudspeaker.

68. By denying copyright protection to musical works (in Subsection A to copyrighted works other than nondramatic musical works) when they are received via radio or TV by hertzian waves and subsequently played on business premises for the enjoyment of customers, the US is not granting the protection which it is obliged to grant under Article 9(1) TRIPS together with Article 11*bis*(1)(iii) Berne Convention.

(c) Article 11(1) Berne Convention

69. This provision reads :

> *"(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing :*
>
> *(i) …*
>
> *(ii) any communication to the public of the performance of their works."*

70. While Article 11*bis*(1)(iii) Berne Convention necessitates that the musical work has been transmitted by hertzian waves at some point during its way to the reception apparatus, Article 11(1)(ii) Berne Convention covers the case when the entire transmission was by wire.[46]

71. The considerations put forward above under Article 11*bis* Berne Convention as to works and communication to the public apply *mutatis mutandis* to Article 11(1) Berne Convention.

72. It can, therefore, be said that the playing of music or other copyrighted works from radio and TV on the business premises for the enjoyment of customers as described in Section 110(5) Copyright Act constitutes acts which are protected by Article 11(1)(ii) Berne Convention if the entire radio or TV transmission is by wire. By denying such protection, the US is violating its obligations under Article 9(1) TRIPS together with Article 11(1)(ii) Berne Convention.

4. Permissible exceptions to copyright protection

73. While the US have at some point in time disputed that a "homestyle radio" is a "loudspeaker or other analogous instrument" in the sense of Article 11*bis*(1)(iii) Berne Convention, they have subsequently exclusively relied on assertions that Section 110(5) Copyright Act would be permissible under exception clauses contained in the Berne Convention and TRIPS. The US have in particular referred to so-called "minor exceptions" under the Berne Convention, to Articles 9(2) and 11*bis*(2) Berne Convention and Article 13 TRIPS.

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performance or display receive it in the same place or in separate places and at the same time or at different times(…).".

[46] See the unequivocal language in WIPO, Guide to the Berne Convention, 1978, at p. 65 which reads: *"the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 11bis. For example, a broadcasting organisation broadcasts a chamber concert. Article 11bis applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11".*

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74. The EC/MS would like to observe that the burden to invoke and prove the applicability of an exception fall on the party invoking the exception. This standard is in accord with the Appellate Body reports in United States - Standards for Reformulated and Conventional Gasoline[47] and United States - Measures Affecting Woven Wool Shirts and Blouses from India.[48]

75. In this situation, the EC/MS would like to say that in their view, none of the exceptions to copyright protection contained in the TRIPS Agreement and the Berne Convention can excuse - totally or in part - the exceptions contained in Section 110(5) Copyright Act. The EC/MS will comment in more detail on this issue in light of arguments which the US might wish to submit in this context to the Panel.

5. Nullification and impairment

76. Under Article 64(1)TRIPS, Article XXIII GATT and Article 3(8)DSU, the violation of the US' obligations under the TRIPS Agreement are considered prima facie to constitute a case of nullification or impairment.

VI. CONCLUSION

77. The EC/MS therefore respectfully request the Panel to find that the US has violated its obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention and should bring its domestic legislation into conformity with its obligations under the TRIPS Agreement.

[47] WT/DS2/AB/R, p. 22 (adopted on 20 May 1996).
[48] WT/DS33/AB/R, p. 16 (adopted on 23 May 1997).

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ATTACHMENT 1.2

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES AT THE FIRST MEETING WITH THE PANEL

(8 and 9 November 1999)

I. INTRODUCTION

1. The European Community (EC) and its Member States (MS) first of all would like to thank you Ms Chairperson and Members of the Panel for taking on this case in anticipation of the time and effort which you will devote to it. These thanks are extended also to the Members of the Secretariat who assist this Panel in its task.

2. This is the fourth panel on TRIPS and the first one on copyright issues. The findings of this Panel are likely to be of significant importance for the implementation by Members of issues namely in relation to the section on copyright of the TRIPS Agreement and the interrelationship between TRIPS and the Berne Convention.

3. We set out our understanding of the facts of this case and our arguments in the first written submission dated 5 October 1999 in which it is explained why we consider that certain aspects of the US' legislation relating to the protection of copyrighted works are incompatible with the US' obligations stemming from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). We will refrain today from repeating all facts and arguments made in the written submission, but will rather concentrate on what we consider to be the pivotal facts and arguments. We will also comment provisionally on the First Written Submission of US of 26 October 1999 and Third Party submissions. The EC/MS will of course reply in full to the US and Third Party Submissions in our rebuttal submission.

4. To put it in telegraphic style, the particular situation under US copyright law, which is the object of the EC/MS' complaint, presents itself as follows:

While Section 106 Copyright Act gives the right holder of a copyrighted work the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work and to perform the copyrighted work publicly, Section 110(5) Copyright Act provides for two exemptions from copyright protection, which in simple terms can be summarised as follows:

- under Subsection B, anybody is allowed to perform in his business premises for the enjoyment of customers "nondramatic music" by communicating radio or television (TV) transmissions without the consent of the copyright owner in cases where a certain surface is not exceeded without any practical limitation or above that surface limit by respecting certain conditions as to the number of loudspeakers used;

- under Subsection A, anybody is allowed to perform in his business premises for the enjoyment of customers without the consent of the copyright holder, any other copyrighted works such as plays, operas or musicals from radio or TV transmissions under the condition, in particular, that the equipment used can be considered "homestyle".

5. In the view of the EC/MS these US' measures are in violation of the US' obligations under the WTO-TRIPS Agreement. In particular, the US' measures are incompatible with Article 9(1) TRIPS together with Articles 11(1) and 11*bis*(1) of the Berne Convention and cannot be justified under any express or implied exception or limitation permissible under the Berne Convention or under TRIPS. These measures cause prejudice to the legitimate rights of European copyright owners, thus nullifying and impairing the rights of the EC/MS.

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6. The EC/MS' economic interests in this matter are significant. According to a study to which the EC/MS will refer to in more detail, approximately 70% of all drinking and eating establishments and 45% of all retail establishments in the US can play without limitation radio or TV music without the consent of the copyright owner. This demonstrates clearly the potential of Section 110(5) Copyright Act to cause very significant losses of licensing income.

II. PROTECTION OF COPYRIGHTED WORKS AND THE EXCEPTIONS THERETO UNDER THE US COPYRIGHT ACT

1. Historical background: Section 110(5) Copyright Act before the 1998 amendment ("the homestyle exemption")

7. Under Section 106 Copyright Act (1976), the right holder of a work has the exclusive right to reproduce the work, prepare derivative works and distribute copies of the work. Under Section 106(4) of said Act, the owner of copyright has also the exclusive right *"to perform the copyrighted work publicly"*.

8. In order fully to understand the exemptions contained in the present version of Section 110(5), it is helpful to consider its previous version. Prior to 1999 Section 110(5) only consisted of the current Subsection A. Subsection B was added to the statute in October 1998 by the "Fairness in Music Licensing Act". The 1976 version of Section 110(5) was generally referred to as "the homestyle exemption". In broad terms, the homestyle exemption covered the use of a "homestyle" radio or TV in a shop, a bar, a restaurant or any other place frequented by the public. The exemption did *not* apply to the playing of tapes, CD's or other mechanical music.

9. The *ratio legis* of the homestyle exemption goes back to the 1975 US Supreme Court case *Twentieth Century Music Corp. v. Aiken* (full text in Exhibit EC-1). Mr Aiken was the owner of a small fast-food restaurant who operated a radio. This installation received the transmission of various radio stations which included protected musical works. At that time it was believed that a business establishment had to obtain a licence to pick up a broadcast and in order to legally communicate it to the public, but Mr Aiken had no licence from the right holders of the copyrighted works that were broadcast through the radio on his premises. The Supreme Court exempted Aiken from liability under the 1909 Copyright Act (which is the predecessor of the 1976 Act), as, according to the Court, what he was doing could not be considered as *"performing"* within the meaning of said Act.

10. However, in the Copyright Act (1976), the new definition of *"perform"* clearly covered what Mr Aiken had been doing. In order to keep the "Aiken" activities permissible without the consent of the right holder, a specific provision has been inserted into the Copyright Act to provide users with an exemption from copyright liability.

11. The scope of Section 110(5) (in its "homestyle" version) has evolved over the years. At the time of the adoption of the Copyright Act (1976), the intention of the US Congress appeared to be that the scope of the exemption should be narrow and apply only to small commercial establishments "where mom is behind the counter and dad does the cashier". However, the Congressional intent was not altogether clear (a good example of the ambiguity of the legislator's intent can be seen in the Congressional record which we have submitted as Exhibit EC-3).

12. While the US claim repeatedly that US Courts have interpreted this provision narrowly, in fact, when looking closely at the vast litigation on Section 110(5) Copyright Act (1976), one does not come to the same conclusion. In these 20 years of litigation, two periods can be distinguished.

13. Until the early 90's, the main elements that Courts took into consideration in this respect were:

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- the physical size of the establishment;

- the economic significance of the establishment;

- the number of speakers;

- whether the speakers were free standing or built into the ceiling;

- the extent to which the receiving apparatus was to be considered as one commonly used in private homes.

As a result of the ambiguous statutory language of Section 110(5) Copyright Act (1976), Courts selectively focused on various criteria or different sets of criteria, what has lead to a certain degree of inconsistency of the case law.

14. In recent years, rather than to look at the legislative history of Section 110(5) Copyright Act (1976), Courts started to focus more on the plain text of the homestyle exemption, resulting in a broader interpretation of the exemption. As a result of this, large chain store corporations were found to be exempt from applying for a licence and paying a licence fee. *Edison* and *Claire's Boutiques* are illustrative decisions which were taken by two different Federal Appeal Courts one month from each other.

15. The core question in both cases was whether in the case of a large nation-wide company, with annual revenues of several hundred million dollars and with a large number of outlets, each outlet using a single receiver of a kind commonly used in private homes, Section 110(5) Copyright Act (1976) was still applicable. In both cases the Courts' answers were in the affirmative. According to the Courts, the only relevant factors in assessing the applicability of the exemption are the quantity and the quality of the receiving apparatus used in a particular premise. The physical size of the establishment qualifying for the exemption, the ownership and/or the corporate structure of the establishment or any other factor considered in previous case law were declared irrelevant with regard to the application of the homestyle exemption.

16. The EC/MS do not see a contradiction between these two appellate decisions and the two appellate decisions cited by the US in its first written submission under point 7, because the relevant business surfaces in the two cases cited by the US were significantly larger than in the Edison and Claire's Boutiques cases (in the Sailor Music case, the average surface was 3,500 square feet, while in Edison and Claire's Boutiques, the surfaces were 800 - 1,200 square feet and 900 - 2,000 square feet respectively).

17. In the early nineties, a coalition of business associations started active lobbying of Congress members in order to secure a widening of the scope of Section 110(5). The coalition's efforts rapidly bore fruit. As from 1995 several bills were introduced in the US House of Representatives and in the US Senate aimed at significantly extending the scope of the homestyle exemption.

18. In October 1998, a bill, entitled Fairness in Music Licensing Act, was adopted by the Congress, signed by the President and entered into force on 26 January 1999.

2. Current scope and application of Section 110(5) of the US Copyright Act

19. Section 110(5) now contains two distinct exemptions: the so-called "homestyle exemption" under Subsection A modified as to the kind of works covered and a new exemption under Subsection B (sometimes referred to as the "business exemption").

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20. The exact meaning and scope of the "homestyle" exemption, now under Subsection A of Section 110(5), after the adding of Subsection B to the statute, and preceded by the expression *"except as provided for in subparagraph (B)"*, appears to be as follows.

While Section 110(5) Copyright Act applied to all kinds of copyrighted works before the 1998 amendment, apparently, Section 110(5)(A) Copyright Act is now intended to exclude from its scope "nondramatic musical works" and continues to apply to all other types of works, including e.g. plays, sketches, operas, operettas, musicals, because Section 110(5)(A) Copyright Act refers to "works" in general, while the scope of Subsection B is expressly limited to "nondramatic musical works".

While the EC/MS are pleased to learn that this interpretation is shared by the US (point 9 first written submission), we would nevertheless remark that this interpretation may not the one necessarily followed by all US Courts. There might be Courts which do not draw the *a contrario* conclusion and apply the exemption contained in Section 110(5)(A) Copyright Act to any sort of literary and artistic work.

Exempted uses

21. The exemption contained in Section 110(5)(B) Copyright Act covers transmissions or retransmissions embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated from a radio or TV broadcast station licensed as such by the Federal Communications Commission. This basically covers a situation which appears similar to the one covered by the homestyle exemption, *i.e.* establishments which are open to the public may play radio or TV on their premises for the enjoyment of their customers without the consent of the right owners.

22. A last difference is that Subsection B does not apply to "works" in general but only to "nondramatic musical works", *i.e.* popular music, and not to operas, operettas, musicals.

23. While the former "homestyle exemption" and the present Subsection A limit the exemption to the use of a single receiving apparatus commonly used in private homes, this condition is completely absent in Subsection B for cases where the establishment does not exceed a certain size. For all larger establishments the "homestyle" requirement has been replaced by much less stringent conditions in relation to the audio or TV equipment which can be used; in practical terms, it limits the number of loudspeakers to six. Moreover, communications to the public from *retransmissions* which were not expressly exempted under Section 110(5) Copyright Act (1976) are now expressly exempted.

24. Most TV programmes in the US are transmitted either by over-the-air broadcast or by cable or satellite. Therefore, the express inclusion of this transmission mode makes TV programmes fully subject to the exceptions in all forms of transmission.

25. It is presumed that Section 110(5)(B) Copyright Act applies in a case of public communication of musical works involving new technologies such as computer networks (e.g. Internet) in view of the wording of this provision. This transmission mode, the importance of which increases from day to day, is now subject to the exemption from copyright protection. The following example is mentioned as an illustration of a situation in which this becomes relevant: an FCC-licensed radio (or TV) broadcaster parallels its over-the–air transmissions on the internet (as an audio back-up to his web-site). These programmes are received by a PC connected with a number of loudspeakers in a bar or other establishment meeting all the conditions set out in Section 110(5)(B) Copyright Act. While the EC/MS appreciate that communications over a digital network also involve the reproduction right and distribution right, we are not concerned with these rights in this case.

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In this case, we are exclusively concerned with the communication to the public right and nothing in the US first written submission supports in our view the US' assertion (point 16 first written submission) that communications to the public of works where a computer serves as the receiving and amplifying apparatus would not be covered by the exemptions contained in Section 110(5) Copyright Act.

Exempted users

26. The legislator has made a distinction between food service and drinking establishments on the one hand and other establishments on the other. For the application of the exemption to the establishments other than food service or drinking establishments, the following conditions apply:

- if the establishment has less than 2,000 gross square feet (= 186 square meters), the exemption applies without any further condition, i.e. any audio equipment also of a professional character and any number of loudspeakers can be used;

- if the establishment has more than 2,000 gross square feet of space, the exemption applies under the following conditions:

    - if the performance is by audio means only, it may be communicated by means of a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room;

    - if the performance or display is by audiovisual means:

        - any visual portion of the performance may be communicated by a maximum of 4 audiovisual devices, of which not more than one may be located in any one room. Moreover such devices should not have a diagonal screen size larger than 55 inches;

        - any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

27. For food service or drinking establishments, the following even more generous conditions apply:

- if the establishment has less than 3,750 gross square feet (= 348 square meters) of space the exemption applies without conditions, i.e. any kind of audio(-visual) equipment, including professional equipment and any number of loudspeakers may be used;

- if the establishment has more than 3,750 gross square feet of space, the exemption applies under the following conditions:

    - if the performance is by audio means only, it may be communicated by means of a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room;

    - if the performance or display is by audiovisual means:

        - any visual portion of the performance may be communicated by a maximum of 4 audiovisual devices, of which not more than one may be located in any one room. Moreover such devices should not have a diagonal screen size larger than 55 inches;

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- any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

28. The exemption applies to "*establishments*" which are now defined by Section 101 of the US Copyright Act (upon amendment by Section 205 of the Fairness in Music Licensing Act) as "*a store, shop or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is non-residential is used for that purpose and in which nondramatic musical works are performed publicly*".

Summary

29. The exemptions from copyright protection contained in Article 110(5) Copyright Act can be summarised as follows: As far as copyrighted works excluding nondramatic musical works are concerned (this is Subsection A of Section 110(5) Copyright Act), anybody in the US can play such works from radio or TV on his business premises for the enjoyment of his customers without the consent of the copyright owner. The only condition in the law which has the potential to somewhat reduce the benefit of the exception from applying to all business premises in the US, consists in requiring that a single apparatus of a kind commonly found in private homes be used, without defining in the law what is meant by this. The other conditions are unlikely to have any limiting effect in practice.

30. As to nondramatic musical works (this is Subsection B of Section 110(5) Copyright Act), anybody can play such works originating from radio or TV in his establishment for the enjoyment of his customers without the consent of the copyright holder. In case the establishment being below a certain size (3,750 square feet for restaurants and bars and 2,000 square feet for all other establishments), no further conditions apply with a potential to limit the number of exempted establishments. In case the premises exceeding these size limits, there exist only limitations as to the number of loudspeakers which can be used. In any event, the use of professional equipment is perfectly permissible.

III. QUANTITATIVE EFFECTS ON COPYRIGHT OWNERS

31. In order to illustrate the scope of the exception, as far as the establishments referred to under Section 110(5)(B) Copyright Act are concerned, and on which no limitations as to the audio(-visual) equipment used exist, the following figures are instructive.

32. In 1999, the Dun & Bradstreet Corp. has prepared a quantitative analysis in order to find out how many businesses in the US fall below the surface thresholds established by Section 110(5) Copyright Act, thus escaping copyright liability. The methodology used by Dun & Bradstreet was identical to the methodology used in an analysis it had prepared in 1995 for the US Congressional Research Service during the legislative process of what eventually became the Fairness in Music Licensing Act.

33. The analysis is based on 1998 figures using Dun & Bradstreet's database comprising more than 6.5 million businesses all over the US.

The result of the analysis is that:

- 73% of all US drinking establishments have a surface of below 3,750 square feet;

- 70% of all US eating establishments have a surface below 3,750 square feet; and

- 45% of all US retail establishments have a surface below 2,000 square feet.

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34. These figures comprise bars, restaurants, tearooms, snackbars, etc. and retail stores. However, other sectors in which a number of establishments are likely to be unconditionally exempted as well were not taken into account (for example : hotels, financial service outlets, estate property brokers, other types of service providers).

35. To put the results of these data otherwise, approximately 70 % of all drinking and eating establishments in the US and 45 % of all retail establishments in the US are entitled under Section 110(5) Copyright Act, without any limitation, to play music from radio and TV on their business premises for the enjoyment of their customers without the consent of the copyright owners thus depriving the latter of any potential source of licensing income for this use of his work. All other - larger - establishments are of course benefiting from the exception under Section 110(5)(B) Copyright Act, if they meet the very lenient conditions as to the number of permissible loudspeakers.

36. Dun & Bradstreet had prepared alternative figures based on its own estimations rather than on actual answers received to its questionnaires to which we have also referred in our First Written Submission. Given that the results of both analyses are very similar, we do not intend to repeat the figures here.

37. For comparison purposes the figures which have been prepared by Dun & Bradstreet in 1995 on behalf of the US Congress, the results were as follows:

- the first scenario used the assumption that premises being unconditionally exempted from copyright liability not exceed the surface of the Aiken establishment which was 1,055 square feet:

    - 16 % of all US eating establishments,

    - 13.5 % of all US drinking establishments, and

    - 18 % of all US retail establishments.

    fall below this surface threshold, thus benefiting from the unconditional exemption.

- the second scenario was based on the alternative assumption that the unconditional copyright exemption would apply to eating and drinking establishments with a surface below 3,500 square feet and retail establishments below 1,500 square feet:

    - 65 % of all US eating establishments,

    - 72 % of all US drinking establishments, and

    - 27 % of all US retail establishments.

    fall below this alternative surface threshold, thus benefiting from the unconditional exemption.

38. These figures do not only corroborate the figures of the 1999 Dun & Bradstreet analysis but also demonstrate very clearly the very significant increase of the scope of the exemption under the 1976 Copyright Act in comparison to today's exception. The scope for eating establishment has seen an increase by 437%, for drinking establishments by 540% and for retail establishments by 250%. We will come back to these figures and explain why they are of relevance to this case later on.

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IV. INCOMPATIBILITY OF THE US LEGISLATION WITH ITS OBLIGATIONS UNDER THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

1. Section 110(5) Copyright Act in the light of Article 9(1) TRIPS together with Articles 11*bis*(1) and 11(1) Berne Convention

39. Given that the distinction between both Subsections of Section 110(5) Copyright Act may not be entirely clear, these Subsections will be taken together for the legal analysis.

Article 9(1) TRIPS

40. This provision reads :

> *"Members shall comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto…"*

This provision has as a consequence that the obligations contained in Articles 1 through 21 of the Berne Convention have become part of the obligations under TRIPS and violations of these provisions are fully subject to the WTO dispute settlement system.

Article 11bis(1) Berne Convention

41. The provision which is of particular relevance for the case at hand is Article 11*bis*(1) Berne Convention which reads :

> *"(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising :*
>
> - *(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
>
> - *(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other that the original one;*
>
> - *(iii) the public communication by loudspeaker or any analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."*

42. Article 11*bis* was introduced into the Berne Convention at the occasion of the Rome Revision (1928), and further elaborated by the Brussels Revision (1948) in a period where public communication by loudspeakers, radio etc. had become a very important means of communication. Such a means of communication was considered to be clearly similar to the public performance of a work, except that it increased the potential audience.

43. Each of the uses described in Article 11*bis*(1)(i) to (iii) Berne Convention is to be considered as a separate use, which requires a separate authorisation for each such use by the owner of the copyright. It is Article 11*bis*(1)(iii) Berne Convention which is the pertinent provision for the case of hand.

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Article 11(1) Berne Convention

44. While Article 11*bis*(1)(iii) Berne Convention necessitates that the musical work has been transmitted by hertzian waves at some point during its way to the reception apparatus, Article 11(1)(ii) Berne Convention covers the case when the entire transmission was by wire.

2. Compatibility of Section 110(5) Copyright Act with Articles 11*bis*(1)(iii) 11(1)(ii) Berne Convention

45. Given that the US appear to concede that Section 110(5) Copyright Act is at variance with Articles 11*bis*(1) and 11(1) Berne Convention (point 17 first written submission), we will limit our presentation of the analysis today to the following remarks and refer to the systematic presentation of the legal analysis on Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention to our first written submission. By denying copyright protection to works when they are received via radio or TV by hertzian waves and subsequently played on business premises for the enjoyment of customers, the US are not granting the protection which it is obliged to grant under Article 9(1) TRIPS together with Article 11*bis*(1)(iii) Berne Convention.

46. The considerations put forward under Article 11*bis* Berne Convention apply *mutatis mutandis* to Article 11(1) Berne Convention. It can, therefore, be said that the playing of music or other copyrighted works from radio or TV on the business premises for the enjoyment of customers as described in Section 110(5) Copyright Act constitutes acts which are protected by Article 11(1)(ii) Berne Convention if the entire radio or TV transmission is by wire. By denying such protection, the US are violating its obligations under Article 9(1) TRIPS together with Article 11(1)(ii) Berne Convention.

3. Permissible exceptions to copyright protection

47. The EC/MS would like to observe that the burden to invoke and prove the applicability of an exception falls on the party invoking the exception. This standard is in accord with the Appellate Body reports in United States - Standards for Reformulated and Conventional Gasoline and United States - Measures Affecting Woven Wool Shirts and Blouses from India.

4. The exceptions to copyright protection under TRIPS and the Berne Convention

48. The US point out in point 18 of their first written submission that:

> "The Berne Convention permits members to make "minor reservations" to the exclusive rights guaranteed by Berne, including limitations to the public performances right in Article 11 and 11*bis* TRIPS. Article 13 articulates the standard by which the permissibility of these limitations to exclusive rights must be judged."

The EC/MS would disagree with this statement.

49. The Berne Convention allows certain exceptions to the specific exclusive rights conferred. Article 9(2) Berne Convention allows exceptions to the reproduction right and Articles 10 and 10*bis* Berne Convention define precisely certain possible free uses of otherwise protected works.

50. As to the public performance and communication to the public right contained in Article 11 Berne Convention, no exceptions or limitations are foreseen in the Berne Convention.

51. As to the exclusive rights covered by Article 11*bis* Berne Convention, a certain "fine tuning" facility is provided in paragraph two which reads:

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> *"It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."*

While "countries of the Union" are given the freedom to determine conditions for the exercise of the rights, this freedom is limited by the minimum requirement that a copyright owner obtains as a minimum equitable remuneration. Section 110(5) Copyright Act fails to provide such equitable remuneration.

52. It is true that some discussion in WIPO on so-called "minor reservations" have taken place during the Brussels and Stockholm Conferences, but the precise scope of Berne rights, subject to such minor reservations, has never been fully clarified. In any event, such minor reservations would be limited to public performances of works for religious ceremonies, military bands and the needs of the child and adult education. All these uses are characterised by their non-commercial character and it is obvious that the uses contemplated in Section 110(5) Copyright Act do not meet this requirement.

53. As an intermediate result, it can be said that the Berne Convention does not contain an express or implied provision which would justify the exceptions contained in Section 110(5) Copyright Act.

54. While the US would appear to agree up to this point, it expresses the view that Article 13 TRIPS provides an exception clause which, if its threefold conditions are met, can permit exceptions to the exclusive rights conferred by Articles 11 and 11*bis* of the Berne Convention. The EC/MS disagree with this interpretation of Article 13 TRIPS.

55. First of all, Article 20 Berne Convention clearly speaks against the US' interpretation of Article 13 TRIPS because it only allows "countries of the (Berne) Union to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the (Berne) Convention". In other words, the Berne Convention countries cannot agree in another treaty to reduce the Berne Convention level of protection. The US interpretation of Article 13 TRIPS would exactly have the effect to reduce the Berne Convention level of protection.

56. Article 20 Berne Convention is mirrored in the TRIPS Agreement by Article 2(2), which stipulates that:

> *"Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the …, the Berne Convention".*

57. Furthermore, the US' interpretation of Article 13 TRIPS would lead to the absurd result that TRIPS would diminish the level of protection contained in the pre-existing Berne Convention. The opposite is true; both the EC/MS and the US fought vigorously and in the end successfully to increase the pre-existing levels of protection through TRIPS.

58. Even if Article 13 TRIPS were considered to be applicable to Articles 11 or 11*bis* Berne Convention, as far as the latter is concerned any permissible exception or limitation would at least have to give the author an equitable remuneration (Article 11*bis*(2) last sentence Berne Convention) what Section 110(5) Copyright Act fails to do. This view appears to be fully shared by Australia (see points 2.10 and 5.2 of its Third Party Submission).

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59. In any event, the three criteria set out in Article 13 TRIPS are not met by Article 110(5) Copyright Act, neither as far as Subsection A nor Subsection B is concerned.

60. Before analysing the three conditions contained in Article 13 TRIPS, a few more systemic remarks on the US argumentation on this issue appears to be necessary.

61. The US give at several places in their first written submission (e.g. points 28, 29) the impression that the exclusive rights contained in the Berne Convention and TRIPS would form a hierarchical order with "important" rights and "unimportant" rights, and refers to the public performance rights contained in Articles 11(1)(ii) and 11*bis*(1)(iii) Berne Convention as "secondary" rights. The EC/MS disagree with this view. Each and every exclusive right stipulated in the Berne Convention and TRIPS are equally important separate rights, which have to be looked at on the basis of theirs respective merits. The relative importance to an individual copyright owner will vary according to the kind of work involved and the way in which he manages his works.

62. From this, it follows that contrary to what the US appear to suggest under points 28 and 29 of their first written submission, it is not possible to argue under Article 13 TRIPS that by increasing the level of protection in relation to one specific exclusive right, it can be justified to reduce the protection of another exclusive right below minimum standard. In other words, one cannot justify a below standard protection for the public performance rights by an above standard protection of the reproduction right. Also Australia underlines in its Third Party Submission (see, for example, point 3.8) that the different exclusive rights granted to a copyright owner have to be looked at separately.

63. Furthermore the US also refer at several instances to agreements between private operators or their associations and associations representing copyright owners (e.g. point 12 first written submission) and claim that these private agreements were similar to what was finally codified by Section 110(5) Copyright Act. While the US have not made available the agreement to which reference has been made, the appreciation of the two leading US collecting societies has been expressed in unambiguous terms in a joint press release by BMI and ASCAP on the day following the passage of the Fairness in Music Licensing Act by Congress of which I will cite only a few passages (the text of the entire press release will be submitted as Exhibit EC-8).

> *"With this music licensing legislation, which seizes the private property of copyright owners, the United States Government has severely penalised American songwriters, composers and publishers… The earnings of songwriters, composers and publishers have been reduced by tens of millions of dollars annually."*

More importantly, the US' argument to refer to private agreements in order to justify provisions of a statute is of a circular nature. It is the task of the law to set the legal framework and to grant certain rights. It is only after the legislator has established this legal framework that the private economic operators can start to act within this framework. Only if the law stipulates a public performance right can the parties usefully agree on a licensing contract. For uses which are free such as the ones contemplated in Section 110(5) Copyright Act there is no object for a licensing contract because there is no right to be licensed in the first place. In its Third Party Submission, Australia points rightly out that the right to obtain remuneration has to be distinguished from a situation in which the right owner elects not to pursue his entitlement (see points 3.12 and 3.13).

64. The US are also making reference to the inherent administrative difficulties to license a great number of small establishments. Logically speaking, questions of enforcement of a right cannot be used to excuse its very existence. One can only enforce a right if it is recognised by the law. European collecting societies are successfully licensing great numbers of also small businesses and do apparently not encounter insurmountable obstacles. In the US, it would appear that if indeed the collecting societies were to encounter administrative difficulties, this is because collection societies

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in the US have never developed the necessary administrative structure to licence small establishments due to a lack of legal protection for extended periods of time in the US. The US' argument is further flawed by the fact that Section 110(5) denies protection to copyrighted works emanating from the radio and TV. The playing of copyrighted works from CDs and tapes is not covered by the exceptions. In other words the operators of establishments have to obtain licences to play music from CDs or tapes, but they can play music from the radio or TV without a license. This differentiation is difficult to justify. Either the licensing of a great number of establishments meets insurmountable difficulties, then it should meet these difficulties independently of the medium used or it does not.

65. Let's now look more specifically at the three conditions to make limitations or exceptions to exclusive rights under Article 13 TRIPS permissible:

- They have to be confined to certain special cases;

- They may not conflict with a normal exploitation of the work; and

- They may not unreasonably prejudice the legitimate interests of the right holder.

These three conditions have to be met cumulatively.

66. When the US claim that Section 110(5) Copyright Act confines the exclusion from copyright protection to "certain special cases" (pages 13-14 first written submission) [49], this would appear to the EC/MS rather to be a claim that the exceptions are well defined in the sense of legal certainty. However, nothing is said about what makes the playing of music from the radio and TV for the enjoyment of customers "special" as compared to other cases. One of the questions coming immediately to one's mind is why is the playing of music from the radio or TV "special" as compared to music played from CDs or cassettes. The remark by Australia in its Third Party Submission (see point 5.5) that "… Section 110(5) Copyright Act appears to provide a blanket exemption for such establishments rather than dealing with special cases" comes to the same conclusion.

67. Furthermore, the fact that very significant numbers of establishments are covered by the exception demonstrates that the exemption rather constitutes the rule than the exception in a situation in which one half to more than two thirds of all US establishments are covered by the exception.

68. As to Section 110(5)(A) Copyright Act, the reference to "homestyle receiving apparatus" is in itself so imprecise that it does not even create any legal certainty leave alone precisely defining a "special case" in the sense of Article 13 TRIPS.

The notion of homestyle receiving apparatus is a moving target that is subject to the developments of technology. Today's audio sets which are purchased by ordinary private customers to be played in their homes may have several hundred Watts of output capable of servicing many times the surface involved in the historic Aiken case.

69. The limitations or exceptions may not conflict with the normal exploitation of the work. As pointed out above, this analysis has to be carried out on the basis of each exclusive right individually.

70. Articles 11(1)(ii) and 11*bis*(1)(iii) Berne Convention create an exclusive right for a copyright owner to grant permission for the public performance of his work. While it is difficult to establish with precision what kind of performance to the public would not form part of the normal exploitation of the exclusive public performance rights, it appears in the view of the EC/MS safe to say that at least all uses which create an economic benefit to the users of the works are comprised in the normal

[49] See paragraphs 24-26.

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exploitation. The ample case law and the legislative history of Section 110(5) Copyright Act make it utterly clear that playing music on the commercial establishment is not an event which happens incidentally, but is a deliberate commercial act to attract customers and to make their stay on the premises of the establishment more enjoyable with the ultimate objective to enhance turnover and profit. This latter aspect is expressly recognised by the NLBA in a News release referred to by the US in their Exhibit US-7. In view of the EC/MS, there can be no doubt that the normal exploitation of the exclusive right concerned includes these commercial activities. This view is also shared by Australia in its Third Party Submission (points 5.6 and 5.7).

71. These arguments apply to both Subsections of Section 110(5) Copyright Act. The author of dramatic musical works, like the author of popular music both expect that their exclusive rights not be disregarded at least for such activities which are carried out by others for commercial gain. The US is offering no evidence whatsoever to support its assertion that owners of dramatic musical works do not expect any benefit from the rights curtailed by Section 110(5) Copyright Act (point 31 first written submission). Also the argument that "Congress intended that this exception would merely codify the licensing practice already in effect…" has to be refuted as circular. Only if there is a right, there can be a licence.

72. The exception may not unreasonably prejudice the legitimate interests of the right holder. The legitimate interest of the right holder consists in being able to prevent all instances of a certain use of his work protected by a specific exclusive right done by a third party without his consent. Clearly, these legitimate interests include as a minimum all the commercial uses by a third party of his exclusive rights. By creating exceptions contained in Section 110(5) Copyright Act, these legitimate interests are diminished, thus prejudiced. This view is shared by Australia in its Third Party Submission point 5.10.

73. While it is difficult to draw the precise line between reasonable and unreasonable prejudice, in view of the EC/MS both exceptions contained in Section 110(5) Copyright Act cause unreasonable prejudice to the owner of the exclusive right concerned.

74. While the US claim that the economic effect of Section 110(5) Copyright Act was minimal, even before the passage of the 1998 Amendment, no evidence whatsoever is offered to support this assertion. To the contrary, the vast body of case law on the pre-1998 homestyle exemptions makes it clear that very significant economic interests were at stake. This is further corroborated by the long and acrimonious legislative debate on the 1998 Amendment. Already under the Aiken scenario the 1995 CRS study showed that 13.5%, 16 and 18% of all US drinking, eating and retail establishments were covered by the exemption. Given that the Aiken surface had been doubled by the Courts before the 1998 Amendment and given that the Courts might after the 1998 Amendment use in Subsection A, the surface categories set out in Subsection B, the coverage of Subsection A is likely to be similar or even identical to the coverage of Subsection B. In practical terms, this means that at least one half of all US service establishments are likely to be covered by the Subsection A exemption. While it is irrelevant for the question of unreasonable prejudice to look at the degree of aggressiveness of licensing activities by the collecting societies, the US' assertion that the establishments exempted under Subsection A … are the least likely to be aggressively licensed by the PROs… (point 34 first written submission) is in contradiction with the US' statement (point 10 first written submission) that the PROs have used harassment and abusive tactics in the licensing practice.

75. As to Section 110(5)(B) Copyright Act, the unreasonableness of the prejudice flowing to the rightholder becomes fully apparent when 73% of all drinking establishments, 70% of all eating establishments and 45% of all retail establishments are unconditionally covered by the exception and the rest of establishments may additionally be exempted under lenient conditions. In this situation, the denial of protection has been elevated to being the rule and protection of the right has become the exception.

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76. In relation to the analyses prepared by Dun & Bradstreet one branch of the US government may consider them "meaningless by themselves" the fact of the matter is that the 1995 analysis has been commissioned by the US Congress, because some meaningful insight into the effects of the size of an exemption was expected. The 1998 analysis is but a re-run of the 1995 analyses based on 1998 figures. In view of the EC/MS, it is irrelevant to quantify the actual financial losses suffered by the rightholders concerned. It is sufficient to demonstrate the potential of the prejudice suffered.

77. As to the criticism by the US that the EC has made no attempt to address the effects of these exceptions on its rightholders, it is sufficient to say that at least 25 % of all music played in the US belong to EC copyright owners.

78. To sum-up our legal argumentation, Ms Chairperson, Members of the Panel, let me point out the following:

In the view of the EC/MS, which is apparently shared by the US, Section 110(5) Copyright Act is at variance with Article 9(1)TRIPS together with Articles 11(1)(ii) and 11*bis*(1)(iii) Berne Convention.

79. The EC/MS do not agree with the US defence that the exception stipulated in Section 110(5) Copyright Act can be justified under Article 13 TRIPS. In view of the EC/MS Article 13 TRIPS is not applicable to Articles 11 and 11*bis* Berne Convention because both Article 20 Berne Convention and Article 2(2) TRIPS do not allow that TRIPS extends the scope of exceptions allowable under Berne. In any event, no exception to Article 11*bis* Berne Convention could ignore the requirement stipulated in Article 11*bis*(2) last sentence Berne Convention which requires as the bottom line that the rightholder receive equitable remuneration. Such equitable remuneration is not foreseen in Section 110(5) Copyright Act.

80. Finally, even if Article 13 TRIPS would be applicable to Articles 11 or 11*bis* Berne Convention none of its three conditions, which have to be met cumulatively, would be met by either alternative contained in Section 110(5) Copyright Act. Of course, based on WTO precedents, the US bear the full burden of proof to establish that Article 13 TRIPS would be applicable and all its conditions be met.

5. Nullification and impairment

81. Under Article 64(1) TRIPS, Article XXIII GATT and Article 3(8)DSU, the violation of the US' obligations under the TRIPS Agreement are considered prima facie to constitute a case of nullification or impairment.

V. CONCLUSION

82. The EC/MS therefore respectfully request the Panel to find that the US have violated their obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention and should bring their domestic legislation into conformity with their obligations under the TRIPS Agreement. Of course, the EC/MS would be pleased to reply to any question the Panel might have. The written version of this statement will be made available during the course of tomorrow at the latest.

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ATTACHMENT 1.3

RESPONSES OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO WRITTEN QUESTIONS FROM THE PANEL – FIRST MEETING

(19 November 1999)

I. REPLIES TO QUESTIONS FROM THE PANEL TO THE EUROPEAN COMMUNTIES AND THEIR MEMBER STATES

Legislation in the EC

Q.1 What types of minor exceptions apply to the public performance of works in the EC law or the laws of the EC member States, and in particular whether any limitations apply to food service and drinking establishments and establishments other than food service and drinking establishments (below referred to as "other establishments").

See reply under question 2.

Q.2 Is the communication to the public of music contained in broadcasts or played from sound recordings or live performances subject to exclusive rights or right of remuneration in the EC law or the laws of the EC member States, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

While the Panel uses here and in other instances the term "minor exception", the EC/MS would like to note that this term is not a term of art neither under the Berne Convention nor under TRIPS. We will refer to "exceptions" where referring to Article 13 TRIPS or express exceptions under the Berne Convention and to "minor reservations" where referring to the concept which has been addressed at the Brussels and Stockholm Diplomatic Conferences of the Berne Union.

There exists no EC law, which addresses directly the question of exceptions to public performance of works; this matter is exclusively dealt with in the domestic laws of Member States. Given the very short time available to prepare these replies, it was not possible to collect this information.

Questions on exceptions to exclusive rights have been asked to the EC/MS in the context of the review of the implementation by WTO Members and replies have been provided to the TRIPS Council in 1996. These replies have been reproduced in documents IP/Q/name of WTO Member/1.

According to the information of which we dispose, it appears safe to say that none of the Member States of the EC has an exception to copyright protection identical or similar to Section 110(5) US Copyright Act. Upon express request, the Irish Music Rights Organisation (Imro), whose complaint to the EC is historically at the origin of this dispute settlement case, has confirmed that it and other Collecting Societies in the MS of the EC are actively and systematically enforcing the rights stipulated by Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention, and that this activity generates significant amounts of income (1.2 million IR£ for 1998 for Ireland alone; of this amount 0.86 million IR£ accrues to bars, night-clubs, guesthouses, hair & beauty salons, hotels, restaurants, retail shops and stores), which is distributed to the right holders.

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Impact on the market

Q.3 Please provide information on the estimated losses to the EC right holders resulting from the exemptions contained in Section 110(5), if possible divided between Subsections (A) and (B) of that paragraph.

It is very difficult to establish precise figures for losses suffered by EC right holders from the operation of Section 110(5) Copyright Act. But in view of the EC/MS, it is not our task to demonstrate such precise figures.

However, in view of having an order of magnitude of losses which European owners of copyrighted works are likely to suffer, the EC/MS would like to refer the Panel to the order of losses for all right holders, which the two major US Collecting Societies have estimated, when the old coverage of the "homestyle exemption" was enlarged by the Fairness in Music Licensing Act in 1998, to represent an amount of "tens of millions of dollars" per year (see Exhibit produced during first substantive meeting and now reproduced as Exhibit EC-14).

The losses to be allocated to EC right holders are the part of these "tens of millions of dollars" proportionate to the EC authors' market share for which we have given estimates in our reply to question 5 below.

This analysis would suggest that the losses suffered by EC authors are, in any event, in the sphere of millions of dollars per year.

Q.4 Please provide any available information or estimations on the revenues collected by the EC collecting societies, in particular:

(a) The total revenues from the licensing of public performance of music divided between the major categories of uses, including:

(i) broadcasting and rebroadcasting within the meaning of Article 11*bis*(1)(i) and (ii) of the Berne Convention,

(ii) public communication within the meaning of Article 11*bis*(1)(iii), and

(iii) other rights, including those referred to under Article 11(1) of the Berne Convention;

(b) As regards the revenues collected from food serving and drinking establishments and other establishments, what is the breakdown as between royalties for the public performance of broadcast music and the public performance of music from other sources;

(c) Breakdown of these revenues between various sources of revenue, in particular the percentage of the revenues collected from small business establishments (e.g. of the type covered by Section 110(5)).

Information or estimations of the revenues collected by all Collecting Societies in the EU in relation to the licensing of the public performance of music under the categories mentioned in this question are not available to EC/MS.

It should be noted by the Panel that the Collecting Societies in the EU do not necessarily categorise the revenues they collect in respect of the licensing of the public performance of music by reference to the Articles, paragraphs and sub-paragraphs of the Berne Convention or by reference to the categories mentioned in subsections (b) and (c) of this question.

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However, the EC/MS have been able to obtain illustrative information in respect of one EU Member State from the Irish Music Rights Organisation (Imro). Imro is a Collecting Society, which licenses and collects revenue in respect of the public performance of music in Ireland. If one were to extrapolate the quantitative data for Ireland to the level of the EC, Ireland representing roughly one hundredth of the EC's population (3.6 million for Ireland; 370 million for the EC), the Irish figures would have to be multiplied with a factor of 100.

(a) (i) In its financial year, which ended on 31 December 1998, Imro collected revenues in respect of broadcasting and rebroadcasting of music (approximating to the rights provided for in Article 11*bis*(1)(i) and (ii) Berne Convention amounting to IR£ 3,634,594 (€ 4,614,982).

(ii) In the same financial year, Imro collected revenues from the licensing of the public performance of music by means of radio and TV (approximating to the right provided for in Article 11*bis*(1)(iii)) in the amount of IR£ 1,242,210 (€ 1,577,281).

(iii) In the same financial year, Imro collected revenue from the licensing of all public performances of music in the amount of IR£ 6,237,676 (€ 7,920,214). This does not include the revenue collected in respect of the licensing of broadcasting and rebroadcasting (approximating to Article 11*bis*(1)(i) and (ii)) mentioned at subsection (a) above. Excluding the radio and TV public performance revenue, Imro collected IR£ 4,995,466 (€ 6,342,933) in respect of the licensing of all other public performances of music (including those referred to under Article 11(1) Berne Convention).

(b) As indicated above, during its most recent financial year, Imro collected revenues in the amount of IR£ 1,242,210 (€ 1,577,281) in respect of the public performance of broadcast music from food serving and drinking establishments and other establishments. In that same financial year, Imro collected revenues in the amount of IR£ 6,237,676 (€ 7,920,214) in respect of the public performances of music from all sources (including the public performance of broadcast music) in food serving and drinking establishments and other establishments.

(c) Imro estimates that it collected revenue from the licensing of the public performance of music by means of radio and TV in small business establishments amounting to approximately IR£ 861,098 (€ 1,093,369) during its most recent financial year. The categories of establishment mentioned in the Section 110(5) Copyright Act are not the basis used by Imro in identifying revenue from "*small business establishments*". However, in identifying the revenue from small business establishments, Imro has included the revenue collected from retail shops, bars, nightclubs, guesthouses, hotels, restaurants, hair and beauty salons. The revenue collected from these small business establishments for the licensing of the public performance of music by means of radio and TV represented 13.8 % of the public performance revenue collected by Imro in that year.

Q.5 In view of paragraph 77 of your oral statement at the first substantive meeting that 25 per cent of all music played in the US belongs to EC right holders, please provide information about what amount of revenue is transferred from the US CMOs to the EC CMOs for the last three years for which data are available. What is the proportion of this transferred revenue in relation to the total revenues collected by EC CMOs?

An assessment of the market share of European authors for copyrighted works, which are communicated via radio and TV to the public, is a very difficult task, and the best one can achieve is an estimate. It has to be recalled that a typical musical work has not only a significant number of holders of copyrights and neighbouring rights (song writers, text writers, singers, musicians,

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producers, publishers, broadcasters, etc) but also the category of authors typically comprises more than one.

Moreover, statistics on record sales are apparently not organised in function of the origin of the right holder of a given work, but rather in function of the origin of the producer. The Frank Sinatra song "My way", for instance, was written by a French composer. Part of this song's licensing income accrues to an EC right holder. The record with the Frank Sinatra version was however produced in the US. Sales of that record will therefore not be categorised as "sales of a French record".

The figure of 25% used in point 77 of our oral statement is based on estimate provided to the EC by the industry, which used published data which suggested for 1988 a 23% "market share" of United Kingdom performing artists in relation to sales of recorded music in the US. This of course requires two additional assumptions to be relevant for the communication to the public, the first being that the presence of performing artist is proportionate to the presence of authors of texts or music; and secondly, that there exists a proportionality between the sale of recorded music to the incidence of communication to the public via radio or TV.

Another way to estimate European authors' "market share" is by looking at the ratio of distributions received from US Collecting Societies. The figures, which we have received from ASCAP (see Exhibit EC-15) for 1998 indicate that EC right holders receive x% of total distributions.[1]

The EC/MS would point out that both figures suggest that EC authors represent a significant "market share" of the US market for the communication to the public by radio or TV.

Q.6 Please provide a copy of the full study by Dun & Bradstreet referred to in EC Exhibit 7. Please comment on the US observations contained in paragraph 37 of its submission, especially with regard to deductions to be made from the relevant numbers?

The EC/MS have made available - as part of Exhibit EC-7 - copy of a document prepared by Dun & Bradstreet in which the results of its 1999 analysis on the basis of 1998 data are shown. We attach - as requested by the Panel - our entire documentation concerning the Dun & Bradstreet analysis (see Exhibit EC-16).

The 1999 - as well as the 1995 - analysis of the impact of Section 110(5) address the potential impact of the exceptions. The US in point 37 of their first written submission makes an attempt to transform the data of potential impact to information on actual impact.

In view of EC/MS, it is the potential impact, which is relevant for the analysis of Article 13 TRIPS, and not actual impact, which is extremely difficult if not impossible to establish with a sufficient degree of certainty. It would appear that the US Congress in 1995 also considered it more instructive to ask for data on potential impact than on actual impact.

Q.7 Please provide any market information concerning other countries that you would consider relevant for the case at hand.

The EC/MS do not dispose of market data concerning other countries.

[1] This information has been provided to the EC in confidence.

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International treaty obligations

Q.8 Please explain which individual exclusive rights under which specific provisions of Articles 11(1) and 11*bis*(1) of the Berne Convention are affected to what extent by which specific provision of Subsection (A) and/or (B) of Section 110(5)?

As pointed out in points 61-72 of our first written submission, and reconfirmed in points 41-46 of our oral statement at the first meeting with the Panel, it is the view of the EC/MS - which is apparently shared by the US, Australia and Switzerland – that both Subsections of Section 110(5) Copyright Act are at variance with Article 11*bis*(1)(iii) and Article 11(1)(ii) Berne Convention.

Both provisions of the Berne Convention cover the same exclusive right, i.e. the communication to the public of a protected work. The distinction being drawn between the two provisions relate to the way (i.e. hertzian waves for Article 11*bis* and through cable for Article 11) in which the works reach the place where they are eventually played to the public (see also the citation from the guide to the Berne Convention cited in footnote 46 of our first written submission). Both Subsections of Section 110(5) allow the playing of music for the enjoyment of customers.

Q.9 Is the potential scope of application rather than the existing actual impact of Section 110(5)(A) and (B) relevant for the examination of its consistency with Article 11*bis*(1) or Article 11(1) of the Berne Convention, as the case may be, or for assessing whether Section 110(5) meets the requirements of Article 13 of the TRIPS Agreement, in particular its second and third conditions ?

In the view of the EC/MS, Section 110(5) is incompatible with Articles 11*bis* and 11 Berne Convention simply because an exclusive right is denied, which according to both Parties is the case. The dichotomy between potential scope and actual impact is, in the view of the EC/MS, of relevance for the three conditions contained in Article 13 TRIPS. This would of course require that Article 13 TRIPS be applicable as an exception to Articles 11*bis* and 11 Berne Convention, something that the EC/MS have repeatedly denied (see also reply to question 11 below).

In the view of the EC/MS, it is the potential impact, which is of primary importance to assess the conditions contained in Article 13 TRIPS. Seen from the right owner, his exclusive right is not only menaced by those who actually perform the acts prohibited by the exclusive right but also by all those who are free to decide to do so at any time and without having to inform him or his Collecting Society of their intentions.

It is the potential, which is created which sets the market conditions. This argument can also be illustrated by reference to another field of IPR. In the patent area, long and acrimonious discussions took place in the Uruguay Round negotiations on TRIPS in relation to compulsory licenses, which generated eventually the disciplines contained in Articles 27(1) and 31 TRIPS.

In the review of the TRIPS implementation by WTO Members which was carried out during 1996-1997, it became apparent that very few and in several case no single compulsory licence has been granted over an extended period of time by a great number of countries reviewed, despite the fact that practically all these countries had provisions on their statute books which allowed the grant of compulsory licences. Also here, the impact of compulsory licences cannot be reasonably measured by the mere number of licenses granted in a given period of time, but can only be fully appreciated by the impact of the possibility to grant compulsory licences on the market place as such. In a country in which it is relatively easy to obtain a compulsory licence, a right owner will be more inclined to grant a contractual licence on more disadvantages terms than if the system makes it more difficult to obtain a compulsory licence.

Q.10 Could the EC further explain the legal basis for its interpretation that the exception of Article 13 of the TRIPS Agreement applies only to those copyrights which were introduced by

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the TRIPS Agreement in addition to those protected in Article 1 – 21 of the Berne Convention? Does this conflict with the argument that the three conditions of Article 13 of the TRIPS Agreement can apply in addition to any requirements under exceptions embodied in the Berne Convention?

The TRIPS Agreement has been negotiated, at least from the perspective of the EC/MS, to improve the level of protection of IPRs as compared to the pre-existing situation. Given that the Berne Convention already contained a system of well-defined exceptions to specific rights, there existed no need to define a general exception for all rights covered by Section 1 Part II of TRIPS. If the latter had been the objective, exceptions would have been created for Berne rights, going beyond those contained in the Berne Convention before TRIPS. Such a result would clearly be incompatible with Article 20 Berne Convention and Article 2(2) TRIPS.

The EC/MS negotiating position is well reflected in MTN.GNG/NG11/W/68 (Exhibit EC-17). The proposed text on the draft TRIPS Article on limitations and exceptions (Article 8 of the proposal) allowed Members to provide for limitations, exceptions and reservations in relation to certain related rights as permitted by the Rome Convention. It did not, however, allow to provide for limitations and exceptions to Berne rights. It is interesting to note that the US had apparently the same objective when stating in their submission to the negotiating group (doc. MTN.GNG/NG11/W/14/Rev.1, Exhibit EC-18) that "*Any limitation and exceptions to exclusive economic rights shall be permitted only to the extent allowed and in full conformity with the requirements of the Berne Convention (1971)*".

The argument that the three conditions of Article 13 TRIPS can apply in addition to any requirement under exceptions embodied in the Berne Convention, is made under the alternative hypotheses that Article 13 TRIPS is applicable to Articles 11*bis* and 11 Berne Convention.

Q.11 What is the legal basis for the EC view that the "minor reservations" doctrine under the Berne Convention justifies only pre-existing exceptions? Does this "grandfathering" of exceptions relate to exceptions existing prior to the conclusion of the Berne Convention, prior to the revision or amendment of certain articles (e.g., Article 9(2) in 1967 or Article 11*bis* in 1928/1948), prior the date of entry into force of the Berne Convention for a particular country entering the Union, or prior to the entry into force of the TRIPS Agreement?

Discussions in the Berne Union on the issue of "minor reservations" were never conclusive. However, one can conclude from several sources that it was intended to preserve or as the Panel puts it to "grandfather" pre-existing "minor reservations". The WIPO Guide to the Berne Convention under point 11.6 states that :

> *"It is in relation to this Article that the question of the "minor reservations" arises… At Stockholm (1967), it was agreed that the Convention did not stop member countries from preserving (emphasis added) their law on exceptions which come under this heading of "minor reservations."*

Furthermore, the Report of the Stockholm Conference (1967) (as cited in Ricketson, The Berne Convention at p. 535 - attached as Exhibit EC-11) states:

> *"210. It seems that it was not the intention of the Committee to prevent States from maintaining (emphasis added) in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference."*

The intent not to admit new "minor reservations" is confirmed by the fact that the Brussels Conference decided against the adoption of a general provision because this could "positively incite

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those nations which had not, to this time, recognised such exceptions to incorporate them in their laws" (Ricketson, The Berne Convention: 1886-1986, at pp. 533 and 536).

As to the timing aspect, the benefits of the "minor reservations" doctrine should only accrue to those national legislations which have been on the statute books on or before 1967. The EC/MS would argue that countries acceding to the Berne Convention after 1967 are either completely prevented from "grandfathering" under the "minor reservations" doctrine or can only "grandfather" their pre-1967 exceptions (of course if all the other conditions are also met). To argue otherwise would give "newcomers" more rights than to established Members.

This logic has also been followed in a TRIPS grandfather provision Article 24(4) where the relevant timeframe is identical for establishment Members and newcomers. The entry into force of TRIPS would appear to be an irrelevant point in time for the "minor reservations" doctrine.

Q.12 Since under Article 11*bis*(2) equitable remuneration has to be paid, are there ways to provide such equitable remuneration other than through compulsory licensing ?

It would appear that a country could set minimum or precise levels of royalties to be paid for the different uses protected under Article 11*bis* Berne Convention. Another way to provide for equitable remuneration could be the introduction of a levy system for the audio/TV equipment purchased by the establishment being allowed to play copyrighted works without authorisations, whereby the proceeds from such a levy system are distributed to the right holders.

II. REPLIES OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO QUESTIONS FROM THE PANEL ADDRESSED TO BOTH PARTIES

Q.1 Please explain the extent to which the case law concerning Section 110(5) cited in your respective submissions is relevant for the purposes of interpreting the present subsection (A) of that paragraph.

The caselaw is first of all relevant to appreciate the development of the exceptions contained in Section 110(5) Copyright Act (1976) to the Fairness in Music Licensing Act (1998). As far as Section 110(5)(A) is concerned, the caselaw would appear to remain relevant for all the elements of the exception which have remained unchanged under the new law.

Categories of works

Q.2 The Panel understands that the text of the original Section 110(5) is identical to that of the present subsection (A) minus the words "except as provided in subparagraph (B)". The preparatory work reproduced in exhibits EC-3 and US-1 (H.R. Rep. No. 94-1476 (1976)) explains that the provision "applies to performances and displays of all types of works". Paragraph 31 of the EC submission and paragraph 9 of the US submission (and certain other paragraphs) contain an interpretation according to which this text, as contained in subsection (A), is intended to exclude from its scope "nondramatic musical works". Please clarify your interpretation of the text of this provision, on the one hand, as part of the original paragraph, and, on the other hand, as part of subsection A, and, to the extent that, in your view, the text should be understood differently in these two contexts. Explain why.

While we consider that Section 110(5) has to be looked at as an entity, we have pointed out our understanding of a possible dividing line between Section 110(5)(A) and (B) as far as the respective coverage of copyrighted works is concerned, both in our first written submission (see points 31 and 32) and in our oral statement (see point 20). In the latter, we have also referred to the possibility of diverging interpretations by US Courts.

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Q.3 What is the definition of the term "nondramatic musical work" in the context of Section 110(5)? What types of musical works are either included in or excluded from the application of the provisions of that Section, and which types of copyright holders are affected by the provisions of Subsections (A) and (B)? Does it also cover communication to the public of live music performances? For example, would the performance of, e.g., one song from a musical, constitute a performance of a "dramatic" or of a "nondramatic" musical work? Is it still a "dramatic" work if a song from a musical is performed separately and by another artist? To what extent the notion of "nondramatic musical work" corresponds or is intended to correspond with the notion of "small musical rights" applied in the practice of CMOs ?

Given that neither the Berne Convention nor TRIPS provide for such a distinction, we would expect that the US points out this distinction existing in its statute, while we reserve our right to comment on such explanations.

Licensing practice

Q.4 Paragraph 4 of the US oral statement at the first substantive meeting states that Section 110(5) is limited to only certain secondary uses of broadcasts of public performances, for which the right holder has already been compensated for the primary performance. In which way, if any, do licensing arrangements between collective management organisations (CMOs) and broadcasting organisations in the US or the EC take into account the potential additional audience created by means of further communication by loudspeaker etc. of broadcasts to the public within the meaning of Article 11*bis*(1)(iii) of the Berne Convention?

The EC/MS would like to reiterate that in their view, each exclusive right has to be looked at separately. Therefore, for each use, an express authorisation of the right holder has to be granted. While it would - from a purely legal point of view - be possible that the broadcaster also obtains - and pays for - a license for "downstream" users of his broadcast (third party beneficiary licence), the EC/MS are not aware of the existence of such a practice in the US for the uses concerned in this case.

Interpretation of treaty obligations

Q.5 What is the legal nature of materials including "General Reports" of Diplomatic Conferences of the Berne Convention countries in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT)? Are they "subsequent agreements on the interpretation or application" in the meaning of Article 31(3)(a), "subsequent practice" in the meaning of Article 31(3)(b), "rules of international law applicable between the parties" in the meaning of Article 31(3)(c), or a "special meaning … given to a term if its established that the parties so intended"?

Materials such as the "General Reports" of Diplomatic Conferences of the Berne Convention would appear to be in the nature of negotiating history. They therefore could constitute "preparatory works" of the Convention within the meaning of Article 32 VCLT. Since, the EC/MS do not consider that an interpretation of the "ordinary meaning" of the relevant provisions of Articles 11 and 11*bis* Berne Convention as incorporated into TRIPS according to Article 31(1) VCLT leads to a result which is manifestly absurd or unreasonable, they do not consider that there is any scope for relying on the General Reports as "preparatory works" for the purpose of determining the meaning of these provisions of the Berne Convention.

The relevant parts of the General Reports may constitute or be evidence of an agreement or instrument on the interpretation or application of the Berne Convention of the kinds described in Article 31(3) VCLT. The obvious difficulty with this suggestion is that there is no language whatsoever in Articles 11 and 11*bis* Berne Convention capable to be *interpreted* as allowing "minor reservations" or as having a special meaning to the same effect.

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A further possibility, which may be easier to reconcile with the text of the Berne Convention, is to consider that the "agreement" between the parties in 1967 was to *modify* the Berne Convention so as to allow what has been referred to in the diplomatic conferences as "minor reservations". This option however encounters difficulties because the Berne Convention contains specific provisions and procedures for amendment in its Article 27. This makes it difficult to argue that an amendment was effected in a General Report of the diplomatic conference.

Another possibility, which the EC would mention is that the statements about minor reservations in the General Reports could constitute genuine "reservations" to the treaty, expressed by certain parties and accepted by the other parties through their approval of the General Reports. This approach suffers from a similar difficulty to the "amending agreement" theory since the Berne Convention provides for reservations in its Article 28 and requires them to be expressed in the instrument of ratification (see also Articles 19-21 VCLT) .

The question of whether they constitute customary international law is discussed under reply to question 8 below. However, the EC/MS consider that for the present case it is not necessary to resolve the issue of the legal nature of the "minor reservations" doctrine. The content of the "minor reservations" is such that they cannot excuse the US measures subject of this dispute, whatever their legal nature.

The origin of the "minor reservations" is considered to be the General Report of the Brussels Conference (1948) in which it is stated that:

> *"Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark, and Finland, the Delegate of Switzerland and the Delegate of Hungary, have all mentioned these limited exceptions allowed for religious ceremonies, military bands and the needs of the child and adult education. These exceptional measures apply to Articles 11bis, 11ter, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principles of the right."*[2]

Its existence is considered to be confirmed by General Report of the Stockholm Conference (1967):

> *"In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands, and the requirements of education and popularisation. The exceptions also apply to articles 11bis, 11ter, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle in the right.*
>
> *It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions*

[2] The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986,WIPO, Geneva, 1986, page 181.

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> *based on the declaration contained in the General Report of the Brussels Conference."*[3]

Whatever the legal nature of the principle set out in these texts, the EC/MS consider that there was a clear intention to limit the "minor reservations" to:

- non-commercial uses described in the General Reports: religious ceremonies, performances by military bands, and the requirements of child and adult education;

- such exceptions existing in the legislation of the MS of the Berne Union at the time the conferences took place (1967 at the latest), i.e. to grandfather pre-existing practices. This appears expressly from the use of the terms "maintain" and "preserve" and the clear intention not to undermine (or "invalidate the principle of") the right by allowing the creation of new exceptions expressed in the Brussels General Report (*supra*).

Since both the US "homestyle" and "business" exemptions are clearly far removed from "religious ceremonies", "military bonds" and "the requirements of child or adult education" but are of an obvious commercial nature and cover a wide proportion of business establishments and because the "homestyle exemption" in original formulation was only introduced in 1976/78 (and the "business exemption" in the "Fairness in Music Licensing Act" has only been introduced in 1998) it would appear that they cannot in any event benefit from the "minor reservations" doctrine.

Q.6 In your view, what is the relationship between Article 13 of the TRIPS Agreement and Article 11*bis*(2) of the Berne Convention? Does Article 13 of the TRIPS Agreement prevail over the exception in Article 11*bis*(2) with respect to the exclusive rights conferred by Article 11*bis*(1)(i-iii) of the Berne Convention in the sense that when the three conditions of Article 13 are met, no requirement to pay equitable remuneration arises? Do the requirements of Article 11*bis*(2) of the Berne Convention prevail as a *lex specialis* over the requirements of Article 13 of the TRIPS Agreement, in the sense that if equitable remuneration is paid, there is no need to comply with the three-conditions test under Article 13? Do the requirements of Article 13 and Article 11*bis*(2) apply on a cumulative basis in the sense that, on the one hand, even if the three-condition test of Article 13 is fulfilled, there is an additional, fourth requirement to pay equitable remuneration, and on the other hand, even if equitable remuneration is paid consistently with Article 11*bis*(2), is it necessary to comply in addition with the three conditions of Article 13? Please explain.

As pointed out in our presentation at the oral hearing, the EC/MS are of the view that Article 13 TRIPS is not applicable as an exception to exclusive rights contained in the Berne Convention (see points 54-58; please compare also reply given to question 10 by the Panel to the EC/MS). If one were to apply Article 13 TRIPS to the Berne rights the relationship between Article 13 TRIPS and Article 11*bis*(2) Berne Convention becomes relevant. In view of the EC/MS, it would appear that in any event the equitable remuneration requirement constitutes a condition *sine qua non* for the grant of exceptions to the rights stipulated by Article 11*bis*(1) Berne Convention.

Q.7 In your view, to what extent has the Berne Convention become part of customary international law, and if so, in particular which part of the Articles 1–21 of the Berne Convention?

In view of the EC/MS, the Berne Convention is <u>not</u> part of customary international law. Customary international law is "constant and uniform usage, accepted as law".[4] It cannot be lightly

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[3] Records of the Intellectual Property Conference of Stockholm WIPO, Geneva, 1971, paragraphs 209-210, page 1166.

[4] *Asylum Case: Columbia v Peru* (1950) ICJ Rep p266.

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inferred that a treaty provision has become customary international law.[5] The Berne Convention is not universally accepted and those countries that have accepted it have accepted different versions. The EC/MS do not therefore believe that it is possible to speak of a "constant and uniform usage". They also do not see how the principles set out in it can be considered as having been "accepted as law" independently of its provisions.

Q.8 Has the "minor exceptions" doctrine under the Berne Convention, and especially in the context of Articles 11*bis*(1) and 11(1) of the Berne Convention, acquired the status of customary international law? What is the legal significance of the "minor exceptions" doctrine under the Berne Convention in the light of subparagraph (3)(a-c) or paragraph (4) of Article 31 of the VCLT or in the light of Article 32 of the VCLT? Has the "minor exceptions" doctrine or any other implied exceptions been incorporated, by virtue of Article 9.1 of the TRIPS Agreement, together with Articles 1-21 of the Berne Convention into the TRIPS Agreement? Please explain.

As explained in the reply given to question 5, the EC/MS do not consider the Berne Convention to be part of customary international law. For the EC/MS it follows that the "minor reservations" doctrine is unlikely to form part of customary international law. One particular difficulty arises out of their exceptional character, which would prevent them becoming "constant and uniform usage, accepted as law".

The EC/MS would not exclude that the "minor reservations" doctrine has, by virtue of Article 9(1) TRIPS, whatever its legal significance may be, become part to the TRIPS Agreement. The EC/MS do not understand what the Panel intends by reference to "other implied exceptions".

With regard to Article 31(4) VCLT, the EC/MS do not see what term in Articles 11 and 11*bis* Berne Convention the "minor reservations" doctrine could give a special meaning to.

Q.9 What else other than religious ceremonies, performances by military bands, charitable concerts or requirements of education does the "minor reservations" doctrine cover? Does it only cover non-commercial uses? Was this doctrine be conceived of only with respect to Article 11 of the Berne Convention, or was it also extended to Article 11*bis*(1)(iii) of the Berne Convention, given that these articles concern different types of rights? What such instances of implied exceptions could be relevant for this dispute?

The General Report of the Brussels Conference (1948), which refers to the "minor reservations" doctrine in relation to Article 11 Berne Convention, mentions an exhaustive list of circumstances where the doctrine may apply. These circumstances were limited to religious ceremonies, military bands and child/adult education.

From these circumstances, it can - in view of the EC/MS - be concluded that "minor reservations" cannot apply to commercial activities. This view is also supported by a reference to the minutes of the Brussels Conference where it is made clear that *"these limitations should have a restricted character and that, in particular, it did not suffice that the performance, representation or recitation was 'without the aim or profit' for it to escape the exclusive right of the author"* (see Ricketson, *The Berne Convention : 1886-1986*, at p. 536).

Q.10 In order to meet the first condition of Article 13 of the TRIPS Agreement ("certain special cases"), is it enough if the limitation or exception is defined in great precision?

The criterion "certain special cases" requires that these cases have to be singled out for their particularities from the totality of cases covered by an individual right.

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[5] *North Sea Continental Shelf Cases* (1969) ICJ Rep p3.

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"Special" means "out of the ordinary". Therefore this notion has a qualitative element. Special cases have to be distinguished from the non-special, i.e. normal cases. In other words, a rule-exception distinction has to be drawn.

There is also a quantitative element involved, whereby the ratio between "certain special cases" and the normal cases can under no circumstances exceed a *de minimis* threshold.

Q.11 Under the second condition of Article 13, in which respect, if at all, is a normal exploitation of the "work" the same as a normal exploitation of "exclusive rights" relating to that work?

In the view of the EC/MS, the analysis has to be done in relation to a specific exclusive right. Thus the normal exploitation of the work under Article 13 TRIPS is the normal exploitation of this very exclusive right in relation to a given work.

By arguing otherwise, entire exclusive rights could be done away with under Article 13 TRIPS if only the "core" rights would be maintained.

This latter approach would be clearly at variance with the very foundation of the Berne Convention, which establishes a sophisticated system of different exclusive rights with different fine tuning mechanisms.

Q.12 To what extent is it appropriate in evaluating the compliance of a law with the conditions of Article 13 of the TRIPS Agreement based on looking at the current market situation in a given country?

The EC/MS do not fully understand what is meant by "current market situation in a given country".

It would appear clear to us that the three conditions contained in Article 13 TRIPS have to be analysed for the territory of a given country, here the US, given that the protection of intellectual property rights is based on the principle of territoriality.

Q.13 To what extent subsequent technological and market developments (e.g., new means of transmission of or increased use of background music or television) are relevant for the interpretation of the conditions under Article 13 of the TRIPS Agreement?

It would also appear that this analysis has to be based on the socio-economic environment existing in the country concerned. We have however repeatedly pointed out that in our view, the economic effects of an exception have to be assessed as to its potential effect. See also our reply to question 9 to the EC/MS above.

Q.14 Is it justified to define the three conditions exclusively by reference to a particular market, or is a comparative analysis of licensing practices in other Members with similar economic conditions warranted?

While it would appear, also in the light of the reply to question 12 above, that the three conditions referred to in Article 13 TRIPS have to be analysed by reference to the situation in the WTO Member concerned, data from other Members at a similar level of socio-economic development can be useful to corroborate or contradict original data in the country concerned or to provide data which is for practical reasons unavailable in the Member concerned.

Q.15 Under the third condition of Article 13, should the concepts of "unreasonable prejudice" and "legitimate interests" be defined based on existing, legally guaranteed entitlements, or do these concepts also connote an aspect of normative concern of right

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holders? In the latter case, what could be the normative concern at issue? In addition to an empirical analysis of prejudice to legitimate interests, how could such a normative element be taken into account in defining the threshold of the third condition of Article 13?

It is not quite clear to the EC/MS what is meant by "normative concern". As also pointed out in the reply to question 18 below, the EC/MS consider that both normative and empirical elements have to be taken into consideration under Article 13 TRIPS and that empirical elements can have an impact on normative questions. We would also refer to the example given in the reply to question 18 below.

Q.16 What is the extent of "reasonable" prejudice to the legitimate interests of rights holders that is permissible under the third condition of Article 13?

All three conditions referred to in Article 13 TRIPS are intended to make sure that the exception-rule situation not be reversed. The reasonable prejudice has to be compared within the unreasonable prejudice. While, as we have pointed out earlier (see points 73 et seq. of our oral statement), it may be difficult to draw an exact line between reasonable / unreasonable prejudice, there can be no doubt in view of the EC/MS that the prejudice caused by an exception which covers 45 to more than 70 % of establishments can under no circumstance be considered reasonable because it reverses the rule-exception situation.

Q.17 With a view to giving distinct meaning to the second and the third condition of Article 13, in which respect does an extent, degree or form of interference with exclusive rights below the threshold of "conflict with normal exploitation" differ from an extent, degree or form of interference with exclusive rights that exceeds the threshold of a reasonable prejudice to the interests of the right holder ? In other words, how does a permissible degree of prejudice under the third condition relate to "normal exploitation" under the second condition of Article 13?

The EC/MS agree that the second and third conditions of Article 13 TRIPS are distinct conditions, which must be applied cumulatively.

First, the requirement that an exception or limitation does not conflict with normal exploitation of the work would appear to call for a more normative or qualitative approach than the third requirement. This appears from the comparison of the word "conflict" (in the sense of "interfere with" or "not be consistent with") with the term "unreasonably prejudice".

Second, "normal exploitation of the work" requirement differs from the "legitimate interests of the right holder" in a number of ways. Exploitation, which is not "normal", may still be a "legitimate interest" of the right holder. Also, "exploitation" refers to the ways in which an author may obtain a *reward* from an exclusive right in his work, whereas his "interests" may cover other matters than financial interests in the exploitation of the particular right in question, such as his interest in an acknowledgement of his work or information about its use.

As a result of the excessive coverage of situations by Section 110(5) (see also the results of the Dun & Bradstreet analysis to which we have referred repeatedly), there can be no doubt in view of the EC/MS that neither of the latter two conditions of Article 13 TRIPS are met.

Q.18 Should quantitative empirical or normative approaches be used in defining the three conditions of Article 13?

In view of the EC/MS, both quantitative and normative elements have to be used for the interpretation. There are also instances in which quantitative data can influence a normative assessment like in the situation where it is established from quantitative data that the exception

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covers more than one half of all situations, thus reversing the rule-exception principle which underlies Article 13 TRIPS.

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ATTACHMENT 1.4

RESPONSES OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO WRITTEN QUESTIONS FROM THE UNITED STATES – FIRST MEETING

(19 November 1999)

Q.1 Does the EC have any factual support for its assertion that European music represents 25 % of all music played in the US?

Please see reply to question 5 asked by the Panel to the EC/MS.

Q.2 On what facts does the EC base its assertion that establishments in the US have "adapted their music installation" or have cancelled contracts for commercial music services in the wake of the Claire's Boutiques and Edison Bros. decisions?

It clearly appears from the complaint for Declaratory Judgement and the Motion of Plaintiff for summary judgement in the case Edison Brothers Stores Inc. v. Broadcast Music Inc. (Edison case) (see Exhibits EC-19 and EC-20) that Edison adapted the music equipment in its stores in order to benefit from the homestyle exemption. This is referred to as the "Edison radio policy" which was initially agreed with BMI until it revoked its agreement (which gave rise to the Edison proceedings).

In its *amicus curiae* brief submitted to the Court of Appeals in the Claire's Boutiques proceedings (see Exhibit EC-21), ASCAP declared that it believed that *"this decision* (i.e. the District Court's decision), *if not reversed, will result in a very substantial reduction in license fees from owners of establishments who use music by means of radios and loudspeaker systems and from background music licensees, many of whose subscribers will cancel their subscriptions and substitute radio music"*.

Q.3 Does the EC contend that no exceptions to the public performance are permissible to Berne Article 11 rights?

As pointed out in the reply to question 11 by the Panel to the EC/MS, the discussions in WIPO on the "minor reservations" doctrine have concentrated on Article 11 Berne Convention. In view of the EC/MS, Section 110(5) under no circumstances would qualify as a "minor reservation" as addressed in WIPO even if the "doctrine" were applicable to Article 11 Berne Convention.

Q.4 Does the EC contend that the "minor reservations" doctrine does not permit any exceptions other than those that existed in Member countries at the time of accession to the Berne Convention?

Please see reply to question 11 by the Panel to the EC/MS.

Q.5 Please list and describe any exemptions in copyright laws or neighbouring rights laws of EC/MS to the public performance right, and provide the dates of enactment of such exemptions.

The US are referred to the replies given by the EC/MS in the context of the TRIPS review on copyright and related rights which has been carried out during the first semester of 1996 in the TRIPS Council, for which the WTO Secretariat has established an extensive documentation. Furthermore, we would like to draw the attention of the US to the fact that all laws and regulations relevant for the implementation of the TRIPS Agreement have been notified to the TRIPS Council in the manner provided therein.

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Q.6 Out of the 70% of all eating and drinking establishments and 45% of all retail establishments that the EC alleges are impacted by the 1998 Amendment, does the EC have any factual data regarding:

- **how many of these establishments play music at all ?**

- **how many of these establishments play radio music as opposed to recorded music?**

All percentage figures given in the Dun & Bradstreet analyses, including of course the basis of 100%, are potential users. The exempted potential users are free to benefit from the possibility offered by Section 110(5) at will at any point in time and without any notification to the right holders or their collecting societies. Therefore, the EC/MS would consider that the question of *"how many establishments actually play music from the radio or recorded at a given point in time?"* is of secondary importance and factually difficult to establish.

Q.7 On what facts does the EC base its assertion that EC right holders have lost or will lose revenue as a result of Section 110(5)(B). What is the estimated amount of the losses or projected losses?

As appears from the joint press release by BMI and ASCAP on the day after the adoption by Congress of the Fairness in Music Licensing Act (see Exhibit EC-14), the total losses from these measures to right holders amount to "tens of millions of dollars per year". The losses suffered by EC right holders will be an amount proportionate to their share in the US market for which we have submitted an estimate in reply to question 5 of the Panel to the EC/MS.

Q.8 Have EC right holders ever received any revenue from secondary performances in US establishments of works other than nondramatic musical works? If so, please provide factual support. If the EC alleges that its right holders have lost or will lose revenue as a result of Section 110(5)(A), please provide supporting data and the estimated amount of such losses.

The EC assumes that the US means by the phrase "*secondary performances*" (a term unknown in the Berne Convention and TRIPS) the performances over which authors enjoy exclusive rights under Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention.

In the time available, it has not been possible for the EC/MS to consult with all the Collecting Societies in the EU on this question. However, the EC/MS have received information relating to this question from the Irish Music Rights Organisation (Imro), the Collecting Society which administers the public performance right in music for most of the music right holders resident in Ireland. Imro has confirmed that, on behalf of its Members, who are right holders in the public performance right in dramatic musical works, it entrusts the collection of revenue in the US in respect of public performance in those works to the US Collecting Societies, subject only to the exclusion of the performance of those works on stage or in similar circumstances. Imro specifically confirms that it entrusts to the US Collecting Societies the collection of revenues deriving from the broadcasting and rebroadcasting of those dramatic musical works in the US (approximating to the right provided for in Article 11*bis*(1)(i) and (ii) Berne Convention) and from the public performance of broadcasts of those dramatic musical works in the US (approximating to the right provided for in Article 11*bis*(1)(iii) Berne Convention).

Q.9 Given that the EC's assertion that exceptions to exclusive rights under Berne Article 11*bis* must be assessed in the light of Article 11*bis*(2), how would the EC evaluate the permissibility of Section 110(5), which implicates two separate exclusive rights, only one of which is subject to a right of equitable remuneration?

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If an exception from copyright liability is provided for in a national law of a WTO Member, which concerns several exclusive rights for which different conditions apply, these different conditions have to be met cumulatively.

Q.10 Does the EC contend that under no circumstances may an exemption for any commercial purpose be permissible to the Berne Article 11 and 11*bis* rights?

The EC/MS are of the view that the "minor reservations" doctrine does not allow exceptions for a commercial use of the right. See also reply to question 9 from the Panel to both Parties. We would, however, not exclude that an exception for commercial purposes could, if properly formulated, meet the requirements set out in Article 11*bis*(2) Berne Convention.

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ATTACHMENT 1.5

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

(24 November 1999)

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I. INTRODUCTION

1. In the light of the extensive number of questions, to which the Parties and Third Parties have replied recently, and because of the often quite detailed discussions held at the first substantive meeting with the Panel on 8-9 November 1999, the EC/MS will take this opportunity to present their case in a systematic way and highlight the remaining conflictual issues.

II. FACTUAL ELEMENTS

2. A large number of factual elements have been clarified in the process up to now. In view of the EC/MS, there remain certain important factual elements, which require further clarification.

1. Economic significance for the author of musical works of the communication to the public rights as compared to the other exclusive rights enjoyed by the author

3. The principal aim of copyright is to compensate authors for their creative efforts and investment. Thus, through appropriate licensing arrangements authors are able to control and to be adequately remunerated for each protected use of their intellectual property.

4. Yet, in the last decades, certain uses have become more important in commercial terms than others. In particular, according to some US commentators, "the right of public performance has become the most important legal right, providing the largest single source of income, for most composers, lyricists and music publishers".[1]

5. The magnitude of the commercial value of the right of public performance, or communication to the public, for authors, whether considered on its own or in comparison to reproduction rights, is significant and confirmed by the figures published annually by collecting societies. For instance, in Belgium, where a single collecting society is responsible for the collection of all rights related to musical works (thus making a comparison more immediate), the total revenues distributed to authors in 1998 for performance rights amounted to BEF 867 mio (€ 21 mio), while in the first semester of the same year the amount distributed for mechanical reproduction rights was only BEF 324 mio (€ 8 mio). This means that about 60 % of all authors' income came from the right of communication to the public.[2]

6. This illustrates well the consequent scale, in quantitative terms, of the loss that exemptions similar to those provided under Section 110(5) Copyright Act cause for authors. Following our domestic example, in Europe revenues distributed for TV and radio broadcast in small establishments open to the public represent between 26 % and 10 % of the total public performance revenues. Consequently, exemptions similar to those at issue in the present case would diminish the overall income that authors receive from their work in an order of 15 to 6 %. These figures and proportions make it utterly clear that the exclusive rights stipulated by Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention are not some secondary, ancillary rights worth little or nothing in reality, but constitute very significant exclusive rights not only in absolute terms but also when compared with the other exclusive rights guaranteed by the Berne Convention and TRIPS.

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[1] B. Korman and I. F. Koenigsberg, "Performing rights in music and performing rights societies", in *33 Journal of Copyright Society*, 1986, pp 332 et seq. (Attached as Exhibit EC-22).

[2] See Exhibit EC-23.

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2. Interplay and separation between Subsections A and B contained in Section 110(5) Copyright Act

7. Both Parties interpret Section 110(5) Copyright Act – by way of an *a contrario* argument from Subsection B – to mean that Subsection A applies to all sorts of literary and artistic works with the exception of nondramatic musical works.

8. While this interpretation has been put forward by both Parties, it is however uncertain that US Courts would invariably share this interpretation. The risk that a US Court might rely textually on Subsection A entails the danger that it would apply the exception contained in Subsection A to all literary and artistic works, including nondramatic musical works.

9. In this context, another element merits clarification. During the first meeting with the Panel on 8-9 November 1999, the US, upon a question from the Panel, made some explanatory remarks on the definition of nondramatic musical works. It explained that a dramatic musical work would be definitively categorised as such at the moment of the creation of the work. This would have the consequence that an aria from an opera or a song from a musical work would continue to be considered as a dramatic musical work, even if played individually.

10. According to the information available to the EC/MS, this does not correctly reflect the situation under US' law and practice. The categorisation of a work as dramatical / nondramatical depends on the circumstances of the performance of the work. This means that a song from a dramatic musical work played on its own, outside the dramatic work, will be considered as a nondramatic work. Furthermore, it is important to note that all the music originating from a dramatic musical work, but being performed as nondramatic works, is part of the repertoire licensed in the US by ASCAP and BMI.[3] This does not mean that right holders of dramatic works do not get any remuneration for the public performance of their works. In the US, the communication to the public of dramatic works is licensed directly by the right holder, without ASCAP and BMI acting as intermediaries.

11. These serious difficulties to clearly separate both Subsections constitute a further argument to treat both Subsections as an entity, where the common objective consists in allowing the widespread use of literary and artistic works in a vast variety of establishments for the enjoyment of customers, if the works have been received by radio or TV.

3. Internet

12. While the EC/MS have already in their first written submission drawn the Panel's attention to the fact that Section 110(5) Copyright Act is likely to also apply to cases involving certain communications via the Internet,[4] the US have, in particular by referring to other exclusive rights, which are not the object of this case, tried to exclude or minimise this danger.[5] The EC/MS are pleased to see in the US' reply to question 6 by the Panel to the US that the US do no more exclude this possibility. In any event, there can be no doubt that Section 110(5) Copyright Act fully applies where a computer is used as a receiving device for radio or TV broadcasts.

4. Third country practices

13. While the EC/MS were not able in the short time since the US' replies were received, to verify the accuracy of the reply on third country practices given on question 16 by the Panel to the US, it is remarkable, albeit not surprising that not a single country mentioned allows an exception to

[3] See citation in footnote 1 above.
[4] See point 39.
[5] See point 16.

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copyright protection for situations comparable to Section 110(5) Copyright Act. It is also noteworthy that a certain number of countries (Brazil, India, the Philippines and South Africa) do not yet have to comply with the copyright section of Part II of TRIPS because they benefit from additional transitional periods under Article 65(2) TRIPS and their domestic legislation has not yet been subject to TRIPS review.

5. US practices

14. It is worth noting that examples of exceptions, which are similar to the third country practices indicated by the US, do exist also in the US copyright law outside Section 110(5) Copyright Act. These are in particular provided in Section 110(1) to (4) Copyright Act and are not under dispute in this case.

III. LEGAL ELEMENTS

1. Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention

15. While the drafting of the submissions is not identical, the Parties appear to agree that Section 110(5) Copyright Act creates exceptions to the exclusive rights stipulated in the provisions referred to above. The divergence of views relates to the issue of if and to what extent these exceptions can be justified by other provisions of the Berne Convention or TRIPS.

2. "Minor reservations" doctrine

16. At the occasion of two diplomatic conferences of the Berne Union, some discussion took place on the issue of "minor reservations", which is reflected in the General Reports of both diplomatic conferences.

(a) Legal character

17. As we have pointed out in our reply to question 5 of the Panel to the EC/MS and US, it is unclear what legal standing the "minor reservations" doctrine has. For the reasons pointed out, these General Reports of diplomatic conferences can, in principle, be used under Article 31(3) VCLT to interpret the Berne Convention, however there is no language in Articles 11*bis* and 11 Berne Convention being susceptible of being interpreted in a "minor reservations" way.

18. The option that the "minor reservations" doctrine constitutes customary international law, by which the text of the Berne Convention has been modified, has been discarded by both Parties.[6]

19. A further option is that the General Reports constitute evidence of an agreement between the Berne Union Members to modify the Berne Convention accordingly. Not only is the language used in the General Report of the Brussels Conference (1948): "You will understand these references are <u>just lightly pencilled</u> in (emphasis added)"[7], not supportive of such an approach, but also Article 27 Berne Convention would create a serious obstacle to such an interpretation.

20. Finally, the option of considering that the relevant language in the General Reports constitutes genuine reservations, encounters similar obstacles as the "agreement approach" because Article 28 Berne Convention prescribes procedures for invoking reservations which have not been followed in the case before us.

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[6] See replies to question 8 by the Panel to both Parties.
[7] See citation contained in reply to question 5 by the Panel to both Parties.

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(b) Scope and timing

21. Eventually, the EC/MS consider that these difficult legal questions can remain unresolved in the case before us, because the exceptions provided for in Section 110(5) Copyright Act go, in many aspects, significantly beyond what the "minor reservations" doctrine would have allowed.

22. As far as the scope of "minor reservations" is concerned, only three instances for exceptions have been mentioned in the General Reports, which were religious ceremonies, playing of military bands, child and adult education. There can be no doubt and, as it appears, nobody has argued so far that the exceptions created by Section 110(5) Copyright Act fit under any of the three headings or are comparable with any one of them.

23. Furthermore, there exists clear textual evidence that the "minor reservations" doctrine was intended to "grandfather" the practices referred to in the preceding paragraph, existing on or prior to the Diplomatic Conference in 1967. At that time the US did not have any such exception clause, and the US only became a Berne Union Member in 1989.

24. To recapitulate, whatever the legal status of the "minor reservations" doctrine, Section 110(5) Copyright Act would clearly not be covered by its scope nor by its "grandfathering" aspect. In other words, no exception under the Berne Convention excuses Section 110(5) Copyright Act.

3. Article 13 TRIPS

25. While both Parties agree apparently to the principle, which is clearly set out in Article 2(2) TRIPS and Article 20 Berne Convention, that the TRIPS Agreement was intended to increase the level of protection of intellectual property rights, the US argue that Section 110(5) Copyright Act could be justified under Article 13 TRIPS.

26. The application of Article 13 TRIPS to the rights contained in Article 11*bis*(1) Berne Convention, has also to be seen in relation to Article 11*bis*(2) Berne Convention, which stipulates a specific exception clause for the rights contained in Article 11*bis*(1) Berne Convention. This means that any exception would, as a minimum, have to provide for the equitable remuneration to be granted to the right holder. This is not the case under Section 110(5) Copyright Act. The EC/MS are of the view that Article 11*bis*(2) Berne Convention applies to all exceptions and limitations to Article 11*bis*(1) Berne Convention. There is no language whatsoever to support the US' view that Article 11*bis*(2) Berne Convention only applies to compulsory licences. The language in the title of Article 11*bis* Berne Convention is irrelevant given that it is not based on a negotiated text but on a draft done by the International Bureau of WIPO.[8]

27. The EC/MS have consistently argued that Article 13 TRIPS, for a multitude of reasons, does not apply to Articles 11*bis*(1) and 11(1) Berne Convention. Even if one were to give to Article 13 TRIPS a role in the context of exceptions to exclusive rights under Berne Convention, one would have to respect the principle that TRIPS rather than to grant new or extend existing exceptions, has as objective to reduce or eliminate existing exceptions. Also the language of Article 13 TRIPS itself says that:

> "Members shall confine (emphasis added) their limitations or exceptions… "

[8] See footnote 1 to Article 1 Berne Convention.

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This language is in remarkable contrast to the language used in all other TRIPS exception clauses, i.e. Articles 17, 26(2) and 30 TRIPS, which provide that:

"Members may provide (emphasis added) limited exceptions …"

(a) Scope

28. On the assumption that Article 13 TRIPS was intended to contain existing exceptions under the Berne Convention, it would have been necessary for the US to point out precisely the extent of the pre-existing exceptions to Articles 11*bis* and 11 Berne Convention. The "minor reservations" doctrine as pointed out above, has addressed pre-existing situations of religious ceremonies, playing of music by military bands and child and adult education, and would, under no hypothesis, have covered Section 110(5) Copyright Act, leave alone gone beyond, so that Article 13 TRIPS could serve any "confining" job.

29. The EC/MS do not understand the relevance of the US' arguments in relation to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which were adopted by a Diplomatic Conference in December 1996. These treaties (signatories 51 WCT, 50 WPPT) have to date only been ratified by a small number of contracting Parties (9 WCT – 7 WPPT; the EC/MS have not yet ratified) and have not reached the threshold of thirty ratifications necessary for entry into force. It is difficult to imagine that such treaties, which are still in a *nasciturus* state, can add or subtract anything to / from obligations under the TRIPS Agreement which has been in force since 1995 and by which more than 130 WTO Members are bound.

(b) Conditions of Article 13 TRIPS

30. Even if one were to argue that Article 13 TRIPS creates new exceptions also to existing rights under the Berne Convention, a situation which would of course be irreconcilable with the argument that TRIPS is intended to improve the level of IPR protection and thus Article 13 TRIPS to reduce or eliminate existing exceptions, the effects of Section 110(5) Copyright Act are such that none of the three conditions set out in Article 13 TRIPS would be met.

31. As to "certain special cases", the EC/MS have pointed out[9] why we think that Section 110(5) Copyright Act does not meet this requirement. From a plausibility point of view, it appears obvious that an exemption, which covers from 45% to more than 70% of all existing establishments, does not represent "certain special cases" but reverses the rule-exception relationship.

32. In relation to the second and third conditions, the EC/MS have indicated their view in reply to questions 11 and 12 from the Panel to both Parties and in our oral statement of the first meeting with the Panel on 8-9 November 1999.[10] The EC/MS continue to believe that the analysis has to be based on an assessment in relation to the exclusive right concerned, given the sophisticated distinction of individual exclusive rights under the Berne Convention. To argue otherwise would entail the risk that entire exclusive rights can be disregarded as long as the core economic right remains protected; a situation, which also the US would consider as not being contemplated by Article 13 TRIPS.[11]

33. The EC/MS cannot follow the argumentation of the US in reply to question 18 by the Panel, in which they put forward the idea that the analysis has to be based on both aspects, i.e. individual exclusive right and whole work. While one can indeed imagine a cumulative test, the test will be

[9] See reply to question 10 by the Panel to both Parties and points 66 to 68 of our oral statement at the first meeting with the Panel.

[10] See points 69 to 71.

[11] See US reply to question 18 from the Panel to the US.

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failed if only one of its constituent element fails. In other words, if the test is not met on the basis of the individual exclusive right, the entire test is not met and it is irrelevant of how the analysis for the entire work turns out.

34. Finally, the EC/MS would like to reiterate that according to well-established WTO jurisprudence[12], it is the task of the US to prove that the exceptions invoked are applicable and their conditions fully met.

IV. CONCLUSION

35. Under Article 64(1) TRIPS, Article XXIII GATT and Article 3(8) DSU, the violation to the US' obligations under the TRIPS Agreement are considered prima facie to constitute a case of nullification or impairment.

36. The EC/MS therefore respectfully request the Panel to find that the US have violated their obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(ii) and 11(1)(ii) Berne Convention and should bring their domestic legislation into conformity with their obligations under the TRIPS Agreement.

[12] See reference under point 47 of our oral presentation at the first meeting with the Panel.

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ATTACHMENT 1.6

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES AT THE SECOND MEETING WITH THE PANEL

(7 & 8 December 1999)

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I. INTRODUCTION

This is the second hearing in this case and thus the last opportunity for the Parties to present their facts and arguments as a whole to you.

The EC/MS will present its case in the light of the facts and arguments made available by the Parties and third Parties. Wherever necessary, we will also comment on the US' replies to questions from the Panel and the EC/MS and on the US' rebuttal statement dated 24 November 1999.

II. FACTUAL ELEMENTS

1. It would appear to the EC/MS that the coverage of Section 110(5) Copyright Act has by now been largely clarified by the Parties with the exception of the question of the interplay and separation between Subsections A and B and the applicability to the IT world and Internet.

2. As to the first issue, the plain text of Subsection A would suggest that all copyright works, which are susceptible to be communicated to the public by loudspeaker, are covered. Subsection B defines its coverage as nondramatic musical works. While it appears possible to draw an *a contrario* argument from Subsection B with the result that Subsection A does not apply to nondramatic musical works, it is far from certain that US Courts would consistently follow this *a contrario* argument.

When the US mention (point 4 of their rebuttal statement) that there exists *« … consistent jurisprudence of US Courts interpreting the homestyle exemption… »*, the EC/MS would like to remark that there exists not a single US Court decision to date, which interprets the scope of Section 110(5)(A) Copyright Act.

3. Also, the distinction between dramatic and nondramatic musical works remains unresolved. While the US have pointed out at the first meeting upon a question from the Panel that the distinction is made definitively when the work is created, the EC/MS have put forward in their rebuttal statement that, according to US literature, the dividing line is not a permanent one, but depends on the circumstances of the performance. In other words, this would suggest that an individual aria from an opera or a song from a musical played on the radio or TV are to be considered as nondramatic, which in turn has important repercussions for the licensing practice.

4. While the EC/MS appreciate that in the IT world other exclusive rights than the ones covered by Section 110(5) Copyright Act are relevant for communications to the public, no argument has been put forward by the US, that the exemptions contained in Section 110(5) Copyright Act do not apply in the digital context.

III. LEGAL ELEMENTS

5. While the language used by the US differs, it would appear that the US agree in essence with the EC/MS.

Section 110(5) Copyright Act is inconsistent with Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention unless the US can demonstrate that their measure is covered by an exception provision.

6. The US argue that Article 13 TRIPS allows the exceptions to Articles 11*bis*(1) and 11(1) Berne Convention, which are contained in Section 110(5) Copyright Act.

In view of the EC/MS, the exemptions contained in Section 110(5) Copyright Act cannot be justified under any kind of argumentation in relation to Article 13 TRIPS.

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7. The EC/MS have pointed out in detail why in their view, Article 13 TRIPS is not applicable to the Berne rights, which have been incorporated into TRIPS by reference. The plain text, the negotiating history and the object and purpose of TRIPS militate for this result.

8. However, even if one were to argue that Article 13 TRIPS may play a role in the context of exceptions to Berne rights, the exceptions contained in Section 110(5) Copyright Act cannot be justified.

9. It would appear that the US agree that one of the major objectives of the TRIPS Agreement consists in increasing the level of IPR protection as compared to the level of protection prevailing under the pre-existing WIPO Conventions. This in turn means for Article 13 TRIPS that – if it were applicable to Articles 11*bis*(1) and 11(1) Berne Convention – its objective would have to consist in limiting any wider pre-existing Berne exceptions.

10. While the Berne Convention provides for a number of exceptions such as Articles 9(2), 10, 10*bis*, there exists no exception provision to Article 11 Berne Convention and Article 11*bis* Berne Convention has a specific exception provision in its paragraph 2, which provides that – as a minimum – the right holder has to be granted equitable remuneration. The US themselves do not claim that Section 110(5) Copyright Act can be justified by Article 11*bis*(2) Berne Convention.

1. "Minor reservations" doctrine

11. In this situation, the US claim the benefit of the "minor reservations" doctrine, which, in the US view, has been further clarified and articulated by TRIPS Article 13 (see point 2 of the rebuttal statement).

12. Discussions have indeed taken place on so-called minor reservations at the occasion of two diplomatic conferences of the Berne Union in 1948 and 1967. We have considered in detail the possible legal character of the references to "minor reservations" in the General Reports of these diplomatic conferences in our reply to question 5 by the Panel to the EC/MS. We have concluded that the legal significance of the "minor reservations" doctrine under public international law is doubtful.

13. The US claim that the "minor reservations" doctrine constitutes "subsequent practice" in the sense of Article 31(3)(b)VCLT. However, such "subsequent practice" is a tool, among others, to interpret provisions of treaty language, which need interpretation. In the case at hand, it is utterly clear that Article 11 Berne Convention does not contain an exception provision and Article 11*bis* Berne Convention contains an exception provision whose conditions are not met by Section 110(5) Copyright Act. Thus no need exists to interpret the plain language any further.

(a) Scope of the "minor reservations" doctrine

14. The list of alleged exception provisions, which is contained in Exhibit US-22, merely states figures of Articles without even specifying the statute to which these articles belong, and without any explanation as to their context. This does not contribute anything to establishing "subsequent practice", and even less so to determining the scope of the "minor reservations" doctrine. The US have referred also to the "minor reservations" doctrine in relation to exceptions provided for in 10 countries Members of the Berne Union (the Berne Union is presently composed of more than 130 Members). All these exceptions are characterised by their non-commercial character and mostly reflect the exceptions, which also exist in the US copyright law, notably in Section 110, paragraphs (1) to (4) Copyright Act. These situations are not the ones covered by Section 110, paragraph (5) Copyright Act.

15. All this leads us to the conclusion that it is difficult to give any legal status to the "minor reservations" doctrine. As we have pointed out repeatedly, there is fortunately no need to decide this

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thorny issue in the case before the Panel, because the exceptions contained in Section 110(5) Copyright Act do under no circumstance meet the requirements on scope and timing as referred to in the General Reports.

16. The only instances, which were mentioned in the discussions on "minor reservations" at the two diplomatic conferences were military bands, religious services and child and adult education. Obviously, Section 110(5) Copyright Act is not limited to any of these categories. But even if one were to argue that these three instances were only illustrative, their common features consist in being for non-commercial activities and for a well-defined social purpose. Given that Section 110(5) Copyright Act is directly intended to serve commercial interests by the use of the copyright works in commercial establishments for the enjoyment of customers with the objective to enhance turnover and profit neither of these common characteristics can be found in Section 110(5) Copyright Act.

17. The US argument that the underlying policy consideration for Section 110(5) Copyright Act consists in fostering small businesses is spurious at best. First of all, it has to be remembered that copyright owners themselves are in their vast majority "small businesses" and second as is well evidenced in the Claire's Boutique case (see Exhibit EC-6) the homestyle exemption applies to big corporations. Claire's Boutique Inc. had a yearly turnover in the vicinity of 200 million dollars and net earnings in excess of 13 million dollars.

(b) The "minor reservations" doctrine as a grandfathering device

18. As to the aspect of timing for the adoption of minor exceptions, we maintain our view that the citations from the General Reports make it utterly clear that the "minor reservations" doctrine was intended to "grandfather" existing practices and not as an invitation to Berne Union Members to subsequently adopt such "minor reservations".

19. Also as to the application of grandfather provisions to newcomers to a convention, our arguments remain. There is no reason to treat newcomers any better than established Members, by allowing them to reduce the level of obligations at a time when an established Member would no more be allowed to do so. This approach is perfectly neutral as to the level of development of a country Member or candidate to an international convention.

20. The case of the Berne Convention represents indeed a good illustration of the non-discriminatory effects of this approach in a situation in which the vast majority of developing countries were already a Member of the Berne Union at the moment the US joined. Furthermore, TRIPS has taken exactly this approach for its grandfather provisions (see Articles 4(d) and 24(4) TRIPS).

(c) Tunis Model Law on Copyright

21. A further argument to support our view that the "minor reservations" doctrine under no circumstances covers the situations contemplated by Section 110(5) Copyright Act, can be drawn from the "Tunis Model Law on Copyright", which has been adopted in 1976 (i.e. after the last reference to "minor reservations" at the diplomatic conference in 1967). This model law was intended to provide the legislators in developing countries with guidance on how to draft a copyright statute in compliance with the Berne Convention (for more details, see the description contained in WIPO, Background Reading Material on Intellectual Property, 1988 at pp. 255-257, Exhibit EC-24).

This model law *"provides for a fairly wide variety of limitations to copyright : both free uses and non-voluntary licenses"* but none of these limitations resembles even remotely the exemptions contained in Section 110(5) Copyright Act. The text of the Tunis Model Law referred to is reproduced in our written text.

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Free uses according to the Model Law include:

(a) use of a work for one's own personal and private requirement;

(b) quotations compatible with fair practice and to the extent not exceeding that justified by the purpose;

(c) the use of a work for illustration in publications, broadcast or sound or visual recordings for teaching, provided that such use is again compatible with fair practice and that the source and the name of the author are mentioned by the user;

(d) the reproduction in the press or communication to the public of articles on current economic, political or religious topics published in newspapers or periodicals and broadcast works of the same character, provided that the source is indicated by the user and such uses were not expressly prohibited when the work was originally made accessible;

(e) the use of a work that can be seen or heard in the course of a current event for reporting on that event;

(f) the reproduction of works of art and architecture in a film or television broadcast, if their use is incidental or if the said work is located in a public place;

(g) the reprographic reproduction of protected work, when it is made by public libraries, non-commercial documentation centres, scientific institutions and educational establishments, provided that the number of copies made is limited to the needs of their activities and the reproduction does not unreasonably prejudice the legitimate interest of the author;

(h) the reproduction in the press or communication to the public of political speeches, speeches delivered during legal proceedings, or any lecture or sermon delivered in public, etc, provided that the use is exclusively for the purpose of current information and does not mean publishing a collection of such works.

(d) WCT and WPPT

22. Finally, the US rely on the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in order to suggest that some wide undefined exceptions must exist under the Berne Convention.

23. We have already pointed out in the rebuttal statement that given the *nasciturus* status of these treaties, which are not even in force and not yet ratified by the EC/MS, whatever they stipulate cannot reduce the level of protection of Berne or TRIPS, or create new exceptions which have not previously existed under Berne or TRIPS.

But also from a substantive point of view nothing in the text of Article 10 WCT suggests that new exceptions would have been contemplated. While Article 10(1) WCT creates limitations and exceptions to new exclusive rights being created by the WCT, Article 10(2) addresses the cases in which the WCT makes Berne rights applicable to the digital network environment, which was not covered under Berne Convention previously.

24. This is in contrast with the case before us, where Section 110(5) Copyright Act is at variance with Articles 11*bis* and 11 Berne Convention whose scope has not been modified by TRIPS.

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25. The arguments put forward in relation to Article 10 WCT apply *mutatis mutandis* to Article 16 WPPT.

26. All in all, it can be said that there exists no exception or limitation provision – express or implied – under the Berne Convention which could justify the exemptions contained in Section 110(5) Copyright Act, leave alone an exception or limitation provision which when "narrowed down" by Article 13 TRIPS could justify Section 110(5) Copyright Act.

2. Article 13 TRIPS

27. In the hypothesis that the Panel should consider that Article 13 TRIPS is of relevance for the assessment of Section 110(5) Copyright Act, we now apply the three steps test provided for in Article 13 TRIPS to Section 110(5) Copyright Act.

(a) Certain special cases

28. We have pointed out repeatedly why we consider that the exemptions contained in Section 110(5) Copyright Act do not constitute "certain special cases". We do not intend to repeat the reasons here, but think it is sufficient to say that exceptions which unconditionally exempt 45 to more than 70% of all retail, drinking and eating establishments from copyright liability for playing of copyright works from the radio or TV and exempting the remainder of such establishment under generous conditions cannot be considered as certain special cases, such exemptions are rather a reversal of the rule-exception principle.

(b) Conflict with the normal exploitation

29. Here again we have pointed out in detail the reasons why we consider that the exemptions created by Section 110(5) Copyright Act (see for example our replies to questions 11 and 12 from the Panel to both Parties) do conflict with the normal exploitation. We would limit ourselves to mention here again the sheer size of the exception, which covers huge proportions of entire business sectors unconditionally and thus, conflict with the normal exploitations of the public performance rights.

(c) Unreasonable prejudice to the legitimate interests of the right holders

30. We do not intend to repeat all the arguments we have made in support of our view that the exemptions contained in Section 110(5) Copyright Act do indeed unreasonably prejudice the legitimate interests of the right holders, but we would like to concentrate on the new quantitative guestimates made in this context by the US in its rebuttal statement (points 33 et seq.).

31. We agree as pointed out in our reply to question 12 by the Panel to both Parties that the economic prejudice to the right holder has to be assessed primarily on the basis of the economic effects in the country, which provides the exceptions. As we have said earlier, and as the US themselves put forward during the negotiations of the TRIPS exceptions' clause (see US submissions to the negotiating group doc. MTN.GNG/NG 11/W/14/Rev. 1, Exhibit EC-18, and Article 6 in doc. MTN.GNG/NG 11/W/70, Exhibit EC-25), we are of the view that it is more appropriate to look at the potential impact (as opposed to the actual impact) because it can be established with a higher degree of certainty and is less subject to unforeseen changes.

32. We have provided an analysis on the potential economic effects of Section 110(5) Copyright Act, which has never been challenged in a substantiated manner by the US. This analysis demonstrates that 73% of all drinking establishments, 70% of all eating establishments and 45% of all retail establishments in the US are unconditionally exempted by Section 110(5) Copyright Act and all remaining such establishments are exempted if a condition essentially on the number of loudspeakers is met. In our view, these results make it utterly clear that the exemptions stipulated in

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Section 110(5) Copyright Act do constitute an unreasonable prejudice to the legitimate interest of the right holder.

(i) US guestimate of losses

33. In its rebuttal submission, the US have made an attempt to minimize the prejudice on the basis of guestimated actual losses based on historic distributions by one single collecting society (ASCAP).

In view of the EC/MS, this approach is fundamentally flawed for a number of reasons:

34. The distributions from collecting societies to right holders are a function of their collections on the market and the collections on the market in turn are a function of the legal protection of the relevant exclusive rights.

In the US, the rights referred to in Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention were not at all protected until 1976 (see the US Supreme Court Decision in Aiken, Exhibit EC-1). While these exclusive rights were protected in general from 1976, the "homestyle" exemption was introduced at the same time by the previous version of Section 110(5) Copyright Act.

This exemption already excluded a wide range of commercial uses (see for example the situations in the Claire's Boutique and Edison cases, Exhibits EC-6 and EC-5 respectively), thus seriously reducing the number of businesses subject to a need to obtain a license.

35. Furthermore, the fact that the National Licensed Beverage Association (NLBA) has, according to the US, concluded in 1995 an agreement with the US collecting societies, which excludes all establishments below 3,500 square feet from copyright liability and under certain conditions excludes larger establishments from such liability (see first written submission by the US points 12-14) lead to a situation in which, for the eating and drinking establishments which are members of the NLBA, no licensing fees have been collected since the entry into force of this agreement.

36. Just as a reminder, the figures given in the US Congress sponsored Dun & Bradstreet Analysis (see oral statement by the EC/MS at the first hearing, point 37) show that the unconditional exemption of eating and drinking establishments with less than 3,500 square feet cover 65% and 72% of all such establishments respectively.

37. Also the use of a figure of losses, which is attributable to EC right holders only in the context of establishing the prejudice under Article 13 TRIPS misinterprets Article 13 TRIPS.

For all conditions referred to in Article 13 TRIPS, the effect on all right holders, US right holders, EC right holders and right holders from other countries, have to be taken together. The specific impact on EC right holders is perfectly irrelevant at this stage. It only becomes relevant in the context of Article 22 DSU.

38. A further shortcoming in the US quantitative guestimate consists in the fact that, while there exist three collecting societies for the collection of the proceeds for the rights concerned in this case, the US only provide figures for one of them.

(ii) Alternative bottom-up approach

39. While we have repeatedly argued that it is the potential impact rather than the actual impact, which should be applied to an analysis under Article 13 TRIPS, the EC/MS consider that the following bottom-up approach gives at least some plausible indications of the order of actual losses suffered by right holders as a consequence of the operation of Section 110(5) Copyright Act.

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40. In the database run by Dun & Bradstreet (see Exhibit EC-16), the figures for 1998 show for the entire US:

- 49,061 drinking establishments, and

- 192,692 eating establishments,

with a square footage of below 3,750 square feet and

- 281,406 retail establishments with a square footage of below 2,000 square feet.

These figures are likely to be lower that the actual number of establishments when compared to the figures for eating establishments on the basis of the US Census Bureau data for 1996 (see Exhibit US-18) from which a figure of 240,000 eating establishments below 3,750 square feet resorts.

41. As a second step, we would agree with the US that not all these establishments would actually play music from the radio or TV on their premises for the enjoyment of their customers.

The US offer in their rebuttal submission (see point 39) the hypotheses that 30.5% of all eating and drinking establishments with a surface below 3,750 square feet, actually play music from the radio in their establishments.

While this assumption has not been motivated by the US, we will use this hypothesis for this analysis and apply it equally to retail establishments.

This process demonstrates that:

- 14,700 drinking establishments,

- 57,800 eating establishments, and

- 84,400 retail establishments,

which all fall below the 3,750/2,000 square feet threshold actually play music from the radio on their premises without having to pay for a license. This analysis disregards the playing of music from TV.

42. As a subsequent step, the appropriate licensing fee for playing music from the radio in the relevant establishments, has to be selected from the licensing schedules of ASCAP (an excerpt is provided as Exhibit EC-26) and BMI (an excerpt is provided as Exhibit EC-27).

Given that ASCAP and BMI represent different repertories, licenses have to be sought from both in order to play the radio in the business establishments.

The lowest ASCAP and BMI licensing fees for eating and drinking establishments add up to an amount of 410 US$ per year. This can also be compared to the fee schedule contained in Exhibit US-7, which effectively mentions yearly licensing fees of 455 US$ for establishments smaller than 1,500 square feet, 869 US$ for establishments between 1,500/2,500 square feet and 1,265 US$ for establishments between 2,500/3,500 square feet.

For retail establishments, the lowest fee categories of BMI and ASCAP add up to 283.50 US$ per year.

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43. When applying the respective rate to the number of establishments playing music from the radio in their establishments, one arrives at the amount of lost revenue by BMI and ASCAP as a consequence of the operation of Section 110(5) Copyright Act.

For eating and drinking establishments, the lost revenues amount to 29.725 mio US$ and for retail establishments, lost revenues amount to 23.93 mio US$ which adds up to a total of 53.65 mio US$.

44. These are the losses in relation to all right holders, US right holders, EC right holders and right holders from third countries. This analysis also confirms the claim made by BMI and ASCAP in their press release on the day following passage of the Fairness in Music Licensing Act (see Exhibit EC-14) when they state that:

> *"The earnings of song writers, composers and publishers have been reduced by tens of millions of dollars annually"*

45. This excursion into the sphere of estimated actual losses suffered by copyright owners from the operation of Section 110(5) Copyright Act confirms the analysis based on potential losses presented earlier and does in the view of the EC/MS clearly indicate that the exceptions provided for in Section 110(5) Copyright Act do unreasonably prejudice the legitimate interests of the copyright owner and thus also the third condition contained in Article 13 TRIPS cannot be met.

IV. CONCLUSION

46. The EC/MS therefore respectfully request the Panel to find that the US have violated their obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention and should bring their domestic legislation into conformity with their obligations under the TRIPS Agreement.

Of course, the EC/MS would be pleased to reply to any further question the Panel might have. As to the replies provided by WIPO, the EC/MS reserve their right to comment after having had the possibility to carefully look at them.

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ATTACHMENT 1.7

COMMENTS FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES ON THE LETTER FROM THE DIRECTOR GENERAL OF WIPO TO THE CHAIR OF THE PANEL[1]

(12 January 2000)

1. The European Communities and their Member States (EC/MS) would like to express through you their appreciation to the International Bureau of WIPO for its work done to reply to the Panel's three questions.

2. As to the substance of the replies given, we note that no evidence in relation to the existence and scope under the Berne Convention of any exception or limitation including the so-called "minor reservations" doctrine, which would be susceptible of justifying the exemptions contained in Section 110(5) US Copyright Act, is contained in WIPO's replies and annexes.

3. In view of the EC/MS, this confirms our conclusion already expressed in point 26 of our presentation at the second substantive meeting that:

> *"All in all, it can be said that there exists no exception or limitation provision – express or implied – under the Berne Convention which could justify the exemptions contained in Section 110(5) Copyright Act, leave alone an exception or limitation provision which when "narrowed down" by Article 13 TRIPs could justify Section 110(5) Copyright Act."*

4. The EC/MS trust that they will be invited to comment on any substantive remarks that may be made by the US based on the WIPO reply and annexes.

[1] This submission by the EC contained also comments on a letter from a law firm representing ASCAP to the USTR that was copied to the Panel. This part of the submission is not reproduced here; neither is the letter in question nor the US comments on it reproduced in the attachments to this report. *See* section VI.B of the report.

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ATTACHMENT 2.1

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(26 October 1999)

Table of Contents

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I. INTRODUCTION

1. Section 110(5) of the United States Copyright Act of 1976[1] is fully consistent with the United States' obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement" or "TRIPS"). The TRIPS Agreement, incorporating the substantive provisions of the Berne Convention on Literary and Artistic Works (1971) ("Berne Convention"), allows Members to place minor limitations on the exclusive rights of copyright owners. Article 13 of TRIPS provides a standard by which to judge the appropriateness of such limitations or exceptions. The exemptions embodied in Section 110(5) fall within the Article 13 standard: they are special cases which do not conflict with a normal exploitation of the work and they do not unreasonably prejudice the legitimate interests of the right holder.

II. FACTUAL BACKGROUND

2. The United States has one of the strongest systems of intellectual property protection in the world. Under the U.S. copyright system, copyright holders are granted a "bundle" of exclusive rights. Specifically, Section 106 of the Copyright Act grants to right holders the exclusive right to do and authorize:

(i) the reproduction of a copyrighted work;

(ii) the preparation of derivative works based upon the copyrighted work;

(iii) the distribution of copies of the copyrighted work to the public;

(iv) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(v) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, the right to display the copyrighted work publicly; and

(vi) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

3. Section 110 of the Copyright Act provides for several limited exceptions to one of these exclusive rights – the public performance right. The exemptions in Section 110 include exceptions to the performance right for certain educational, charitable and religious uses, as well as the provisions challenged by the EC in this proceeding, Section 110(5)(A) and (B).

A. SECTION 110(5)(A)

4. Section 110(5)(A) constituted the entire Section 110(5) exemption for the 22 years prior to the passage of the Fairness in Music Licensing Act of 1998 ("the 1998 Amendment").[2]

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[1] United States Copyright Act of 1976, Act of Oct. 19, 1976, Pub. L. 94-553, 90 Stat. 2541(as amended).

[2] The 1998 Amendment added a new subsection (B) to Section 110(5). Consequently, the previous Section 110(5) was redesignated Section 110(5)(A). Fairness in Music Licensing Act of Oct. 27, 1998, P.L. 105-298, 112 Stat. 2830, 105th Cong. 2nd Sess. (1998).

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Section 110(5)(A) exempts public performances communicated by means of "homestyle" receiving equipment, subject to certain additional limitations, and provides as follows.[3]

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –
>
> (A) direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public.

5. In establishing the "homestyle" exemption in 1976, Congress intended to exempt from copyright liability small stores and restaurants whose owners merely turned on an ordinary radio or television set while they worked. As explained in the House Report accompanying the 1976 revision of the Copyright Act,

> [T]he clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.[4]

According to the House Report, factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions were made, and the extent to which the receiving apparatus was altered or augmented for the purpose of improving the quality of the performance.[5] The Conference Report elaborates on the rationale for the exemption, noting that it would be justified in situations where the defendant was a small commercial establishment and "not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[6]

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[3] Section 110(5), both (A) and (B), also exempt the display right. Because that right has little or no economic relevance to copyright owners in musical works, it is not discussed here.

[4] Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976) (hereinafter " House Report") (the relevant page is annexed hereto as exhibit US-1).

[5] *Id.* The factors to consider in applying the exemption are largely based on the facts of a case decided by the United States Supreme Court immediately prior to the passage of the 1976 Copyright Act, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). In *Aiken*, the Court held that an owner of a small fast food restaurant was not liable for playing music in a 1,055 square-foot shop that had only four speakers and a radio. The House Report describes the fact situation in *Aiken* as representing the "outer limit" of the homestyle exemption. *Id.*; *see also* exhibit EC-1.

[6] Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976) (hereinafter "Conference Report") (annexed as exhibit US-2).

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6. By its nature, the licensing of thousands of individual restaurants and retail establishments is a difficult and resource-intensive process.[7] Naturally, there is a point at which the potential licensing revenue does not justify the administrative burden of the licensing process. The licensing process is especially difficult with respect to smaller establishments that might benefit from the homestyle exception. Congress expected the homestyle exemption to have a limited economic effect because it essentially codified the licensing practices of the performing rights organizations ("PROs") with respect to such establishments. As observed in the House Report on the homestyle exception, "in the vast majority of cases no royalties are collected today, and the exemption should be made explicit in the statute".[8]

7. In the almost two and one-half decades since the homestyle exemption was enacted, U.S. courts have applied the exception narrowly and in a manner consistent with Congress's intent. Of the forty decisions reported under Section 110(5) (now Section 110(5)(A)), only three courts have found that the defendant was entitled to take advantage of the exception. In reaching their conclusions, courts have generally engaged in a highly fact-specific analysis, taking into account the factors cited in the text and legislative history of Section 110(5)(A). For example, in *Sailor Music v. Gap Stores, Inc.*, the Court of Appeals for the Second Circuit found that a chain store was not entitled to the homestyle exception because it used four to seven speakers recessed in the ceilings of its stores, and in the court's words, "was of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[9] Similarly, in *Broadcast Music, Inc. v. United States Shoe Corp.*, the Court of Appeals for the Ninth Circuit followed *Gap Stores* in denying the applicability of the homestyle exemption to a chain of retail stores. The Court expressly relied on the fact that the size and nature of the Defendant's operation justified the use of a commercial background music system.[10]

8. Two courts have given relatively greater weight to equipment, rather than other factors, in applying the homestyle exception. These two courts did not consider corporate revenues or ownership structure, but rather focused on the fact that the chain stores at issue had extremely limited stereo equipment. In *Broadcast Music, Inc. v. Claire's Boutiques*, for example, the "receiving apparatus" at issue retailed at $129.95, had just five watts of power, and was able to drive only two speakers, each of which measured 7 inches x 5 inches x 4 inches (approximately 18 x 13 x 10 cm). The Court then went on to conduct a stringent analysis of the stereo system, requiring the Defendant to prove that each of the components of the system was "home-type," and also that the components

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[7] *See* Music Licensing in Restaurants and Retail and Other Establishments, Hearing before the House of Representatives, Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (July 17, 1997) (hereinafter "Judiciary Committee Hearing") (testimony of Patrick Collins, SESAC, at 109-110). Due to the length of the Judiciary Committee Hearing transcript, we are not annexing this document, however, the transcript is available on the internet at: http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_0 htm.

[8] House Report, at 86 (exhibit US-1).

[9] *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) ("*Gap Stores*") (the cases interpreting section 110(5)(A) are annexed as exhibit US-3 in alphabetical order).

[10] *Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982). *See also Red Cloud Music Co. v. Schneegarten, Inc.*, 27 U.S.P.Q.2d 1219 (C.D. Cal. 1992) (following the *United States Shoe* decision). Other courts across the country have also applied this type of nuanced analysis of equipment and establishment size and revenues in finding that the homestyle exception did not apply. *E.g.*, *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990) (restaurant with 1,192 square feet using radio and recessed speaker system did not qualify for section 110(5) exemption); *Little Mole Music v. Mavar's Supermarket*, 12 U.S.P.Q.2d 1209 (N.D. Ohio 1988) (chain of supermarkets did not qualify for 110(5) exemption based on use of six to ten ceiling speakers and physical size); *Merrill v. Bill Miller's Bar-B-Q Enters.*, 688 F. Supp. 1172 (W.D. Tex. 1988) (chain of restaurants did not qualify for 110(5) because equipment was not homestyle, physical size was 1000 - 1500 sq. feet and annual revenues justified a commercial subscription service).

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were configured in a manner commonly found in a home.[11] Similarly, in *Broadcast Music, Inc. v. Edison Brothers* , the court was persuaded that the exemption applied where it found that the company used only "low grade radio-only" receivers, with no more than two portable speakers placed within 15 feet (4.6m) of the receiver.[12]

9. Taken as a whole, the substantial body of case law under Section 110(5)(A) demonstrates its limited nature and careful application by the courts. In addition, however, it is important to recognize that the 1998 Amendment dramatically limited the homestyle exception even further. As the EC acknowledges, Section 110(5)(A) no longer covers nondramatic musical works at all. Rather, it covers only other types of works, such as plays and operas. No licensing mechanism currently exists for right holders to collect royalties on a collective basis for secondary performances of these other types of works in establishments. As a practical matter, no royalties are collected for these secondary performances, and thus the statutory exemption for homestyle receiving equipment has no effect on this market.

B. SECTION 110(5)(B)

10. In the mid-1990s, in response to complaints from different sectors of the small business community of various abuses by the PROs,[13] Congress undertook consideration of a proposed expansion of the homestyle exemption advocated by a coalition of business associations (the "coalition"). The proposal put forward by the coalition was much broader than that which was eventually passed into law, and called for a complete exemption for the performance of nondramatic musical works, regardless of the type of establishment, size of establishment or equipment used to broadcast the work. It also would have permitted further retransmission beyond where the transmission was received. The only limitations were that no admission fee could be charged, and that the transmission must be properly licensed.[14]

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[11] *Broadcast Music Inc. v. Claire's Boutiques*, 949 F.2d 1482, 1493 (7th Cir. 1991).

[12] *Broadcast Music Inc. v. Edison Bros. Stores, Inc., supra*. The EC makes the unsubstantiated statement in its submission that, as a result of this case, chain stores have adapted their music installation to qualify for the exemption or even canceled their subscription to music services. EC Submission, p. 9 note 25. The EC offers no support or citations whatsoever for these statements, and the U.S. is not aware of any cases in which this scenario actually occurred.

[13] Specifically, there was widespread complaint from small business owners about harassment and abusive tactics by the PROs in the licensing process. *See generally*, Judiciary Committee Hearing, statement of Bruce A. Lehman, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, at 42, statement of Pete Madland on behalf of the Tavern League of Wisconsin at 220, and testimony of Peter Kilgore on behalf of the National Restaurant Association at 235-236.

[14] The coalition's proposal was reflected in H.R. 789, the Fairness in Music Licensing Act of 1997, by Representative James Sensenbrenner, annexed hereto as exhibit US-4. This proposal, *not* the provisions at issue in this case, were the basis of the testimony by the Register of Copyright, Marybeth Peters, and Bruce Lehman, that is cited by the EC in its submission. EC first submission, para. 4. While the EC cites the portion of Ms. Peters' statements relating to this much broader exemption that was not enacted into law, they neglect to mention her statement on Section 110(5)(A). With respect to Section 110(5)(A), Ms. Peters noted that an ad hoc committee had investigated 110(5) in the context of U.S. accession to the Berne Convention and stated: "I strongly believe that the existing section 110(5) is fine, given what is required by the Berne Convention, and may be similar to exemptions that you see in a few other countries." Judiciary Committee Hearing at 46. Furthermore, the EC mischaracterizes the statements by Ms. Peters and Mr. Lehman concerning the TRIPS-compatibility of the coalition proposal. Even a cursory reading of the quoted statements reveals that Ms. Peters and Mr. Lehman actually expressed the belief that the proposed amendments would lead to *claims by other countries* that the United States was in violation of its obligations – an unsurprising view since the EC had already complained about the TRIPS-consistency of the homestyle exemption, and had initiated a formal investigation of the provision at the time the statements were made. *See also* exhibits EC-11 and EC-12.

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11. At that time, the PROs also proposed amendments to Section 110(5) that they believed "accurately reflect[ed] uses by small commercial establishments in the marketplace".[15] The PROs' proposal, in addition to suggesting a square footage limit of 1,250 sq. ft. (116.2 sq. m.), also advocated specific equipment limitations of no more than four loudspeakers and two TV screens not greater than 44 inches (1.1m).[16] Notably, the scope of the exemption advocated by the PROs in this initial proposal was broader than the courts' interpretation of the existing homestyle exemption, and thus represented a modest expansion of the exemption.

12. In October of 1995, the National Licensed Beverage Association ("NLBA"), which had been one of the initial proponents of an amendment to Section 110(5) and an important member of the coalition, settled its differences with the PROs and signed a private group licensing agreement. This agreement applied to most of the NLBA's wide membership, and was also available to any eating, drinking or retail establishment licensed to sell alcohol for on-premise consumption.[17] It exempts establishments affiliated with the NLBA from paying licensing fees for the performance of music by radio or television if:

(i) the establishment is smaller than 3,500 sq. ft. [325.28 m. sq.], or,

(ii) the establishment is 3,500 sq. ft. or larger and no more than 6 radio and/or TV speakers are used, with no more than 4 in any one room; and no more than 3 TVs of a screen size smaller than 55 inches [1.4 m.] are used, with no more than 2 TVs in any one room; and

(iii) no direct charge was made to see or hear the transmission and there was no retransmission.[18]

13. The NLBA agreement also provided reduced licensing rates for music performances by other means, such as mechanical music, live performances, establishment-owned jukeboxes and radio and TV performances not qualifying for the exemption.[19] The largest U.S. PRO, the American Society of Composers, Authors and Publishers (ASCAP), praised the agreement, calling it a "fair compromise",[20] and stating that it would benefit small businesses while ensuring that the rights of "songwriters, composers and music publishers will remain protected".[21] Again, it is notable that the scope of the exemption in this voluntarily negotiated agreement is almost identical to the legislation that, three years later, in 1998, became the Fairness in Music Licensing Act. Moreover, at the time that the agreement was concluded with the NLBA, the PROs offered to extend the same proposal to the National Restaurant Association and other members of the business coalition, but, at that time, it was rejected.[22]

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[15] Letter of July 24, 1995 to The Honorable Carlos Moorhead from ASCAP, BMI, Inc. and SESAC, Inc., (annexed hereto as exhibit US-5).

[16] *Id*. at 5-6.

[17] Any establishment that is a member of the NLBA can take advantage of the terms of the agreement and establishments which are not members of NLBA can, by joining the NLBA, also avail themselves of the agreement. To be a member of the NLBA, an establishment must sell alcohol on its premises, a condition that applies to all bars and taverns, as well as a very large number of restaurants.

[18] NLBA News, April 1997 (annexed hereto as exhibit US-6).

[19] *Id.*; *see also* Music Licensing Agreement with ASCAP, BMI & SESAC for NLBA Members, 2-3 (attached as exhibit US-7).

[20] ASCAP Playback, February 1996 (annexed as exhibit US-8).

[21] ASCAP Playback, December 1995 (annexed as exhibit US-9).

[22] Judiciary Committee Hearing (testimony of Wayland Holyfield, on behalf of ASCAP at 75). The NRA did not accept the offer, however, because of their view that its standards were more appropriately reflected in legislation, rather than a private commercial agreement.

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14. In October 1998, after extended negotiations between the PROs and the coalition, Congress passed legislation amending Section 110(5), with terms very similar to the NLBA agreement. The 1998 amendment revised Section 110(5) to add subsection (B), which applies exclusively to nondramatic musical works. The new subsection (B) exempts secondary performances of nondramatic musical works based on defined criteria of square footage and/or equipment, subject to three additional limitations. It provides in full as follows:

> (5)(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public originated by radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if:
>
> (i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (185.9 m. sq.) (excluding space used for customer parking and for no other purpose) and:
>
> (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
>
> (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
>
> (ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (348.5 m. sq.) (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and:
>
> (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
>
> (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual

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> device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
>
> (iii) no direct charge is made to see or hear the transmission or retransmission;
>
> (iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and
>
> (v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed.[23]

15. This legislation was part of a larger bill in which the term of protection for copyright was extended by twenty years, giving copyright owners substantially more protection than that required by international agreements.

16. Contrary to the assertions of the EC, Section 110(5)(B) does not apply to the communication of works over the Internet.[24] In fact, neither Section 110(5)(A) or Section 110(5)(B) exempts communications over a digital network. Such communications, by the very nature of the technological process of transmission, involve numerous incidences of reproduction, and could implicate the distribution right as well. When a work is transmitted to a distant location over a computer network, temporary RAM copies are made in the computers through which it passes, by virtue of the technological process of transmission.[25] This is an essential function of the way that digital information is transported over a digital network. The Section 110(5) exemptions, both (A) and (B), only apply to the performance right, and do not affect copyright holders' exclusive reproduction and distribution rights. Therefore, even under Section 110(5) as amended, establishment owners generally must still seek a license for the reproduction and possibly distribution rights implicated by Internet transmissions.

III. LEGAL ANALYSIS

17. The EC devotes almost its entire legal argument to arguing that Articles 11 and 11*bis* of the Berne Convention are implicated by the Section 110(5) exemptions. This issue is not in dispute. The relevant issue in this case is not whether Berne rights are implicated, but whether the provisions at issue are permissible exceptions under the standard of TRIPS Article 13. In its submission, the EC does not substantively address this central issue at all.

18. TRIPS Article 9(1) incorporates Articles 1 through 21 of the Berne Convention. The Berne Convention permits members to make "minor reservations" to the exclusive rights guaranteed by Berne, including limitations to the public performance right in Article 11 and 11*bis*.[26] TRIPS

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[23] P.L. 105-298, Section 202 (annexed as exhibit US-10).

[24] EC first submission, para. 39.

[25] The US courts have consistently held that RAM copies implicate the copyright holder's reproduction right. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S.Ct. 671 (1994); *Stenograph L.L.C. v. Bossard Assocs.*, 144 F.3d 96, 101-02 (D.C.Cir. 1998) (these cases are annexed as exhibit US-11). This conclusion was codified in Title III of the Digital Millennium Copyright Act at section 301.

[26] World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Artistic and Literary Works (Paris Act 1971) 103 (1978) ("WIPO Guide to the Berne Convention").

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Article 13 articulates the standard by which the permissibility of these limitations to exclusive rights must be judged. This standard is based on the language in Berne Article 9(2),[27] which pertains to exceptions to the reproduction right, and provides: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

19. Article 13 of the TRIPS Agreement provides that "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." This provision must be interpreted in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*, which provides in relevant part that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[28]

20. The text of Article 13 plainly establishes cumulative requirements for exceptions to exclusive rights. Any exception must apply only to certain special cases, cannot conflict with a normal exploitation of the work, and, in addition, cannot cause unreasonable prejudice to the legitimate interests of the right holder.

21. The context of Article 13 includes other exceptions in the TRIPS Agreement that provide WTO members a certain amount of flexibility in implementing the relevant provisions of the Agreement. Articles 17, 26 and 30 contain language very similar to Article 13 and apply this exception to trademarks, industrial designs and patents, respectively. Article 1.1 of TRIPS also emphasizes flexibility, and provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice".

22. The object and purpose of Article 13, as reflected in its text, are to allow certain exceptions to the exclusive rights conferred by a copyright. The object and purpose should be considered in light of the "Objectives" of the Agreement, set forth in Article 7, which provides that the provisions of the Agreement are designed to result in mutual advantages to producers and users, and contribute to a balance of rights and obligations.

23. Each of the criteria in Article 13 of the TRIPS Agreement must be interpreted in light of these principles. Under such an analysis, the exceptions in Section 110(5)(A) and (B) satisfy Article 13 because they are confined to special cases which do not conflict with normal exploitation and do not unreasonably prejudice the legitimate interests of copyright holders.

A. SECTION 110(5) APPLIES TO CERTAIN SPECIAL CASES

24. As a preliminary matter, Section 110(5) is confined to "certain special cases." The TRIPS Agreement does not elaborate on the criteria for a case to be considered "special," and WTO Members have flexibility to determine for themselves whether a particular case represents an appropriate basis for an exception to exclusive rights. The limiting adjectives "certain" and "special" in Article 13 do indicate that exceptions should be "clearly delineated," rather than vague and open ended.[29]

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[27] *See also* Gervais, The TRIPS Agreement: Drafting History and Analysis, §2.72, 90 (1998).

[28] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 18 AB Report, 18 December 1997 (citing Vienna Convention, done at Vienna, 23 May 1969, 1155 U.N.T.S. 221; 8 International Legal Materials 679 (1969)).

[29] Gervais at 90.

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25. Section 110(5)(A) is confined to certain special cases – *i.e.*, those involving use of a "homestyle" receiving apparatus. This is a fact-specific standard, but nonetheless one that is well-defined. Courts have considered the various factors articulated in the text and legislative history of the provision in determining whether a given establishment meets the Section 110(5)(A) standard. Although judges may have weighed the various factors differently in making their individual decisions, these cases reflect the reasonable and consistent application of a fact-specific standard in a common-law system.

26. Section 110(5)(B) is also confined to certain special cases, and defines with great precision the establishments that are entitled to benefit from the exception. The size and equipment limitations in the law are unambiguous, and can be applied with ease.

B. SECTION 110(5) DOES NOT CONFLICT WITH NORMAL EXPLOITATION

27. There is no normative definition in TRIPS as to what constitutes the "normal exploitation" of a copyrighted work. The normal exploitation of a work, however, can and must necessarily include permissible exceptions to an author's exclusive rights – it is for the purpose of allowing those exceptions that Article 13 was included in the TRIPS Agreement. Limitations and exceptions to exclusive rights by definition deprive a copyright owner of potential compensation for certain uses of his or her work. If every time a copyright owner was deprived of any potential compensation, such deprivation constituted a conflict with normal exploitation, then Article 13 would have no meaning.

28. To determine what constitutes normal exploitation, the Panel must look at all "the ways in which an author might reasonably be expected to exploit his work in the normal course of events".[30] Under U.S. copyright law, the copyright owner of a musical work has a broad range of exclusive rights. Those most important to such right holders include the right to reproduce their work in copies and phonorecords, the right to distribute and sell those copies and phonorecords, and the right to perform their music publicly.[31] Section 110(5) is an exception to only the public performance right.

29. With respect to the public performance right, by far the most significant area of exploitation for the copyright owner is the primary performance of the work. The compensation paid by broadcasters for the right to broadcast the musical work is particularly important. Royalties from broadcasting and live performance are the principal means by which copyright owners in nondramatic musical works receive compensation for the public performance of their works. Section 110(5) does not affect a copyright owner's right to be compensated for these types of exploitation. Rather, it affects only secondary uses of broadcasts. Moreover, it does not exempt all secondary performances, but only those in establishments that use homestyle receiving equipment, or meet the square footage and other criteria in the statute. Finally, even in those establishments exempted by Section 110(5), owners must still pay licensing fees for the use of recorded music, on CD or cassette tapes, and for live performances of music.

30. Furthermore, as noted by Professor Ricketson, a use does not conflict with normal exploitation if the copyright owner would not otherwise expect to collect a fee from that use.[32] It is important to emphasize that the issue in this dispute is the scope of normal exploitation in the United States. Thus, even though a use may technically fall within the exclusive rights of the copyright owner, it may not normally be capable of being exploited within a particular market or jurisdiction.

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[30] Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, 483 (Kluwer 1987). This language refers to the use of the phrase "normal exploitation" in the context of Berne Art. 9(2).

[31] This includes the right to broadcast their work found in Berne Art. 11*bis*.

[32] Ricketson, at 483 (an example of uses that would not conflict with normal exploitation is "uses for which [the copyright owner] would not ordinarily expect to receive a fee - even though they fall strictly within the scope of his [exclusive] right").

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With respect to the homestyle exemption in Section 110(5)(A), even before nondramatic musical works were removed from its scope by the passage of the 1998 Amendment, it was limited to establishments that were not large enough to justify a subscription to a commercial background music service.[33] As noted in the House Report, Congress intended that this exception would merely codify the licensing practices already in effect by the right holders and their licensing organizations.[34] Congress's intent and scope has been followed by the courts, as discussed above. Since 110(5)(A) only affected establishments that were not likely otherwise to enter into a license, or would not have been licensed under the practices at that time, it did not conflict with the expectations of right holders concerning the normal exploitation of their works.

31. Now that Section 110(5)(A) excludes nondramatic musical works (*e.g.*, songs commonly played on the radio rather than as part of a larger dramatic performance such as an opera) from its scope, it is even more clear that it does not conflict with the normal exploitation of copyrighted works. For nondramatic musical works, there is, at least, a collective licensing mechanism (the PROs) that generates *some* revenue from secondary performances. For the remaining works covered by the exemption, such as operas, plays, and musicals, there is no such system for the collective licensing of secondary performances, and little or no direct licensing by right holders to retail, eating or drinking establishments. Owners of copyright in these works do not and have never expected direct revenue from secondary performances in such establishments. In other words, licensing this aspect of the performance right is not a part of how an author "might reasonably [] expect[] to exploit his work in the normal course of events.[35]

32. In the case of Section 110(5)(B), a significant portion of the establishments exempted by that section had already been exempted, for almost a quarter of a century, by the homestyle exception. Owners of copyrights in nondramatic musical works had no expectation of receiving a fee from these establishments. Moreover, even if Section 110(5)(B) had not been passed, many of the establishments now eligible for that exemption would have been able to avail themselves of the nearly identical exemption under the NLBA agreement voluntarily concluded by the PROs. Thus, even prior to the passage of the 1998 Amendment, copyright owners would not normally expect a fee from these establishments either. In the final analysis, a small number of establishments may not have been entitled to take advantage of either the homestyle exemption or the NLBA agreement; and thus were newly exempted under Section 110(5)(B). However, when viewed against the panoply of exploitative uses available to a copyright owner under the U.S. Copyright Act, this minor limitation on some secondary uses on broadcasts to the public simply does not rise to the level of a conflict with normal exploitation.

C. SECTION 110(5) DOES NOT UNREASONABLY PREJUDICE THE LEGITIMATE INTERESTS OF THE RIGHT HOLDER

33. While the "conflict with normal exploitation" standard of TRIPS Article 13 looks to the amount of market displacement caused by a limitation or exception, the "unreasonable prejudice" standard measures how much the right holder is harmed by the effects of the exception. It is important to recognize that the issue in this analysis is not whether the right holder's interests are prejudiced. Given that any exception to exclusive rights may technically result in some degree of prejudice to the right holder, the key question is whether that prejudice is unreasonable.[36]

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[33] Conference Report, 75 (exhibit US-2).

[34] House Report, 86 (exhibit US-1).

[35] Ricketson, 483. This language refers to the use of the phrase "normal exploitation" in the context of Berne Art. 9(2).

[36] WIPO Guide to the Berne Convention at 55-56.

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1. Section 110(5)(A)

34. The economic effect of Section 110(5)(A) was minimal even before the passage of the 1998 Amendment, and thus caused no unreasonable prejudice to any legitimate interests of EC right holders. Returning again to the fundamental intent of the provision, it was to exempt from liability small shop and restaurant owners whose establishments, for a variety of reasons, would not have justified a commercial license. In general, where no such licenses would have been sought or issued in the absence of an exception, there is literally no economic detriment to the right holder from an explicit exception.[37] The establishments exempted by Section 110(5)(A), with small square footage and elementary sound equipment, are the least likely to be aggressively licensed by the PROs and licensing fees for these establishments would likely be the lowest in the range.[38] Furthermore, given their size and that the playing of music is often incidental to their services, these establishments are among those most likely simply to turn off the radio if pressed to pay licensing fees.

35. With the passage of the 1998 Amendment, and the removal of nondramatic musical works from the scope of Section 110(5)(A), this section has been limited even further and ceased to have any real economic relevance. As described above, there is, for all practical purposes, no substantial licensing market for secondary performances in retail, eating or drinking establishments for works now covered by Section 110(5)(A). In other words, these establishments are not and could not be significant sources of revenue for right holders. Therefore, this exception does not prejudice the legitimate interests of these right holders.

36. Perhaps most probative of this issue, the EC has not made any attempt, in its submission, to address the effect of this exception on its right holders. Nowhere in its submission are there any concrete allegations as to the prejudice the EC believes it suffers as a result of Section 110(5)(A).

2. Section 110(5)(B)

37. In the section of its submission entitled "Quantitative effects on copyright owners," the EC provides no information about the quantitative effects on copyright owners of Section 110(5)(B). Instead, the EC provides the Panel with a few statistics – meaningless by themselves – concerning the square footage of certain drinking, eating and retail establishments in the United States. For several reasons, these numbers do not serve as a useful basis for estimating the economic impact of Section 110(5)(B) on right holders. They fail to account for the majority of the relevant factors that determine whether a right holder would be economically prejudiced at all by the exemption in Section 110(5)(B). Even assuming for the sake of argument the accuracy of the figures cited by the EC, in order to obtain a reasonable estimate of the number of establishments from which copyright owners have truly lost revenue as a result of the FMLA, one would have to:

- subtract from those gross totals the sizable number of establishments that do not play music;

- subtract from that number the establishments that rely on music from some source other than radio or TV (such as tapes, CDs, jukeboxes, or live music);

- subtract again for the number that were not licensed prior to the passage of the FMLA and which the PROs would not be able to license anyway regardless of the exemption;

- subtract once more for the establishments that would simply take advantage of the NLBA agreement practically identical to Section 110(5)(B) if the statutory exemption were not available; and,

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[37] *See supra* para. 6 (discussion of licensing practice).

[38] *See* Judiciary Committee Hearing, letter from Marilyn Bergman, ASCAP President and Chairman of the Board, at 175-186.

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- finally, subtract again for the establishments that would prefer to simply turn off the music rather than pay the fees demanded by the PROs.

While these figures are impossible to estimate with scientific precision, there is ample reason to believe that they represent substantial numbers of establishments. Even a realistic figure of the number of establishments from which copyright owners have lost revenue, however, would not present a true figure of economic harm to EC right holders. Whatever revenues could be collected from these smaller establishments would then have to be reduced again by the portion due to right holders in the EC, as opposed to all other right holders.

38. The EC makes no attempt to take these factors into account but rather merely asserts that copyright owners have been deprived of a significant source of income. Without providing any support for this assertion, the EC has not presented a *prima facie* case that any prejudice suffered by EC right holders is unreasonable within the meaning of Article 13 of the TRIPS Agreement.

39. In light of the history of the 1998 Amendment, and the close similarity between that legislation and the voluntary agreement reached between the PROs and the NLBA in 1995, the EC's claim that copyright holders are suffering unreasonable prejudice is even more tenuous. As previously discussed, the PROs voluntarily concluded the agreement with the NLBA that exempts almost the same establishments. Far from alleging unreasonableness, the PROs hailed this agreement as a "fair" deal that "protected" their members' rights. Marilyn Bergman, President and Chairman of ASCAP, explained in ASCAP's 1996 Annual Report, "We are proud to have reached a resolution with the NLBA and it is a good one for both of our organizations".[39]

40. Finally, the analysis of unreasonable prejudice must also take into account the limited resources of the PROs and the small percentage of the market actually licensed by the PROs. In light of the certainty provided by the precise limitations of the Section 110(5)(B) exemption, the PROs can now efficiently redirect their licensing resources toward those establishments not eligible for the Section 110(5)(B) exemption, and thus compensate for any minor prejudice they might suffer. In fact, the largest PRO has already stated its intent to do exactly this, as well as generate additional income by encouraging live and recorded music, for which there is no exemption. Even before the 1998 Amendment went into effect, ASCAP outlined its plan to "reverse the effects" of the legislation: "A critical element of our plan will be to *aggressively license those eligible establishments that have withheld royalty payment and to promote the value of live and mechanical music to a large number of newly targeted establishments.*"[40]

IV. CONCLUSION

41. For all of these reasons, the Panel should find that both Section 110(5)(A) and Section 110(5)(B) of the U.S. Copyright Act meet the standards of Article 13 of the TRIPS Agreement and the substantive obligations of the Berne Convention. Both provisions are limited to certain special cases, and do not conflict with a normal exploitation of the work, nor cause unreasonable prejudice to the legitimate interests of EC right holders. Accordingly, this Panel should dismiss the claims of the EC in this dispute.

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[39] Marilyn Bergman, *Safeguarding the Creative Community*, ASCAP Annual Report, 1 (1996) (annexed as exhibit US-12).

[40] ASCAP, Playback, October-November-December 1998, at 2 (emphasis added) (annexed as exhibit US-13).

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ATTACHMENT 2.2

ORAL STATEMENT OF THE UNITED STATES AT THE
FIRST MEETING WITH THE PANEL

(8 November 1999)

I. INTRODUCTION

1. Good morning, Madame Chair and members of the Panel. We are pleased to have this opportunity to appear before you to present the arguments of the United States in defense of the Section 110(5) music licensing exemptions. We welcome any questions you may have, and we look forward to responding to them.

2. The United States has one of the strongest systems of intellectual property protection in the world. In fact, the 1998 music licensing amendment was part of a larger bill in which the term of protection for copyright was extended by twenty years, giving copyright owners substantially more protection than that required by international agreements. To help the Panel focus on the real issue in this dispute, we have provided you a chart, exhibit US-14, which outlines the scope of the exemptions in the relevant context.

II. BACKGROUND OF SECTION 110(5) EXEMPTIONS

3. Turning to exhibit US-14, we see that the U. S. copyright system grants a bundle of exclusive rights to right holders. Specifically, right holders are granted the exclusive right to do and authorize: (1) the reproduction of their work in copies and phonorecords, (2) the distribution and sale of those copies and phonorecords, (3) the adaptation, translation, arrangement or other transformation of their work, (4) the public performance of their work, (5) the display of their work, and (6) with respect to sound recordings, the public performance by means of a digital audio transmission. Of these rights, the most important to a right holder in musical works are the reproduction, distribution and public performance nights.

4. Section 110(5) effectively limits only one of these exclusive nights – the public performance right. Moreover, Section 110(5) has no effect on the most significant area of public performance exploitation for a copyright owner – the primary performance of his or her work (for example, broadcasting of works over the television and radio). Rather, the exception is limited to only certain secondary uses of broadcasts of public performances, for which the right holder has already been compensated for the primary performance.

5. The EC grossly exaggerates the scope of Section 110(5). It is important to remember that there are two exceptions contained in Section 110(5): the Section 110(5)(A) homestyle exemption (which has been narrowed), and Section 110(5)(B), which was added by the 1998 amendment. Almost all of the EC's allegations are based on speculation regarding the impact of the 1998 Amendment, which created Section 110(5)(B).

6. With respect to the homestyle exemption, the EC acknowledges that its scope has been limited by the 1998 Amendment's removal of nondramatic musical works from its purview. However, the EC attempts to distort the standing body of caselaw developed by U.S. courts over more than twenty years regarding the scope of the homestyle exemption.

7. As we demonstrated in our first submission, in the almost two and one-half decades since the homestyle exemption was enacted, U.S. courts have applied the exception narrowly and in a manner consistent with the text of the statute and with Congress's stated intent. Of the forty decisions reported under Section 110(5) (the homestyle exemption), only three courts have found that the

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defendant was entitled to take advantage of the exception. Of those three cases, only two courts, in *Claire's Boutiques* and in *Edison Bros.,* found that chain stores qualified for the exemption. In both cases the deciding factor was the limited and unsophisticated homestyle-type equipment used in the stores. For example, in *Edison Bros.*, the stores used only a radio-only receivers with two portable speakers placed within 15 feet of the receiver. These two cases are not "illustrative" as the EC has claimed this morning and in their submission. They are the only cases finding that a chain store qualified for the exemption.

8. The mid-1990s brought a call for relief from small businesses against what they viewed as abusive collecting tactics and harassment by the collecting societies. Over the next several years, a broad expansion of the homestyle exemption was advocated by a diverse coalition of businesses. In response, the collecting societies proposed legislation exempting establishments based on size and equipment. Indeed, the legislation that ultimately became Section 110(5)(B) last year, after intensive negotiations with the business coalition and the collecting societies, was remarkably similar to the agreement the collecting societies voluntarily negotiated with the National Licensed Beverage Association three years earlier. At that time, ASCAP, the largest U.S. collecting society, praised the NLBA agreement, calling it a "fair compromise."

III. SECTION 110(5) MEETS ARTICLE 13'S STANDARD

9. As we noted in our first submission, the relevant issue in this case is not whether Berne Convention rights are implicated, but whether the provisions at issue are permissible exceptions under the TRIPS articulation, in Article 13, of the Berne "minor reservations" standard. TRIPS Article 13 articulates the standard by which the permissibility of limitations (or "minor reservations") to exclusive rights must be judged. Indeed, TRIPS Article 13 is based on the Berne standard for exceptions to the exclusive reproduction right, Berne Article 9(2).

10. In considering, the scope of Berne Convention rights such as those at issue in this case, it is important to remember the basic distinction that exists in copyright law between exceptions to exclusive rights and compulsory licenses. Sections 110(5)(A) and (B) are exceptions to an exclusive right. By contrast, with respect to certain rights, Berne permits countries to provide a compulsory license in lieu of an exclusive right. With a compulsory license, an author is deprived of the right to authorize or prohibit use of the work, provided that compensation is provided. Exceptions and compulsory licenses are subject to different standards of review under Berne. Exceptions to exclusive rights are generally subject to the doctrine of "minor reservations." Compulsory licenses are subject to the standard of equitable remuneration, such as articulated in Article 11*bis*(2). For this reason, Article 11*bis*(2) is not relevant to the Panel's consideration of Sections 110(5)(A) and (B).

11. The central issue for the Panel then, is to determine whether, in accordance with TRIPS Article 13, Section 110(5) exempts from copyright infringement "special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

12. As a preliminary matter, Section 110(5) is confined to "certain special cases". The TRIPS Agreement does not elaborate on the criteria for a case to be considered "special", and WTO Members have flexibility to determine for themselves whether a particular case represents an appropriate basis for an exception to exclusive rights. The limiting adjectives "certain" and "special" in Article 13 do indicate that exceptions should be "clearly delineated", rather than vague and open ended.

13. The homestyle exemption is confined to certain special cases – that is, those involving use of a "homestyle" receiving apparatus in small businesses which would not generally pay for a commercial license. This is a fact-specific standard, but nonetheless one that is well-defined. Courts

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have considered the various factors articulated in the text and legislative history of the provision in determining whether a given establishment meets the homestyle exemption standard. Although judges may have weighed the various factors differently in making their individual decisions, these cases reflect the reasonable and consistent application of a fact-specific standard in a common-law system.

14. The 1998 Amendment is also confined to certain special cases, and defines with great precision the establishments that are entitled to benefit from the exception. The size and equipment limitations in the law are unambiguous, and can be applied with ease. The legislative history of the 1998 Amendment demonstrates Congress's view that the straightforward square footage criteria would curtail overreaching and abusive tactics by the collecting societies.

IV. NORMAL EXPLOITATION

15. The two central assessments therefore, are whether Section 110(5) conflicts with normal exploitation and unreasonably prejudices the legitimate interests of the copyright holder. First, limitations and exceptions to exclusive rights by definition deprive a copyright owner of potential compensation for certain uses of his or her work. If every time a copyright owner was deprived of any potential compensation, such deprivation constituted a conflict with normal exploitation, then Article 13 would have no meaning.

16. To determine what constitutes normal exploitation, the Panel must look to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. As outlined in exhibit US-14, under U.S. copyright law, the copyright owner of a musical work has a broad range of exclusive rights. Section 110(5) is an exception to only one of the three most important exclusive rights – the public performance right. Of the uses protected by this public performance right, Section 110(5) affects only certain secondary uses, and does not affect the most significant area of public performance exploitation for the copyright owner, the primary performance of the work. Moreover, even in those establishments exempted by Section 110(5), owners must still pay licensing fees for the use of recorded music, on CD or cassette tapes, and for live performances of music.

17. As we emphasized in our submission, the relevant market to assess the scope of normal exploitation in this dispute is that of the United States. Thus, even though a use may technically fall within the exclusive rights of the copyright owner, it may not normally be capable of being exploited within a particular market or jurisdiction. With respect to the homestyle exemption, even before nondramatic musical works were removed from its scope by the passage of the 1998 Amendment, it was limited to establishments that were not large enough to justify a subscription to a commercial background music service.

18. Indeed, this exception merely codified the licensing practices already in effect by the right holders and their licensing organizations. Since the homestyle exemption only affected establishments that were not likely otherwise to enter into a license, or would not have been licensed under the practices at that time, it did not conflict with the expectations of right holders concerning the normal exploitation of their works.

19. Now that the homestyle exemption excludes nondramatic musical works *(e.g.,* songs commonly played on the radio rather than as part of a larger dramatic performance such as an opera) from its scope, it is even more clear that it does not conflict with the normal exploitation of copyrighted works. For nondramatic musical works (such as pop, jazz or rock songs), there is, at least, a collective licensing mechanism (the collecting societies) that generates *some* revenue from secondary performances. For the remaining works covered by the homestyle exemption, such as operas, plays, and musicals, there is no such system for the collective licensing of secondary performances, and little or no direct licensing by right holders to retail, eating or drinking

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establishments. Owners of copyright in these works do not and have never expected direct revenue from secondary performances in such establishments.

20. In the case of the 1998 Amendment, a significant portion of the establishments exempted by that section had already been exempted, for almost a quarter of a century, by the homestyle exception. Owners of copyrights in nondramatic musical works had no expectation of receiving a fee from these establishments. Moreover, even if the 1998 Amendment had not been passed, many of the establishments now eligible for that exemption would have been able to avail themselves of the nearly identical exemption under the NLBA agreement voluntarily concluded by the collecting societies. We would note that both the NLBA agreement and the 1998 Amendment are based on square footage, as well as equipment. In the NLBA agreement, the square footage requirement is 3,500 square feet, and in the 1998 Agreement it is 3,750 square feet, a difference of only 250 square feet. Thus, even prior to the passage of the 1998 Amendment, copyright owners would not normally have expected a fee from these establishments either.

21. In the final analysis, a small number of establishments may not have been entitled to take advantage of either the homestyle exemption or the NLBA agreement; and thus were newly exempted under the 1998 Amendment. However, given that copyright owners did not expect to receive compensation from most of the uses exempted by the statute, this minor limitation on some secondary uses on broadcasts to the public simply does not rise to the level of a conflict with normal exploitation. Therefore, the Section 110(5) exemptions do not conflict with normal exploitation.

V. UNREASONABLE PREJUDICE

22. The "unreasonable prejudice" standard measures how much the right holder is harmed by the effects of the exception. It is important to recognize that the issue in this analysis is not whether the right holder's interests are prejudiced. Any exception to exclusive rights may technically result in some degree of prejudice to the right holder. The key question is whether that prejudice is unreasonable.

23. The economic effect of the homestyle exemption was minimal even before the passage of the 1998 Amendment, and thus caused no unreasonable prejudice to any legitimate interests of EC right holders. Returning again to the fundamental intent of the provision, it was to exempt from liability small shop and restaurant owners whose establishments did not justify a commercial license. Rather, the homestyle exemption merely codified then existing licensing practices. In general, where no such licenses would have been sought or issued in the absence of an exception, there is literally no economic detriment to the right holder from an explicit exception. As noted by ASCAP, the establishments exempted by the homestyle exemption, with small square footage and elementary sound equipment, are the least likely to be aggressively licensed by the collecting societies and licensing fees for these establishments would likely be the lowest in the range. (ASCAP's letter introduced at the Judiciary Committee Hearings). Furthermore, given their size and that the playing of music is often incidental to their services, these establishments are among those most likely simply to turn off the radio if pressed to pay licensing fees.

24. With the passage of the 1998 Amendment, and the removal of nondramatic musical works from the scope of the homestyle exemption, this section has been limited even further and ceased to have any real economic relevance. As we have demonstrated, there is, for all practical purposes, no substantial licensing market for secondary performances in retail, eating or drinking establishments for the limited category of works now covered by the homestyle exemption (dramatic works such as operas). In other words, these establishments are not and could not be significant sources of revenue for right holders. Therefore, this exception does not prejudice the legitimate interests of these right holders.

25. In the section of its submission entitled "Quantitative effects on copyright owners," and here again today, the EC provides the Panel with a few statistics – meaningless by themselves –

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concerning the square footage of certain drinking, eating and retail establishments in the United States, intended to show the dramatic effect of the 1998 Amendment. For several reasons, however, these numbers are not relevant. They certainly do not serve as a useful basis for estimating the economic impact of the 1998 Amendment on right holders. They fail to account for the majority of the relevant factors that determine whether a right holder would be economically prejudiced at all by the exemption in the 1998 Amendment. Even assuming for the sake of argument the accuracy of the figures cited by the EC, in order to obtain a reasonable estimate of the number of establishments from which copyright owners have truly lost revenue as a result of the 1998 Amendment, one would have to:

- subtract from those gross totals the sizable number of establishments that do not play music;

- subtract from that number the establishments that rely on music from some source other than radio or TV (such as tapes, CDs, jukeboxes, or live music);

- subtract again for the number that were not licensed prior to the passage of the 1998 Amendment and which the collecting societies would not be able to license anyway regardless of the exemption;

- subtract once more for the establishments that would simply take advantage of the NLBA agreement practically identical to the 1998 Amendment if the statutory exemption were not available; and,

- finally, subtract again for the establishments that would prefer to simply turn off the music rather than pay the fees demanded by the collecting, societies.

While these figures are impossible to estimate with scientific precision, there is ample reason to believe that they represent substantial numbers of establishments.

26. Even a realistic estimate of the number of establishments from which copyright owners have lost revenue, however, would not present a true picture of economic harm to EC right holders. Whatever revenues could be collected from these smaller establishments would then have to be reduced again by the portion due to right holders in the EC, as opposed to all other right holders.

27. The EC makes no attempt to take these factors into account but rather merely asserts that copyright owners have been deprived of a significant source of income. Without providing any support for this assertion, the EC has not presented *prima facie* case that any prejudice suffered by EC right holders is unreasonable within the meaning of Article 13 of the TRIPS Agreement.

28. In light of the history of the 1998 Amendment, and the close similarity between that legislation and the voluntary agreement reached between the collecting societies and the NLBA in 1995, the EC's claim that copyright holders are suffering unreasonable prejudice is even more tenuous. As previously discussed, the collecting societies voluntarily concluded the agreement with the NLBA that exempts almost the same establishments. Far from alleging unreasonableness, the collecting societies hailed this agreement as a "fair" deal that "protected" their members' rights.

29. Finally, the analysis of unreasonable prejudice must also take into account the limited resources of the collecting societies and the small percentage of the market they actually license. For example, the revenues generated by ASCAP from general licensing average 14% of overall revenues. This 14% includes significant sources of revenues that are unaffected by Section 110 (5). In addition to radio music played in establishments, it includes use of music at large gatherings such as conventions and in establishments such as circuses, theme parks, shopping malls, sports events and roller and ice rinks. It also includes revenues from certain live performances and from recorded

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music (CDs, records and tapes). Therefore, any revenue loss to the collecting societies as a result of Section 110(5) is necessarily a small fraction of the 14% of total revenues.

30. In light of the certainty provided by the precise limitations of the 1998 Amendment, the collecting societies can now efficiently redirect their licensing resources toward those establishments not eligible for the Section 110(5)(B) exemption, and thus compensate for any minor prejudice they might suffer. In fact, ASCAP has already stated its intent to do exactly this, as well as generate additional income by encouraging live and recorded music, for which there is no exemption. As noted in our first submission, even before the 1998 Amendment went into effect, ASCAP outlined its plan to "reverse the effects" of the legislation.

31. We believe that a thorough analysis of all the issues will lead you to conclude that both the homestyle exemption and the 1998 Amendment are fully consistent with the TRIPS Agreement. Thank you.

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ATTACHMENT 2.3

RESPONSES OF THE UNITED STATES TO WRITTEN QUESTIONS
FROM THE PANEL – FIRST MEETING

(19 November 1999)

I. REPLIES TO QUESTIONS FROM THE PANEL TO THE UNITED STATES

Q.1 Please provide:

(a) a consolidated version of the current text of Section 110(5) of the US Copyright Act together with the current text of Section 106;

(b) a copy of the study by the US Congressional Research Service on the impact of the proposed legislation referred to in paragraph 5.3 of the Australian submission;

(c) if possible, a copy of the full text of the group licensing agreement between the US collective management organizations (CMOs) and the National Licensed Beverage Association (NLBA) referred to in your submission.

(a) There is no official U.S. Government text consolidating Section 110(5). We are providing the Panel with a copy of a commercial service's consolidated Section 110(5), as well as the current text of Section 106 at exhibit US-15.

(b) It is our understanding that the CRS "study" referred to by Australia involved only the preparation of a couple of estimates, resulting in the one chart attached at exhibit US-16.

(c) We have been advised by the NLBA that its Agreement with the collecting societies contains a strict nondisclosure provision, and cannot be released. However, we have attached an NLBA circular, as well as a letter from the organization, both of which provide an overview of its main terms. (*See* exhibit US-17.)

Exceptions and limitations

Q.2 In paragraph 17 of its first submission, the US states – with respect to the EC allegations that Section 110(5) of the US Copyright Act violates Articles 11 and/or Article 11*bis* of the Berne Convention in combination with Article 9.1 of the TRIPS Agreement – "this issue is not in dispute" and that the dispute centres around the exceptions and limitations in Article 13 of the TRIPS Agreement. Could the US clarify whether it accepts that Section 110(5)(A)(B) in its revised form is not consistent with Articles 11 and/or 11*bis* of the Berne Convention read in combination with Article 9.1 of the TRIPS Agreement, but that it claims that Section 110(5) is fully justified by the exceptions and limitations provided in Article 13 of the TRIPS Agreement?

The U.S. does not dispute that Section 110(5)(A) and (B) implicate Articles 11 and 11*bis* of the Berne Convention. That is to say, it affects rights that are protected under those Articles. The question of whether Section 110(5) is consistent with those Articles cannot be determined, however, without looking both to the scope of the rights that they afford, and to the exceptions which are permitted to those rights. Only if Section 110(5) does not fall within the exceptions permitted to Articles 11 and 11*bis* will it be inconsistent with them.

The U.S. does not claim that TRIPS Article 13 permits exceptions or limitations that would not be allowed by the Berne Convention, with respect to Berne rights. The U.S. does claim that

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Section 110(5) is justified under the minor reservations doctrine. TRIPS Article 13 is relevant because it provides an explicit test under which a minor reservation must be evaluated. TRIPS Article 13 is a mechanism for evaluating what would, and what would not, be permissible under Berne. (For further discussion of this issue, please see U.S. Response to Panel Question 14.)

Categories of works

Q.3 Section 110(5)(B) applies to "performance or display of a nondramatic musical work". What was the objective of excluding works other than nondramatic musical works from the scope of application of Subsection (B)? When is "display" of a nondramatic musical work relevant? To what extent does Subsection (B) apply to categories other than musical works, in particular to audiovisual works?

Nondramatic works were the focus of Subsection (B) for two related reasons. First, the impetus for the enactment of Subsection (B) was complaints from business owners about the licensing tactics of the PROs. Since PROs do not license dramatic musical works, there were no complaints about the licensing of such works, and thus there was no reason to address these works in the amendment. Furthermore, in as much as the PROs do not license them, there is effectively no licensing of secondary performances of dramatic musical works in establishments affected by the exemption. To our knowledge, individual right holders do not license these types of secondary performances. Without any licensing taking place in this field, there was no need for Section 110(5)(B) to include such works.

A display of a nondramatic musical work is almost never relevant. The only occasion in which it would conceivably arise would be an audiovisual transmission in which sheet music was held up to the camera. It should also be noted that the display right, while present in U.S. law, is not required by the Berne Convention.

Subsection (B) does not to apply to any categories of works other than nondramatic musical works. The application of this provision to works other than nondramatic musical works, and in particular audiovisual works, turns on the construction of the word "embodying". Subsection (B) exempts only the performances of nondramatic musical works which occur in the process of an audiovisual transmission. While the establishment owner would not be required to pay a license fee for the performance of music during television programs, he or she would still be required to pay the copyright owners of the other works performed, such as cinematographic works. In practice, however, there is no licensing of the secondary performances of other types of works, including audiovisual works, to bars, restaurants and retail establishments.

Establishments covered

Q.4 Under Subsection 110(5)(B) of the U.S. Copyright Act, if (I) an establishment other than a food service or drinking establishment has less than 2,000 gross square feet of space or (ii) a food service or drinking establishment has less than 3,750 gross square feet of space, and if it wants to play nondramatic musical works, can it use any professional equipment or can it use only a homestyle-type equipment described in Subsection 110(5)(A)?

If an establishment falls within the 2,000/3,750 square footage limit, the equipment limitations of Subsection (A) do not apply.

Rights affected

Q.5 What types of transmissions are covered by Section 110(5)(A) and (B), in particular:

(a) Please specify separately in respect of Subsection (A) and (B) whether they cover:

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(i) original broadcasts over the air;

Both Subsections A and B would cover if the broadcasts originated from a radio or TV station licensed by the FCC.

(ii) original satellite broadcasting;

Both Subsections A and B would cover.

(iii) rebroadcasting by terrestrial means or by satellite;

Both Subsections A and B would cover.

(iv) cable retransmission of original broadcast;

Both Subsections A and B would cover.

(v) original cable transmission or other transmission by wire.

Both Subsections A and B would cover.

(b) In the above-mentioned cases, is there a difference between the treatment of audio and audiovisual transmissions?

Generally, there is no difference in treatment except in regard to the technical aspects of the receiving devices.

(c) What are the objectives and implications of the specific reference to audiovisual transmissions by a cable system or satellite carrier in Subsection (B)? What situations are intended to be either included or excluded?

Because cable systems and satellite carriers are not licensed as "radio or television station licensed as such" by the FCC, they were specifically included in Subsection (B). This makes application of the provision uniform and predictable, applying to most audiovisual transmissions without distinctions between originating source.

(d) Does Subsection (A) apply to transmissions regardless of whether they are intended to be received by the general public (cf. the wording of Subsection (B))?

Under Subsection (A), the performance must be by "the public reception of the transmission on a single receiving apparatus . . .". If the reception was not public, then Subsection (A) would not apply. For both sections, if transmissions are not received by the public, then they would not implicate the author's exclusive rights under Berne Article 11 and 11*bis*. For example, if the radio were playing in a person's car, or in the private back office of a restaurant, there would be no exercise of the public performance right.

As the Panel notes, for Subsection (B), there is the added requirement that the transmission must have been *intended* to be received by the general public. Presumably this would exclude from the exemption transmissions intended for a more select audience, such as music subscription or on-demand services. There is no such requirement in Subsection (A). For all practical purposes, however, this limitation is implicit in Subsection (A), since homestyle devices are not likely to be capable of receiving other types of transmissions than those intended for the public.

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Q.6(a) Are Internet transmissions covered by Section 110(5)(A) and (B)?

Internet transmissions would generally not be covered by Sections 110(5)(A) or (B) because those sections apply only to the public performance right. See answer to sub-question (b) below. It is unclear whether the performance aspect of an internet transmission would be covered by either Section 110(5)(A) or (B). Under Subsection (A), the courts have not determined whether a computer would be considered a "single receiving apparatus of a type commonly used in homes", although it should be observed that computers differ in many ways from the stereo and radio receivers contemplated by the legislative history of the homestyle exception and the case law of Section 110(5)(A). In the case of Subsection (B), most Internet transmissions will not originate from television or radio stations licensed as such by the FCC, nor will they be AV transmissions by satellite or cable systems. However, if an FCC-licensed broadcaster itself streams its signal on the Internet, the performance aspect of the broadcast might fall within Subsection (B).

(b) Paragraph 16 of the US submission says that "establishment owners generally must still seek a licence for the reproduction and possibly distribution rights implicated by Internet transmission". Please explain to what extent reproductions are created by a person who listens to a radio transmission "streamed" over the Internet and whether an authorization is required for such reproductions, as well as under what circumstances a person who receives radio transmissions "streamed" over the Internet would violate the distribution right. Please clarify whether any small stores or restaurants covered by Section 110(5) have acquired a reproduction or distribution licence for communicating by a loudspeaker music streamed over the Internet, and from whom such licences have been or could be obtained.

Temporary reproductions are created by all transmissions that traverse a computer network. This a technical requirement of sending digital information – the information is sent from one computer, and goes through numerous other computer servers before it reaches its final destination. Each one of the computer servers through which the information passes makes a copy of that information in the process of passing it on. Under U.S. law, these copies implicate an author's reproduction right.

The process of creating temporary reproductions occurs whether or not a transmission is "streaming". The term "streaming" means only that a reproduction of the entire work may not be created on the recipient's computer. Reproductions still occur as the information is transmitted across the network.

The distribution right could be implicated by copies of the work, or parts of the work, being deposited on the recipient's computers. This occurs with many streaming technologies, in which portions of the streamed work are "cached" on the recipient's computer as a backup or buffer to the portion being performed or displayed on-screen.

The United States has no information regarding whether or how business owners have obtained or could obtain licenses for the practices described above. The idea of a business owner performing broadcast works over a computer for the benefit of his or her patrons is still a novel one, with which we have no experience.

Even in the event that such forms of reception become more widely used, it is important to note that the owner of an establishment would receive no greater, or broader, ability to play music than he receives from his radio. In consultations prior to this Panel, the EC voiced concerns that this Subsection would apply to a variety of new music services that could become available over the Internet, such as on-demand music. However, since the Subsection is limited to transmissions "intended to be received by the general public," a

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restaurant or small business owner would only have access to the same broadcasts he or she could get over a common radio or TV. Access to those same broadcasts over a computer, and only to those originating from the relatively small number of licensed radio stations, pose no additional threat to copyright owners.

(c) Assuming that a food service or drinking or other establishment would be required to acquire a reproduction and/or distribution licence for the public performance of music transmitted over the Internet, would this affect the scope to which it would be permissible to provide limitations to the public performance right in the law?

Yes, the requirement to obtain a license for the reproduction and/or distribution of music performed over the internet could affect the scope of permissible exceptions to the public performance right. Although it is difficult to answer this question without any licensing experience in this area, it appears that right holders could take into account in their licensing practices for reproduction/distribution any diminished revenues for performances. The exception from the public performance right might then cause right holders no economic prejudice whatsoever. Moreover, right holders could simply withheld authorization of the reproduction or distribution in any instance in which they wished to prevent an unauthorized public performance.

Q.7 What is the purpose for exempting under Section 110(5) communications to the public of music broadcasts but not of music from tapes or CDs or live music? In which respect are administrative difficulties with licensing thousands of small establishments for playing broadcasts more difficult to surmount than those arising in the context of collecting royalties for playing tapes or CDs or live music?

The United States does not argue that administrative difficulties in licensing small establishments are more severe with respect to broadcasts as opposed to CDs or live music. Part of the rationale for this distinction is a historical one. In the *Aiken* decision, the Supreme Court decided that a radio broadcast was not a public performance. When Congress overruled the rationale, though not the result of *Aiken*, in the 1976 Copyright Act by declaring that playing the radio was a public performance, it created an exemption to the exclusive right of public performance based on the fact pattern of the *Aiken* case (ie., a small establishment of approximately 1055 square feet with limited receiving equipment). The equitable consideration that the copyright owner had already been compensated once is reflected in the legislative history of both Sections 110(5)(A) and (B). Congress thus determined to encourage small business by creating the exception, but at the same time limited the scope of that exemption to broadcasts.

Governmental proceedings to set or adjust royalties

Q.8 Please clarify the purpose of a new paragraph added to Section 110 concerning the impact of the exemptions provided under paragraph (5) on any administrative, judicial, or other governmental proceedings to set or adjust royalties, in particular whether the intention is that the exemptions can or cannot be reflected in the royalties payable to right holders for broadcasting or other transmissions.

Our understanding is that this paragraph was drafted by the collecting societies to ensure that the exemption in Section 110(5)(B) would not be taken into consideration in any proceeding to determine the amount of royalties each of the right holders should be paid by the collecting societies. One can surmise that the provision was the result of a business decision on the part of the collecting societies that the passage of Section 110(5) should not affect the distribution of their royalty payments to right holders.

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Impact on the market

Q.9 Please provide any available information or estimations on the actual or potential beneficiaries of the exemption in Section 110(5), in particular:

(a) Percentage of food service or drinking establishments and establishments other than food service and drinking establishments (below other establishments) that benefitted from the original "homestyle" exemption;

In 1996, the Congressional Research Service estimated that based on the square footage guidelines of the *Aiken* case (1,055 square feet), approximately 16% of eating establishments and 13.5% of drinking establishments, were eligible for the homestyle exemption. Combined with the estimate from the National Restaurant Association that approximately x% of restaurants use the radio (and x% use the television)[1], the result is that less than 5% of restaurants and drinking establishments might have been eligible for the original homestyle exemption with respect to radio music and less than 3% with respect to television usage. Exhibit US-18 (Letter from the National Restaurant Association, 18 November 1999).

(b) Percentage of food service or drinking establishments and other establishments that fall under the relevant size limits of Subsection (B) (3,750 square feet and 2,000 square feet respectively);

The National Restaurant Association (NRA) estimates that 36% percent of table service restaurants in the United States (those with sit-down waiter service) are less than 3,750 square feet, and approximately 95% of fast-food restaurants are less than 3,750 square feet. Exhibit US-18. In 1996, the Congressional Research Service conducted an analysis of a legislative proposal from ASCAP and BMI that would have exempted restaurants under 3,500 square feet. CRS estimated that 65.2% of restaurants would fall under this size limit and 71.8% of drinking establishments. Exhibit US- 16. The United States has not been able to obtain information regarding the number of retail establishments that may fall under 2,000 square feet.

(c) Percentage of such establishments either below or above the limit that are likely to be exempted when other factors, in particular the limits on equipment, are taken into account.

The United States has no access to data regarding the establishments likely to be exempted by Section 110(5)(B) based on equipment usage.

Q.10 Please provide information on the licensing practices of the three US CMOs in regard to public performance of music by food service and drinking establishments and other establishments, in particular:

The United States is pleased to provide the following information in response to the Panel's questions numbered 10, 11 and 12. We would like to note that, as we mentioned at the first meeting with the Panel, in preparation for this case we requested information from the largest U.S. collecting societies (ASCAP and BMI) regarding their licensing practices, but that information was not provided. In response to the Panel's questions, we have renewed and reiterated these requests to the collecting societies. If they are responsive, we may be able to provide the Panel with additional information in the future. See Exhibit US-19.

[1] Confidential Exhibit US-18.

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(a) The percentage of such establishments in which broadcast music was licensed before the 1976 Copyright Act;

The United States does not have detailed information regarding the pre-1976 period; however, in the House Report cited in the U.S. First Submission, (Exhibit US-1), Congress found that the majority of beneficiaries of the homestyle exemption were not licensed.

(b) The percentage of such establishments in which broadcast music was licensed since the entry into force of the 1976 Copyright Act until the entry into force of the Fairness in Music Licensing Act (for the last three years for which data are available);

According to surveys conducted by the National Restaurant Association in 1996-1997, 16% of table service establishments and 5% of fast food establishments in the United States were licensed before the 1998 Amendment. According to Census Bureau Data, in 1996 there were approximately the same number of table service and fast food restaurants in the United States. (Confidential Exhibit US-18, NRA letter reporting estimates based on Census Bureau figures of 183,253 table service restaurants in the United States and 185,891 quick-service restaurants). Thus, averaging 16% and 5%, it appears that approximately 10.5% percent of restaurants were licensed in the United States.

Information from ASCAP, the largest collecting society also indicates the relatively low level of licensing of establishments. In her testimony before Congress in 1997, Marilyn Bergman, the President of ASCAP stated that "the total number of ASCAP restaurant licensees does not exceed 70,000." Exhibit US-20, page 177. The Census Bureau figures cited above indicate that there are approximately 368,044 total restaurants (table and quick-service) in the United States. Thus, it appears that even the largest U.S. collecting society, ASCAP, estimates that it licenses no more than 19% of the restaurants in the United States.

(c) To what extent collecting societies license the use by such establishments of music other than broadcast music (such as live music and music performed by means of sound recordings or jukeboxes) (for the last three years for which data are available).

The United States has no data regarding the extent to which the collecting societies attempt to collect from establishments under 3750 or 2000 square feet for the use of live music, recorded music or jukeboxes.

Q.11 Please provide any available information or estimations on the revenues collected by the US collecting societies (for the last three years for which data are available), in particular:

(a) The total revenues from the licensing of public performance of music divided between the major categories of uses, including (a) broadcasting and retransmission within the meaning of Article 11*bis*(1)(I) and (ii) of the Berne Convention (b) public communication within the meaning of Article 11*bis*(1)(iii) and (c) other rights, including those under Article 11(1) of the Berne Convention;

ASCAP's annual reports for 1995-1997, attached as exhibit US-21, indicate that the revenues from broadcasting are by far its most significant source of revenue.

Revenues from the licensing of public performances of music by television broadcast amounted to 32%-33% of ASCAP's annual revenues in 1995, 1996 and 1997. Revenues from radio broadcasts amounted to 25%-26% of ASCAP annual revenues in each of those same years. The actual revenue figures are as follows (in millions):

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	1995	1996	1997
Radio	$110	$120	$124.7
TV	$141.8	$158.4	$155.2
Total revenue	$436.8	$482.6	$482.1

Precise figures on the amount of revenues from public communication by loudspeaker are not available. The only available statistics are ASCAP's receipts for so-called "general and background licensing", which include all licensing revenues from food, drinking and retail establishments, as well as from licensees such as conventions, circuses, theme parks and sports events. It must be remembered that these general figures include all licensing revenues from such establishments, including revenues from the playing of recorded music and live bands. For this reason, these figures do not represent the potential loss of revenue from the Section 110(5)(A) or (B) exemptions, but most certainly represent an upper bound on those losses. For each of the years 1995, 1996 and 1997, general licensing revenue amounted to approximately 14% of ASCAP's total revenue.

	1995	1996	1997
General licensing	$63.2	$66.2	$67.3

The other sources of revenue reported by ASCAP in each of the three years include revenues from symphonies and concerts (1%), revenues from foreign collecting societies (25%-26%), and interest and member dues (1%).

(b) As regards the revenues collected from food service and drinking establishments and other establishments, what is the breakdown as between royalties for the public performance of broadcast music and the public performance of music from other sources;

As described above, in ASCAP's case, total revenues from food service, drinking and other establishments is less than 14% of total revenues for the years 1995-97. The United States does not have access to data itemizing ASCAP's general licensing revenues by broadcast music and music from other sources.

Surveys conducted by the NLBA, however, indicate that the use of recorded music from CDs and tapes (26% in member establishments) or background music services (18%) is very significant in its members establishments, and approximately as prevalent as the use of radio music (28%). The same survey showed that the public performance of live music (37%) was even more prevalent than the use of radio music. See Letter from NLBA (November 18, 1999) Exhibit US-17. Given that many establishments play music from several different sources, these percentage figures do not represent the percentage of total royalties collected for the use of music from each of these sources. For example, the percentage of royalties collected for the use of radio music is almost certainly less than 28% because many establishments that play radio music also play music from other sources.

The United States estimates that approximately 74% of all restaurants play some kind of music. From this data, as well as confidential NRA estimates, it can safely be assumed that no more than 44% of licensing fees from restaurants can be attributed to radio music.

(c) Breakdown of these revenues between various sources of revenue, in particular the percentage of the revenues collected from food serving and drinking establishments and other establishments; to the extent possible, please break down these figures between

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food service and drinking establishment and other establishments that fall below and above the respective size limits provided for in Subsection (B);

To the extent that this information is available, it has been provided in the answer to question 10 and sub-questions (a) and (b), above.

(d) What is the likely impact of the amended Section 110(5) on the revenues collected earlier from such establishments.

The effect of the amended Section 110(5) on the revenues of the collecting societies is likely to be minimal. ASCAP collects just 14% of its total revenues from general licensees, including eating, drinking and retail establishments. Much of this revenue is for the public performance of live or recorded music, rather than broadcast music. Based on the data provided by the NLBA and other sources, it can be conservatively estimated that radio music accounts for a maximum of 28% to 44% of revenues from eating and drinking establishments. 28%-44% of 14% is equivalent to 3.9% - 6.2% of total revenues. In addition, this figure must be reduced further, since all restaurants and bars are not eligible for the Section 110(5) exemptions. Even using the EC's figure that 70% of all U.S. restaurants would be exempt under Section 110(5)(B), it appears that the exception for radio music will have a maximum effect on revenues of 2.7% - 4.3%.

Q.12 Can the US confirm the EC statement in paragraph 77 of its oral statement at the first substantive meeting that at least 25 per cent of all music played in the US belongs to EC copyright owners? If not, could the US give alternative estimates?

The United States does not agree with the EC statement. In particular, we cannot agree with the EC's implication that 25% of royalties collected in the United States are due to EC right holders. In fact, the United States is surprised by the EC's statement, given that a 1998 internal EC analysis of the economic effect of the homestyle exception on EC right holders estimated that just 6.2% of ASCAP revenues were distributed to all foreign collecting societies, and that just 5.6% of BMI revenues were due to all foreign collecting societies. Obviously, the percentage payable to EC collecting societies would be significantly less than these figures for total payments to all foreign collecting societies. European Commission, Examination Procedure Regarding the Licensing of Music Works in the United States of America (23 Feb. 1998).

Q.13 Please provide any market information concerning other countries that you would consider relevant to the case at hand.

Market conditions in the United States are the most relevant to the case at hand and thus the United States does not believe that market information concerning other countries is necessary to the resolution of this case. Right holders' legitimate expectations regarding the exploitation of their work in a particular market must be guided by the conditions in that market.

International treaty obligations

Q.14 Could the US explain how, absent express wording to that effect in the TRIPS Agreement, Article 13 of the TRIPS Agreement "constitutes the articulation" of the "minor reservation" doctrine under the Berne Convention? Does the US claim that Article 13 of the TRIPS Agreement can be invoked on its own or only through the "minor reservation" doctrine under the Berne Convention?

During the negotiation of Article 13 in TRIPS, the question posed by the Panel was discussed at length, and there were differing views regarding the need for Article 13. Eventually, the position that prevailed recognized that practically every country had small exceptions to exclusive rights

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under Berne, either through statutory law, case law or practice, and that the inclusion of Article 13 was an effective way to measure the appropriateness of such exceptions.

In the draft of the TRIPS text from July 23, 1990 (W/76), this statement is made regarding Article 13: "In respect of the rights provided for at point 3, the limitations and exemptions, including compulsory licensing, recognized under the Berne Convention(1971) shall also apply *mutatis mutandis*". Furthermore, a prominent scholar, and author of a book on the negotiating history of TRIPS comments:

> The interpretation of [Article 13] is possible only in the light of Article 2(2) and 9(1) of the Agreement and, by incorporation, Article 20 of the Berne Convention. Hence, Article 13 does not create new exceptions, even though when read separately from these other provisions, one would be tempted to say that it allows countries to create new compulsory licenses. . . . Yet this line of argument must fail. Introducing *new* compulsory licenses would in almost all cases violate the Berne Convention. Article 13 allows a dispute settlement panel to review exceptions, including the so called "small exceptions", to ensure that they pass the test. . . [Quotes report from the Brussels Conference mentioning minor reservations applicable to Article 11, 11*bis*, 11*ter*, 13 and 14.] When these exceptions are invoked, they may from now on be submitted to the general test of Article 13. . . (emphasis added).
>
> *D. Gervais, The TRIPS Agreement: Drafting History and Analysis, 89-80 (1998).*

Importantly, this interpretation is also confirmed by the language and history of subsequent treaty affirming Berne rights. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) were adopted by the WIPO Diplomatic Conference on December 20, 1996, at Geneva. The WCT requires compliance with the substantive rights of Berne (WCT, Article 1(4)), and includes language very similar to Article 13 of TRIPS. Furthermore, the WCT specifically provides that it is a "special agreement within the meaning of Article 20 of the Berne Convention". WCT, Article 1(1). With respect to both the WCT (in Article 10) and the WPPT (in Article 16), it was believed important to incorporate the same standard for judging limitations and exceptions as already applied in the TRIPS Agreement and the Berne Convention.

The WCT explicitly clarifies the application of the standard set forth in TRIPS Article 13 to existing provisions of the Berne Convention as well as the rights established in the new Treaty. Article 10(1) of the WCT provides that:

> (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 10(2) clarifies that this standard also applies in respect of the implementation of any limitations on or exceptions to any rights under the Berne Convention:

> (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with

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> a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The Agreed Statement concerning Article 10 of the WCT further buttresses this view:

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10 neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

If no minor exceptions or limitations were permitted under Berne, there would be no reason for Article 10(2) of the WCT or the cited provision of the Agreed Statement.

Article 10 of the WCT reflects the same text included as Article 12 in the Basic Proposal for the 1996 Diplomatic Conference (CRNR/DC/4). The commentary on the Basic Proposal is enlightening. After observing that the TRIPS Agreement already enunciated this standard for permissible limitations and exceptions to rights, it states that "[n]o limitations, not even those that belong in the category of minor reservations, may exceed the limits set by the three step test".

The EC and the U.S. are signatories of both the WCT and the WPPT.

Q.15 In the light of Article 2.2 of the TRIPS Agreement and Article 20 of the Berne Convention, can Article 13 of the TRIPS Agreement derogate from the requirement under Article 11*bis*(2) of the Berne Convention to provide "equitable remuneration"?

Article 13, as explained above, in no way derogates from the protection afforded under the Berne Convention and consequently is entirely consistent with TRIPS Article 2.2 and Berne Article 20. In fact, Article 13 strengthens the protection under the Berne Convention, by providing explicit criteria to judge exceptions where none existed before.

In particular as applied to Article 11*bis*(2), Article 13 does not derogate from the right to equitable remuneration. Minor exceptions apply in respect of many of the rights under Berne, explicitly including Article 11 and 11*bis*. Should a party choose to implement a compulsory licensing regime under Article 11*bis*(2), as opposed to having a small exception to that right, such a system must provide for equitable remuneration. The U.S. compulsory licensing regime, for example, as it applies to secondary retransmissions of broadcast signals by cable systems clearly falls within, and complies with, this provision. (For further discussion of this issue, please see US Response to Panel Question 6 to US and EC.).

Q.16 Are there exceptions similar to the US Section 110(5)(A) or (B), or examples of "minor reservation" exceptions in the copyright laws of other countries?

There are numerous exceptions similar to U.S. Section 110(5)(A) and (B), and examples of minor reservation exceptions, in the copyright laws of other countries. Although the United States has not been able, in the time provided, to review the copyright laws of all other WTO or Berne Members, even a limited review of the copyright laws of a handful of WTO members reveals a number of exceptions to the public performance right, including a number in EC Member States.

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For example, the Australian copyright law provides a number of exceptions to the public performance right. Section 46 provides an exemption for public performances by wireless apparatus or by a record "at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests". *Copyright Act 1968 (amended 1994), Section 46.* The commercial nature of this exemption is notable, as it applies to hotels and guest houses. Parliament of Australia, Standing Committee on Legal and Constitutional Affairs, "Don't Stop the Music!: a report on the inquiry into copyright, music and small business", 29 (May1998) (available at www.aph.gov.au/house/committee/laca/reports/copyrigh/index.htm. Australia also exempts public performances for educational purposes. *Id., Section 28.*

Under the Belgian copyright law, Section 22, an author "may not prohibit . . . communication to the public of a work shown in a place accessible to the public where the aim of the [] communication to the public is not the work itself". *Law on Copyright and Neighboring Rights 1994 (amended 1995), Art. 22(1).* Belgium also has an exception for the "free performance of a work during a public examination where the purpose of the performance is not the work itself, but assessment of the performer . . ." *Id.*

Under the Copyright Law of Finland, "A published work may also be publicly performed in events where the performance of such works is not the main feature, provided that no admission fee is charged and the event is not arranged for profit". *Copyright Act (amended 1997) Law 446/ 1995, Art. 21.* The same law also contains an exemption for public performances "in connection with religious services and education". *Id.* Denmark also provides an exception for public performances of non-dramatic works on radio or television "on occasions when the performance of such works is not the main feature of the event, provided that no admission fee is charged and the event is not for profit". *Act on Copyright 1995, Sec. 21.*

New Zealand exempts public performances of musical works at educational establishments. *Copyright Act 1994, Section 47.* The Philippines excepts public performances for educational and charitable purposes. *Intellectual Property Code of the Philippines, Sec. 184* (1997). India, in addition to educational exemptions, also exempts "the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience . . ." *India Copyright Act 1957 (amended 1994), Sections 52(l), 52(I).*

Canada provides a number of exceptions to the public performance right. *Copyright Act 1994 (amended 1997).* It provides several exceptions for educational purposes, *see Sections 2 9.4 & 29.5,* and for performances "at any agricultural or agricultural-industrial exhibition or fair," *Section 32.2(2),* as well as a blanket exception for any public performance of a musical work – whether live or by "communication signal" – by a religious organization or institution, education institution, charitable or fraternal organization in furtherance of a religious educational or charitable object. *Section 32.2.(3).* The later section specifically provides that under such circumstances, no such organization "shall be held liable to pay any compensation". *(Emphasis added.)*

South African law provides that "the copyright in a literary or musical work shall not be infringed by the use thereof in a *bona fide* demonstration of radio or television receivers or any type of recording equipment or playback equipment to a client by a dealer in such equipment. *Copyright Act of 1978 (amended May 1995).*

Finally, the United States references Brazil's letter to the Panel of 17 November 1999, in which Ambassador Amorim noted that Brazilian copyright law contains exceptions in the sense of the minor reservations doctrine.

Q.17 Precisely how do you justify the submission that the provisions of Section 110(5)(A) and (B) constitute a special case within the meaning of Article 13 of the TRIPS Agreement?

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Article 13 requires that exceptions be limited to certain special cases. The Oxford Dictionary defines "certain" as "determined; fixed" and "definite". *The New Shorter Oxford Dictionary* (ed. Lesley Brown), 364 (1993). The word "special" is defined as "exceptional", "distinguished from others of the kind by a particular quality or feature; distinctive in some way", "appointed or employed for a particular purpose or occasion", "having an individual or limited application or purpose", and "containing details, precise, specific". *Id.* at 2971. These definitions contain a significant degree of overlap, and the key criterion that emerges from the requirement that exceptions be limited to "certain, special" cases is that the exception be both well-defined and of limited application. One report of the TRIPS negotiating history explains as follows: "When these exceptions are invoked, they may from now on be submitted to the general test of Article 13, which should be interpreted on the basis of Article 9(2) of the Berne Convention. The two tests contained in that Article are cumulative. In addition, any exception must be clearly delineated so as to apply only to "certain special cases". *Gervais, at 90*.

The negotiating history of Berne Article 9(2) reinforces this view. The original text proposed for Article 9(2) listed three areas of permissible exceptions, the third of which was "certain particular cases, provided (I) that reproduction is not contrary to the legitimate interests of the author, and (ii) that it does not conflict with a normal exploitation of the work". The Conference decided, however, that a more general formula for exceptions was preferable, and instead of the three areas of exceptions, adopted a proposal of the United Kingdom to modify the text to allow exceptions "in certain special cases" that met the two conditions. WIPO, *Records of the Stockholm Conference*, 1144-46, paras. 78, 81, & 86 (1967). The WIPO Guide to the Berne Convention also supports the idea that the phrase "certain special cases" in Article 9(2) is not intended as a separate threshold requirement for exceptions, and does not discuss the imposition of any limitation on the purposes for which an exception can be made. *WIPO – Guide to the Berne Convention*, 55, para. 9.6 (focusing exclusively on the "two" conditions that limit the power to make exceptions: conflict with normal exploitation and unreasonable prejudice).

Thus, the concept of "special" need not include the concept of the purpose of the exception. To the extent that the purpose of an exception is relevant under TRIPS Article 13, it is only necessary that the exception have a particular purpose. By itself, the term "special" does not convey any priority of purpose, or preference for one purpose over another.

Moreover, in considering whether an exception constitutes a "special case," it is critical that a WTO Panel not judge the desirability of a country's public policy rationale for an exception. In an organization as diverse as the WTO, a Panel should not determine the acceptability of a Member's public policy objectives. There is no support in the TRIPS Agreement for a Panel to determine acceptable policy rationales for exceptions under Article 13 of TRIPS. The purpose for which countries may make exceptions to exclusive rights is not the central focus of Article 13; rather, it is tangentially relevant, if at all. It is the scope of the exception and its effect on right holders that is key.

As discussed in the U.S. first submission, paragraphs 24-26, the exceptions in Sections 110(5)(A) and (B) of the U.S. Copyright Law are well-defined and limited to particular circumstances. Section 110(5)(A) is limited to cases involving use of a homestyle receiving apparatus, and Section 110(5)(B) is confined to cases involving establishments meeting its clear size and equipment requirements.

Moreover, important public policy concerns underlie both Sections 110(5)(A) and (B). With respect to 110(5)(A), the record is clear that Congress was concerned with small "mom and pop" businesses. Small businesses play a particularly important role in the American social fabric. They foster local values and innovation and experimentation in the economy. Small businesses also create a disproportionately greater number of economic opportunities for women, minorities, immigrants,

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and those formerly on public assistance, and thus are an essential mechanism by which millions enter the economic and social mainstream. *The State of Small Business: Report of the President*, (U.S. GPO: Washington) 3 (1998).

Important public policy concerns also support the exception in Section 110(5)(B). With respect to many of the businesses exempted, the same concerns relating to the social importance of small businesses apply. *E.g.*, Congressional Record (Oct. 7, 1998); Letter from Representative James Sensenbrenner, Jr. to Members of Congress, *"Key small business vote next week"* (Mar. 20, 1998). In addition, the legislative history of this provision is replete with concern over abuses of the PROs. By exempting small businesses, many of whom the collecting societies had already agreed to exempt in the context of the NLBA Agreement, Congress believed that it was resolving the issue of abusive licensing practices without causing any unreasonable prejudice to right holders.

Q.18 Does Article 13 of the TRIPS Agreement permit the balancing of revenues generated or likely to accrue under individual exclusive rights, *inter alia*, for purposes of determining "normal exploitation" of works, and/or "unreasonable prejudice to legitimate interests of rights holders", or is it necessary to consider each individual exclusive right separately?

This question, like question 19, appears to assume that the Panel must *either* consider each right separately *or* consider all rights together. On the contrary, both paradigms are relevant. Exceptions should be considered in the context of all the exclusive rights granted to the right holder, as well as the context of the particular right to which the exception applies.

Exceptions can take many forms. Some exceptions might represent a great intrusion on one particular exclusive right, and no intrusion on any other exclusive right. Other exceptions might represent a lesser degree of intrusion on several exclusive rights. Both kinds of exceptions might violate the TRIPS Agreement, and the analytical framework of Article 13 must take both situations into account.

Thus, a Panel considering an exception should consider the scope of the exception *vis-à-vis* the scope of all the right holders' exclusive rights, as well as the scope of the exception *vis-à-vis* the exclusive right to which it applies. Whether an exception applies to one exclusive right or several is relevant in the analysis of conflict with normal exploitation and unreasonable prejudice. Similarly, the degree to which an exception affects a particular exclusive right is also relevant to that analysis. Whether any particular exception is determined to conflict with normal exploitation or cause unreasonable prejudice is ultimately a highly fact-specific inquiry that will turn on the precise circumstances of the exception and the market at issue.

The text of Article 13 supports this broad analysis. Article 13 requires that exceptions be limited to cases that do not conflict with a normal exploitation of the "work", not a normal exploitation of the particular right affected. If the drafters had meant to limit the analysis to the exclusive right to which an exception applied, the provision could easily have referenced the "normal exploitation of such exclusive rights". It is also significant that Article 13 also references unreasonable prejudice to the "legitimate interests of the right holder" without any limiting language regarding their legitimate interests in a particular right.

The fact that an exception must be evaluated in the overall context of the rights granted by a country does not imply that a country could completely eliminate an exclusive right if that right were economically unimportant. TRIPS established minimum standards. The exclusive rights set forth in Articles 1-21 of the Berne Convention (minus 6*bis*) and in Part I, Section 1 of TRIPS must be provided. Moreover, Article 13 references "limitations or exceptions" to exclusive rights. The abolition of an exclusive right is not equivalent to a limitation to such right. So long as the exclusive

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right is provided, however, the relative economic importance of that exclusive right would be a relevant factor in the Article 13 analysis.

Actual revenues from exclusive rights are also important in the Article 13 analysis. Marketplace realities guide the expectations of benefit of copyright owners. In determining the scope of normal exploitation, and unreasonable prejudice it is highly appropriate to look at marketplace realities. The concepts of normal exploitation and unreasonable prejudice cannot be determined in the abstract.

Q.19 In considering criteria for determining "normal exploitation" and/or "unreasonable prejudice to legitimate interests of rights holders" under Article 13 of the TRIPS Agreement, is it necessary to consider each individual exclusive right separately?

See answer to Question 18, above.

Q.20 Could the US further explain how the provision of Article 11*bis*(2) of the Berne Convention could amount to a greater degree of derogation from substantive copyright law than an exception under Article 13 of the TRIPS Agreement?

This question could also be phrased: "How could a right of remuneration under Article 11*bis*(2) of the Berne Convention amount to a greater degree of derogation from exclusive rights than an exception under the minor reservations doctrine applicable to Article 11*bis*?" As discussed above, Article 13 does not "provide" exceptions that are not already provided for by Berne, it merely furnishes a standard under which they can be judged.

Generally speaking, a compulsory license may be much broader, and may abrogate more rights, than an exception. The minor reservation doctrine, applied to Article 11*bis*, would only allow narrow and reasonable exceptions to a right holder's rights. Should a country choose to substitute a right of remuneration for the exclusive right under Article 11*bis*, rather than creating a narrow exception targeted to address a particular problem, it could result in a far greater diminution of revenues. A compulsory license under 11*bis*(2) potentially could abrogate all of a right holder's rights under Article 11*bis* – including his right to license his work to radio stations, television stations, and cable systems. Especially in the context of certain audiovisual works, which receive virtually all their revenue through this mechanism, it can be seen how broad this abrogation would be. Furthermore, although the right holder would still be entitled to some compensation for use of the work, he cannot set the price of that compensation himself. It will most likely be set by an administrative or quasi-governmental entity, which could determine that the work is worth far less than the right holder himself believes, or could get in a free market.

In contrast, under the minor reservations doctrine, outright exceptions to the Berne rights must be narrow, and cannot conflict with normal exploitation or prejudice a right holder's legitimate interests in the work. Exceptions which pass this test will likely be narrower and have less impact on the right holder than the licenses authorized by Article 11*bis*(2).

In sum, under Article 11*bis*(2), a country can put any condition on a right holder's rights, provided that he is not deprived of equitable remuneration, which he does not even have the authority to determine himself. In contrast, under the minor reservations doctrine, as judged through TRIPS Article 13, countries can only create narrow exceptions which have a reasonable effect.

Q.21 Does the US protect broadcasting rights through the performance rights protected in Section 106 of the US Copyright Act?

Assuming that by "broadcasting rights" the Panel is referring to the right of broadcasting of the copyright owner under Article 11*bis* (as opposed to broadcasters' rights in the programming that they produce), the simple answer is yes.

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Broadcasting is only one means by which a work may be publicly performed. The copyright owner generally has the exclusive right under U.S. copyright law to authorize or prohibit that broadcast. The right of public performance in Section 106 of the U.S. Copyright Act includes the broadcasting right in Berne Article 11*bis* as well as other types of public performances.

II. REPLIES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL ADDRESSED TO BOTH PARTIES

Q.1 Please explain the extent to which the case law concerning Section 110(5) cited in your respective submissions is relevant for the purposes of interpreting the present subsection (A) of that paragraph.

The United States believes that the case law is relevant because Section 110(5) was TRIPS consistent even before non-dramatic musical works were excluded from its scope. Moreover, the case law also provides guidance as to the bounds of the exception with respect to works other than non-dramatic musical works.

Categories of works

Q.2 The Panel understands that the text of the original Section 110(5) is identical to that of the present subsection (A) minus the words "except as provided for in subparagraph (B)". The preparatory work reproduced in exhibits EC-3 and US-1 (H.R. Rep. No. 94-1476 (1976)) explains that the provision "applies to performances and displays of all types of works". Paragraph 31 of the EC submission and paragraph 9 of the US submission (and certain other paragraphs) contain an interpretation according to which this text, as contained in subsection (A), is intended to exclude from its scope "nondramatic musical works". Please clarify your interpretation of the text of this provision, on the one hand, as part of the original paragraph, and, on the other hand, as part of subsection A, and, to the extent that, in your view, the text should be understood differently in these two contexts. Explain why.

With respect to the original (homestyle) exemption, the precursor to subsection A, as noted, the intent was to exempt the public performance of all types of work, within the other limitations of the exemption. The 1998 Amendment narrowed the scope of the homestyle exemption. Subsection B refers to "nondramatic musical works" and the scope of subsection A is specifically limited to whatever is not detailed in subsection B. *See also* U.S. Response to Panel Question 3 to the U.S. Thus, given that nondramatic musical works are covered under Subsection B, they are not included within Subsection A. The United States observes that on this particular question of fact – the scope of Section 110(5) – there is no dispute between the parties to the case.

Q.3 What is the definition of the term "nondramatic musical work" in the context of Section 110(5)? What types of musical works are either included in or excluded from the application of the provisions of that Section, and which types of copyright holders are affected by the provisions of Subsections (A) and (B)? Does it also cover communication to the public of live music performances? For example, would the performance of, e.g., one song from a musical, constitute a performance of a "dramatic" or of a "nondramatic" musical work? Is it still a "dramatic" work if a song from a musical is performed separately and by another artist? To what extent the notion of "nondramatic musical work" corresponds or is intended to correspond with the notion of "small musical rights" applied in the practice of CMOs?

The term "nondramatic musical work" is not defined in Section 110(5). However, as we have discussed, nondramatic musical works are typically those not accompanied by a dramatic performance, such as a play or opera. Nondramatic music represents most of the music played in the United States since it encompasses pop, rock, jazz, and ethnic music. The United States wishes to clarify our preliminary answer at the first meeting of the Panel with the Parties, and note our understanding that the PROs do license nondramatic renditions of dramatic musical works.

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Licensing practice

Q.4 Paragraph 4 of the US oral statement at the first substantive meeting states that Section 110(5) is limited to only certain secondary uses of broadcasts of public performances, for which the right holder has already been compensated for the primary performance. In which way, if any, do licensing arrangements between collective management organisations (CMOs) and broadcasting organizations in the US or the EC take into account the potential additional audience created by means of further communication by loudspeaker etc. of broadcasts to the public within the meaning of Article 11*bis*(1)(iii) of the Berne Convention?

The United States does not assert that licensing arrangements between broadcast organizations and the collecting societies include royalties for secondary performances by the receiving public. In assessing the economic impact of Section 110(5), however, and specifically the extent of prejudice to a copyright owner, the Panel should take note that the copyright owner has already been compensated once for the broadcast or radio transmission of a particular public performance.

Interpretation of treaty obligations

Q.5 What is the legal nature of materials including "General Reports" of Diplomatic Conferences of the Berne Convention countries in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT)? Are they " subsequent agreements on the interpretation or application" in the meaning of Article 31(3)(a), "subsequent practice" in the meaning of Article 31(3)(b), "rules of international law applicable between the parties" in the meaning of Article 31(3)(c), or a "special meaning … given to a term if its established that the parties so intended"?

The General Reports of Diplomatic Conferences of the Berne Convention countries may, depending on the context, be considered to be preparatory work for revisions to the Berne Convention, or evidence of the circumstances surrounding the adoption of the text of the revisions to the Berne Convention; thus they would be analyzed under Article 32 of the Vienna Convention. They are not "agreements on the interpretation or application" of the Berne Convention, they do not represent a widespread "subsequent practice" of the parties to the Convention, and they do not as such constitute "rules of international law applicable between the parties." Thus they do not fall within any of the categories listed as Article 31(3)(a), (b) or (c).

Q.6 In your view, what is the relationship between Article 13 of the TRIPS Agreement and Article 11*bis*(2) of the Berne Convention? Does Article 13 of the TRIPS Agreement prevail over the exception in Article 11*bis*(2) with respect to the exclusive rights conferred by Article 11*bis*(1)(I-iii) of the Berne Convention in the sense that when the three conditions of Article 13 are met, no requirement to pay equitable remuneration arises? Do the requirements of Article 11*bis*(2) of the Berne Convention prevail as a *lex specialis* over the requirements of Article 13 of the TRIPS Agreement, in the sense that if equitable remuneration is paid, there is no need to comply with the three-conditions test under Article 13? Do the requirements of Article 13 and Article 11*bis*(2) apply on a cumulative basis in the sense that, on the one hand, even if the three-condition test of Article 13 is fulfilled, there is an additional, fourth requirement to pay equitable remuneration, and on the other hand, even if equitable remuneration is paid consistently with Article 11*bis*(2), is it necessary to comply in addition with the three conditions of Article 13? Please explain.

As a fundamental matter, it must be clarified that the "equitable remuneration" language of Article 11*bis*(2) only applies to, and indeed is a shorthand for, compulsory licenses. Article 11*bis*(2) allows a country to put any conditions on a right holder's broadcasting rights, provided that they do not deprive the right holder of equitable remuneration. This is a compulsory license. Compulsory

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licenses may be much broader than an exception, and are a different mechanism for limiting rights than the minor reservations doctrine.

Article 11*bis*(2) is consistently described as a provision authorizing compulsory licenses:

> - "Long discussions – in the subcommittee as in the General Committee – was caused by para. 2 [of Article 11*bis*] which enables Union countries to introduce obligatory licenses in favor of the radio." (*Report on The Brussels Conference for the Revision of the Berne Convention*, Dr. Alfred Baum, Zurich, 1948.)
>
> - "This provision [Article 11*bis*(2)] allows member countries to substitute, for the author's exclusive right, a system of compulsory licenses." (WIPO Guide to the Berne Convention, 70.)
>
> - "The reference to "conditions" in article 11*bis*(2) is usually taken to refer to the imposition of compulsory licenses, but the form of these licenses is left to national legislation to determine."
>
> *(S. Ricketson, The Berne Convention for the protection of literary and artistic works: 1886-1986, 525 (1987)).*

Notably, the minor reservations doctrine, discussed at length in the negotiating history of Berne and in subsequent treatises, is never linked in any way to compulsory licenses or to Article 11*bis*(2). In the General Report at the Brussels Conference (1948), Marcel Plaisant explicitly discusses the applicability of minor reservations to Article 11*bis*: "These exceptional measures apply to Articles 11*bis*, 11*ter*, 13 and 14". (Quoted in Ricketson, p. 534.) The right to remuneration provision in Article 11*bis*(2) was already in the Convention at that time. If the drafting committee had intended that minor reservations should be subject to some additional requirement with respect only to Article 11*bis*, it surely would have mentioned that fact in the Report. Likewise, in the WIPO Guide to the Berne Convention, Article 11*bis*(2) is discussed on page 70 under the heading "Compulsory Licenses". The minor reservation doctrine, is discussed on page 65: "It is in relation to Article 11 that the question of the 'minor reservations' arises. . . . It was agreed at Brussels that these exceptions (which apply also to Articles 11*bis*, 11*ter*, 13 and 14) were valid". No mention is made of Article 11*bis*(2), and there is no indication that it relates to the minor reservations doctrine.

Q.7 In your view, to what extent has the Berne Convention become part of customary international law, and if so, in particular which part of the Articles 1-21 of the Berne Convention?

The United States is continuing to consult internally regarding the issues raised by this question, as well as the following one. For this reason, the following views must be considered preliminary, and we may elaborate further in our Second Submission to the Panel.

The United States does not consider that the Berne Convention has become part of customary international law. In the view of the United States, there is not the required degree of consistency and uniformity of practice, nor do non-signatories States view the obligations of the Berne Convention as sufficiently obligatory, to consider it part of customary international law. First negotiated in 1886, the Berne Convention has been revised five times with two additions since that time. The current text is that of the Paris revision of 1971. Many countries are not party to the Berne Convention, do not comply with its provisions, or have not accepted some of the latter revisions of the Convention. The United States acceded to the Berne Convention only in 1989 when it passed domestic legislation to conform its law to Berne requirements. Berne Convention Implementation Act of 1988, H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988).

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Q.8 Has the "minor exceptions" doctrine under the Berne Convention, and especially in the context of Articles 11*bis*(1) and 11(1) of the Berne Convention, acquired the status of customary international law? What is the legal significance of the "minor exceptions" doctrine under the Berne Convention in the light of subparagraphs (3)(a-c) or paragraph (4) of Article 31 of the VCLT or in the light of Article 32 of the VCLT? Has the "minor exceptions" doctrine or any other implied exceptions been incorporated, by virtue of Article 9.1 of the TRIPS Agreement, together with Articles 1-21 of the Berne Convention into the TRIPS Agreement? Please explain.

The "minor exceptions" doctrine under the Berne Convention has not acquired the status of customary international law. The doctrine under the Berne Convention constitutes subsequent practice of Berne Members under Vienna Convention Article 31(3)(b). See U.S. Response to Panel Question 16 to the U.S. regarding minor exceptions in the laws of other Berne members. The minor exceptions doctrine is also explicitly referenced in the preparatory work of the Berne Convention, which constitutes a supplementary means of interpretation under Article 32 of the Vienna Convention. See U.S. response to Panel Question 14 to the U.S.

The "minor exceptions" doctrine has been incorporated into TRIPS by the specific articulation in Article 13 of the standard by which to judge such minor exceptions. See U.S. response to Panel Questions 14 and 15 to the U.S. The 1996 WIPO Copyright Treaty also confirms that Berne countries intended to allow minor exceptions to Berne rights. See U.S. response to Panel Question 14 to the U.S.

Q.9 What else other than religious ceremonies, performances by military bands, charitable concerts or requirements of education does the "minor reservations" doctrine cover? Does it only cover non-commercial uses? Was this doctrine be conceived of only with respect to Article 11 of the Berne Convention, or was it also extended to Article 11*bis*(1)(iii) of the Berne Convention, given that these Articles concern different types of rights? What such instances of implied exceptions could be relevant for this dispute?

Minor reservations cover exceptions that meet the standard now articulated in TRIPS Article 13. The doctrine is not limited to the specific examples cited by some countries in the negotiating history, and subsequent practice of many countries demonstrates the applicability of the doctrine to a wide variety of types of exceptions. As set forth in the negotiating history, the doctrine was intended to extend to Article 11*bis*.

Q.10 In order to meet the first condition of Article 13 of the TRIPS Agreement ("certain special cases"), is it enough if the limitation or exception is defined in great precision?

See our response to Question 17 of the Panel's questions to the United States.

Q.11 Under the second condition of Article 13, in which respect, if at all, is a normal exploitation of the "work" the same as a normal exploitation of "exclusive rights" relating to that work?

See our response to Question 18 of the Panel's questions to the United States.

Q.12 To what extent is it appropriate in evaluating the compliance of a law with the conditions of Article 13 of the TRIPS Agreement based on looking at the current market situation in a given country?

The current situation in a given country is extremely important in that it determines the bounds of normalcy in that market and sheds light on the reasonableness of any prejudice suffered by right holders. A contrary approach – evaluating the TRIPS Article 13 criteria by reference to hypothetical future or potential market situations – would be unworkable, and finds no support in the

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TRIPS Agreement. That is not to say that the evolution of market conditions is irrelevant. It is possible that exceptions justifiable under Article 13 at one point in time may become unacceptably broad with the passage of time and changes in the market. It is also possible that an exception that fails to meet the Article 13 criteria at a certain time may in fact meet those criteria as market conditions evolve.

It seems highly speculative to attempt to determine whether the conditions of Article 13 are met with respect to any potential market situation. One could also hypothesize changes in the market that would affect the degree of prejudice caused by an exception to exclusive rights. The WTO dispute settlement system is not based on such speculation. To look at anything other than the current market situation would be tantamount to reading into TRIPS a requirement that exceptions avoid any potential conflict with normal exploitation of a work and avoid even the possibility of unreasonable prejudice to the right holder. The plain text of Article 13, however, provides that exceptions must be evaluated by the extent to which they "do" not conflict with a normal exploitation and "do" not cause unreasonable prejudice.

Q.13 To what extent subsequent technological and market developments (e.g. new means of transmission of or increased use of background music or television) are relevant for the interpretation of the conditions under Article 13 of the TRIPS Agreement?

Technological and market developments are relevant to the interpretation of the conditions under Article 13 of TRIPS to the extent that they relate to a particular case at a particular time. The Article 13 analysis should be based on the current state of technology and market development, as opposed to speculation about future possibilities. See U.S. Response to Question 10, above.

Q.14 Is it justified to define the three conditions exclusively by reference to a particular market, or is a comparative analysis of licensing practices in other Members with similar economic conditions warranted?

TRIPS Article 1.1 provides guidance on this question, and provides that WTO Members are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". This provision would mean little if the reasonableness of a country's exceptions were determined in part by foreign right holders' licensing practices in other Members. Similarly, Article 5(2) of Berne provides that "apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." The spirit of this provision is that, except where Berne specifically provides otherwise, countries are free to determine the content of their own national laws regarding the extent of copyright protection.

A Member's national market is the most important determinant of normalcy and reasonableness with regard to that Member. It cannot be assumed that right holders have identical interests in various WTO Members, even where similar economic conditions prevail. There is no support in the TRIPS Agreement for requiring that any exception to exclusive rights be justified not only by reference to the prejudice it might cause to right holders' in the market that it would affect, but also by reference to the prejudice it would cause in theory if it were imposed in a completely separate market.

A comparative analysis of other WTO Members is particularly inappropriate with respect to the issue of "certain, special cases." Local history and tradition may play a major role in determining whether a particular country considers a case sufficiently special to warrant an exception to an exclusive right. TRIPS certainly does not require that other Members share the same social values.

Q.15 Under the third condition of Article 13, should the concepts of "unreasonable prejudice" and "legitimate interests" be defined based on existing, legally guaranteed entitlements, or do these concepts also connote an aspect of normative concern of right

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holders? In the latter case, what could be the normative concern at issue? In addition to an empirical analysis of prejudice to legitimate interests, how could such a normative element be taken into account in defining the threshold of the third condition of Article 13?

Existing, legally guaranteed entitlements to an exclusive right are one factor in defining the concepts of unreasonable prejudice and legitimate interests. Existing entitlements determine the benefits that a right holder might legally expect from his work, and thus provide helpful guidance in evaluating prejudice to the right holder's interests. In addition, the concepts of unreasonable prejudice and legitimate interests do also connote an aspect of normative concern to right holders.

Q.16 What is the extent of "reasonable" prejudice to the legitimate interests of rights holders that is permissible under the third condition of Article 13?

The extent of prejudice that may be deemed reasonable under TRIPS Article 13 must be determined on the facts and circumstances of each case, and cannot be established in the abstract due to the myriad potential factors that may influence the inquiry in any particular instance. To determine whether prejudice is unreasonable, the Panel should undertake a fact-intensive inquiry into the extent of the prejudice suffered by right holders subject to an exception, and then must ultimately balance these facts to reach a conclusion based on reason, rather than on a *per se* notion of the permissible degree of prejudice.

Q.17 With a view to giving distinct meaning to the second and the third condition of Article 13, in which respect does an extent, degree or form of interference with exclusive rights below the threshold of "conflict with normal exploitation" differ from an extent, degree or form of interference with exclusive rights that exceeds the threshold of a reasonable prejudice to the interests of the right holder? In other words, how does a permissible degree of prejudice under the third condition relate to "normal exploitation" under the second condition of Article 13?

The normal exploitation element of Article 13 looks to the amount of market displacement caused by the exception or limitation at issue. In other words, are there areas of the market in which the copyright owners would expect to exploit his or her work which are not now available to be exploited because of this exemption? Note that it is only the normal exploitation that is at issue – uses from which an owner would not expect to receive compensation are not part of normal exploitation. In contrast, the legitimate interest element of Article 13 looks at the amount of harm that is caused to the owner, economic or otherwise, by whatever provision is in dispute. Although these two elements may overlap, they are not coextensive. One could imagine a situation in which a large part of the market was displaced, but, because it was not a particularly profitable market and the right holder lost very little money, there was not unreasonable prejudice of the owners' interests. Likewise, one could imagine a situation in which relatively little of the market was displaced, but, because those few uses were so lucrative, the owner's legitimate interests would be unreasonably prejudiced.

Q.18 Should quantitative empirical or normative approaches be used in defining the three conditions of Article 13?

A quantitative empirical approach is the most appropriate approach to the Article 13 conditions. The grant of an exclusive right compensates the author for his initiative and creativity and for his investment and risk in producing the work. Exceptions should neither unreasonably prejudice the right holders' economic rewards, nor should not undermine the incentive to create. Without an empirical analysis of the actual effect of an exception on the market, it is not possible to determine the extent to which a right holder is actually prejudiced and the reasonableness of that prejudice. For example, the fact that a right holder has not collected royalties from a particular market for decades is at least a relevant factor bearing on the reasonableness of an exception applicable to that particular market.

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The context, object and purpose of Article 13 are also relevant to this discussion. The TRIPS Agreement is a trade agreement, and its purpose was to "reduce distortions and impediments to international trade". TRIPS, preamble. The Agreement was negotiated against the backdrop of a wide variety of national systems, and was intended to contribute to "the mutual advantage of producers and users" and "a balance of rights and obligations". As mentioned above, the drafters also intended that Members would have flexibility in implementing the Agreement within the context of "their own legal system and practice". These guiding principles support the position that the analysis of the conditions of Article 13 must be grounded in local market realities, and in the actual practice and experience of right holders and users in the country concerned.

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ATTACHMENT 2.4

RESPONSES OF THE UNITED STATES TO WRITTEN QUESTIONS FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES – FIRST MEETING

(19 November 1999)

Q.1 Does the US agree that Section 110(5) US Copyright Act would be inconsistent with Article 11*bis*(1)(iii) Berne Convention if it were not for the minor reservations doctrine? If not why not?

The US agrees that any exception to the exclusive right under Article 11*bis*(1)(iii) would be inconsistent with the Berne Convention if it were not for the minor reservations doctrine. If there were no minor reservations doctrine, then no exceptions would be permitted to the exclusive rights under either Berne Article 11 or Berne Article 11*bis*. This would mean that exceptions for marching bands, religious services or school activities, found in many European Union member states' laws as well as those of other WTO Members, would all be inconsistent with the Berne Convention. For further discussion of this and related issues, see US response to Panel Questions to the United States and the European Communities, numbers 8 and 9.

Q.2 Would the US in particular confirm that it does not consider that Section 110(5) can be justified under Article 11*bis*(2) Berne Convention?

The U.S. confirms that it does not consider that any exception to an exclusive right can be justified under Berne Article 11*bis*(2). That provision does not speak to whether exceptions to an exclusive right are permissible, but merely authorizes a country to substitute a compulsory license for that exclusive right. Only compulsory licenses can be evaluated under Article 11*bis*(2). For further discussion of this and related issues, see US response to Panel Question 6 to the United States and the European Communities.

Q.3 The US seems to concede that TRIPS does not diminish any rights available under the Berne Convention. Would the US not therefore agree that Article 13 TRIPS, rather than being considered as an exemption in its own right, can only be considered as a further limitation of any possibility to maintain limitations, reservations or exceptions that may be contained in the Berne Convention?

No. Article 13 is not a further limitation on the possibility of providing exceptions to exclusive rights under Berne; rather, it articulates the standard by which implied exceptions to Berne should be evaluated.

Q.4 Does the US agree that the purpose of minor reservations under the Berne Convention is to allow Parties to maintain existing minor exceptions when acceding to the Berne Convention?

No. The U.S. does not agree with this statement. Although the negotiating history of Berne may contain some references to countries' desire not to encourage exceptions (and thus the minor reservations doctrine was kept implicit, rather than specified in the text of the Convention), a general desire to minimize exceptions is not equivalent to an intent to prohibit them.

Q.5 Where in the negotiating history of TRIPS does the US find a basis for its contention that Article 13 TRIPS was designed to "articulate" the minor reservations under the Berne Convention? Does the US consider that the possibility of "minor reservations" can apply to all rights guaranteed under the Berne Convention?

See U.S. response to Question 14 from the Panel to the United States.

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Q.6 In paragraph 32 of its First Written Submission the US seeks to justify the "business exemption" by saying that it adds only a "small number of establishments" to those benefiting from the pre-existing homestyle exemption. Would the US please provide an estimate of this additional "small number of establishments"? If the US Congress were to further increase the thresholds, would the US then seek to justify the new version under Article 13 TRIPS by arguing that most of the establishments covered by the newly-formulated exemption were exempted under the pre-existing version?

See U.S. Response to Panel Questions 9-10 to the United States for the data available to the United States. The United States will not speculate concerning the hypothetical sub-question posed in the above question.

Q.7 What percentage of establishments would have to be excluded from protection under Article 110(5) US Copyright Act before it ceased to qualify for exemption under Article 13 TRIPS according to the US ?

See U.S. Response to Question 16 from the Panel to the United States and the European Communities.

Q.8 Could the US please explain why the playing of copyrighted works originating from radio or TV broadcasts may be excluded from protection and not the playing of copyrighted works directly from tapes or cassettes?

See U.S. Response to Question 7 from the Panel to the United States.

Q.9 Could the US please provide a copy of the NLBA licence which it claims at paragraph 13 of its First Written Submission is based on similar criteria to those used in Section 110(5)?

See U.S. response to Panel Question 1 to the United States and exhibit US-16.

Q.10 In paragraph 4 of its Oral Statement, the US states that the Article 110(5) "exception is limited to only certain secondary uses of broadcasts of public performances, for which the right holder has already been compensated for the primary performance." Does the US really consider that payment of a royalty for the "primary performance" may be considered to also compensate for "secondary uses"?

See U.S. response to Panel Question 4 to the United States and the European Communities.

Q.11 Please explain why you consider the other exception provisions of TRIPS (Articles 17, 26(2) and 30) to be relevant context for the interpretation of Article 13 and what consequences you draw? What is the relative importance of these other provisions of TRIPS and the exceptions, reservations or limitations allowed under the Berne Convention as context for the interpretation of Article 13?

Under Article 31 of the Vienna Convention, other provisions of a treaty are part of the context for the purpose of interpreting a particular provision. In considering the interpretation of Article 13 of TRIPS, it would be inappropriate not to consider three other similarly worded provisions governing exceptions in the Agreement. Generally under TRIPS, the permissibility of exceptions is determined by similar (though not identical) standards in relation to copyrights, patents, industrial designs as well as trademarks. These exceptions reinforce the principle that the TRIPS Agreement was intended to balance the interests of producers and users of intellectual property. There is no basis in the negotiating history of TRIPS to assume that WTO Members used similar wording, but nevertheless intended to permit exceptions of radically differing scope, with respect to different types of intellectual property rights.

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Moreover, Articles 30 and 31 reinforce the point made in U.S. Response to Panel Question 6 to the United States, in that they reflect the clear distinction in intellectual property between exceptions (for which equitable remuneration is not required) and compulsory licenses (for which equitable remuneration is required).

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ATTACHMENT 2.5

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(24 November 1999)

Table of Contents

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I. INTRODUCTION

1. In this case, the Panel is faced with two important questions under the TRIPS Agreement. First, the Panel must decide on the proper standard to evaluate an exception to an exclusive right under the Berne Convention that has been challenged under the provisions of the TRIPS Agreement. Second, the Panel must apply that standard to the case at hand to determine whether the exception is permissible under Berne and TRIPS. The proper determination to both of these questions leads to the conclusion that Section 110(5)(A) and (B) of the U.S. Copyright Law are permissible under the Berne Convention and the TRIPS Agreement.

2. The minor reservations doctrine is well-founded in the history and practice of the Berne Convention, and should be applied to exceptions to the Berne rights at issue here — Article 11 and 11*bis* rights. That doctrine, however, has been clarified and further articulated by TRIPS Article 13, which is the standard by which such exceptions are to be judged. The Article 13 test should be used by the Panel as the means to judge the permissibility of Section 110(5) under Berne. The exemptions in Section 110(5) fall within the Article 13 standard: they are special cases which do not conflict with a normal exploitation of the work and they do not unreasonably prejudice the legitimate interests of the right holder.

II. FACTUAL ISSUES

3. As an initial matter, several factual issues relating to Section 110(5)(A) require clarification. First, the United States emphasizes that there is no factual dispute before the Panel regarding the works covered under the current Section 110(5)(A), and the text of the provision itself is unambiguous. Both parties agree that the homestyle exemption was substantially narrowed by the removal of nondramatic musical works from its spectrum, and that the exemption now applies only to works other than nondramatic musical works.[1]

4. Although it has failed to provide any evidence of prejudice to EC right holders as a result of Section 110(5)(A), the EC has nevertheless made unsupported factual assertions regarding the scope of this provision. The scope of Section 110(5) is a question of fact to be established before this Panel, as it is an accepted principle of international law that municipal law is a fact to be proven before an international tribunal.[2] Despite the plain language of Section 110(5)(A) regarding the requirement of homestyle receiving equipment, the EC asks the Panel to consider that at some point in the future, U.S. courts might expand that exemption by applying the square footage and size requirements of Section 110(5)(B) to subsection (A).[3] The Panel should give no weight to the EC's speculative and unsupported assertion that U.S. courts might begin to ignore the text of Section 110(5)(A) in the future. The consistent jurisprudence of U.S. courts interpreting the homestyle exemption is dispositive evidence of the scope of this law.[4]

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[1] EC Oral Statement, para. 20.

[2] See India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, Report of the Appellate Body, adopted 19 December 1997 ("India Mailbox"), paras. 65-66.

[3] EC first submission, para. 32.

[4] See Judge Lauterpacht, Case Concerning the Guardianship of an Infant [1958], ICJ Rep., Sep. Op., at 91 (It is settled practice among States that international judicial bodies should accept, and treat as binding, questions of municipal law and practice decided by competent municipal courts); Case Concerning the Payment of Various Serbian Loans Issued in France [1929], PCIJ Rep., Series A, No. 20, at 46; Case Concerning Certain German Interests in Polish Upper Silesia [1926], PCIJ Rep., Series A, No. 7, at 19; Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France [1929], PCIJ Rep., Series A, No. 21, at 124-25 (The PCIJ attached controlling weight to the manner in which French courts had interpreted French legislation). See also India - Mailbox, para. 65.

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5. The EC also argues that two particular cases, *Edison Bros.* and *Claire's Boutiques*, are "illustrative" of a judicial trend toward broadening the homestyle exemption.[5] Far than being illustrative, however, these two cases are the only decisions allowing chain stores to take advantage of the homestyle exception. Furthermore, as explained in the U.S. first submission, these cases are consistent with the body of U.S. case law under Section 110(5), in that they involved the use of extremely limited receiving equipment.

6. With respect to Section 110(5)(B), the EC again wrongly asserts that the prohibitions against charging admission fees and retransmission "have no potential whatsoever to limit the exception."[6] As a factual matter, the prohibitions do limit the scope of both subsections. There is a market for paid events at restaurants in the United States – for example, sporting events. If restaurants charged a fee for entrance, it would change the nature of a customer's visit to a restaurant, signifying that the main reason for the visit was to attend an event, not necessarily to eat. This requirement thus limits the impact of the exemption.

III. TRIPS ARTICLE 13 IS THE APPLICABLE STANDARD FOR EVALUATING EXCEPTIONS

7. Given that this case was initiated under the WTO TRIPS Agreement, the text of that Agreement should be the starting-point for the Panel's legal analysis regarding the exceptions in Section 110(5) of the U.S. Copyright Law. In this case, the plain language of Article 13 indicates that it is the appropriate standard by which to judge exceptions to exclusive rights such as Section 110(5). This interpretation of Article 13 is confirmed by the recently-concluded WIPO Copyright Treaty ("WCT"), as well as the negotiating history of the TRIPS Agreement.

8. The EC argues that TRIPS Article 13 should not apply to this case because Article 13 would then represent a derogation from the protection afforded by the Berne Convention, in violation of TRIPS Article 2.2 and Berne Article 20. On the contrary, however, this result does not derogate from Berne because TRIPS Article 13 articulates the standard applicable to minor reservations under Berne. According to the EC, Berne either does not permit exceptions to Articles 11 and 11*bis* at all, or, if it does permit such exceptions, then Section 110(5) does not fall within those permitted exceptions because it is commercial in nature and enacted after 1967. These arguments fail, however, because neither of these factors is determinative in deciding whether an exception falls within the minor reservations doctrine under the Berne Convention.

A. PLAIN LANGUAGE OF ARTICLE 13

9. The text of Article 13 is straight-forward and applies to "limitations or exceptions to exclusive rights". In light of this plain language, the Panel should be particularly reluctant to adopt an interpretation of Article 13 that makes it somehow inapplicable to a "limitation or exception" to an exclusive right. The EC's position conflicts with the text of Article 13, in that the EC argues that Article 13 is not applicable to limitations and exceptions to the particular exclusive rights in TRIPS that have been incorporated from the Berne Convention.

10. The general rule of treaty interpretation in the WTO is that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[7] A corollary to the general rule of interpretation is that the interpretation must give meaning and effect to all terms of a treaty, and not adopt a reading

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[5] EC first submission, paras. 26-27, EC Oral Statement, para. 12-16.

[6] EC first submission, paras. 43-44.

[7] Vienna Convention on the Law of Treaties, Article 31(1). See United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Report of the Appellate Body, adopted 20 May 1996 (pp. 16-17), India - Mailbox, paras. 43 and 44.

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that would reduce or nullify a provision.[8] These rules govern a Panel's interpretation of TRIPS.[9] As we discussed extensively in the U.S. first submission and Statement at the first meeting of the Panel with the Parties, Article 13 articulates the standard for exceptions within the context of the TRIPS Agreement and the Berne Convention as incorporated into TRIPS.[10]

B. WIPO COPYRIGHT TREATY

11. The WCT represents further evidence of the applicability of the standard articulated in Article 13 to exclusive rights provided under the Berne Convention. As articulated in the U.S. Response to Panel Question 14 to the United States, the WCT was adopted by consensus in 1996 by the WIPO Diplomatic Conference. The overwhelming majority of Berne members (99 out of 119) and WTO members (94 out of 128) participated in the Diplomatic Conference.[11] Like TRIPS, the WCT is an Agreement explicitly designed to provide a higher level of protection than that provided under Berne. Article 1 of the WCT provides that it is a "Special Agreement" within the meaning of Berne Article 20, provides that it does not derogate from existing obligations under Berne, and also explicitly requires compliance with Articles 1-21 and the Appendix of the Berne Convention.[12]

12. The preamble of the WCT states that the Parties recognized "the need to introduce new international rules and clarify the interpretation of certain existing rules".[13] Article 10(2) of the WCT is an example of a clarifying interpretation of Berne, and provides: "Contracting Parties shall, when applying the Berne Convention, confine any limitations or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." (Emphasis added.) Thus, under the WCT, exceptions permissible under Berne are those that meet the same standard set out in TRIPS Article 13. On the other hand, under the EC's interpretation of TRIPS Article 13 – that it cannot represent the standard governing exceptions to Berne rights because TRIPS would then represent a derogation of rights provided under Berne – the WCT must represent a derogation of rights provided under Berne, a conclusion flatly at odds with Article 1 of the WCT.

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[8] United States - Reformulated Gas; India - Mailbox , para. 46.

[9] See India - Mailbox, paras. 43, 46.

[10] Neil W. Netanel, The Digital Agenda of the World Intellectual Property Organization: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement, 37 Va. J. Int'l L. 441, 460 (Winter 1997) ("Article 13 to applies to all exclusive rights"); Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy , 39 Harv. Int'l Law J. 357, 380 (Spring 1998) ("On its face, article 13 applies to all copyright limitations and exceptions, both those added by TRIPS and those incorporated by Berne, and it overrides the more expansive limitations and exceptions set forth in other Berne articles."); Ruth L. Gana, Prospects for Developing Countries Under The TRIPS Agreement, 29 Vand. J. Transnat'l L. 735, 760 ((1996) (noting that the Article 13 standard "extends to all rights covered by the TRIPS Agreement, not just the reproductive right."); Pamela Samuelson, The Digital Agenda of the World Intellectual Property Organization: The U.S. Digital Agenda at WIPO, 37 Va. J. Int'l L. 369, 403 (Winter 1997) ("[at the time of the WCT], it is true that the universalization of Article 9(2)'s three-step test had already become an international norm by the adoption of Article 13 of the TRIPS Agreement").

[11] For a complete listing of states participating in the Geneva conference, see List of Participants, WIPO Doc. CRNR/DC/INF.2 at www.wipo.org/eng/dipconf).

[12] Article 1 of the WCT is entitled "Relation to the Berne Convention", and provides as follows:

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regard Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treatises other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971, of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties shall comply with Article 1 to 21 and the Appendix of the Berne Convention.

[13] WCT, preamble.

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C. NEGOTIATING HISTORY OF THE TRIPS AGREEMENT

13. The negotiating history of the TRIPS Agreement further supports our conclusion that Article 13 applies to Berne rights. As explained by one commentator: "Article 13 allows a dispute settlement panel to review exceptions, including the so called 'small exceptions', to ensure that they pass the test. . . . When these exceptions are invoked, they may from now on be submitted to the general test of Article 13".[14] The United States has already elaborated on the negotiating history of TRIPS in its Response to the Panel Question 14 to the United States and in its first submission.

14. In its Response to Question 10 from the Panel, the EC has cited its opening position in the TRIPS negotiations as evidence of the non-applicability of Article 13 to Berne rights. During the TRIPS negotiations, the EC had taken the position that the exceptions article in TRIPS should not apply to Berne rights, but rather should apply only to so-called "Berne-plus" rights set forth in particular provisions of TRIPS.[15] The contrast between the EC negotiating position and the final text of Article 13, the application of which is not limited to specified exclusive rights, demonstrates that if WTO Members had intended Article 13 to apply only to certain exclusive rights under TRIPS, they would have specified that result. Rather, Article 13 was phrased generally, does not indicate any sort of limited application, and was intended to apply to all exclusive rights.

D. RELATIONSHIP WITH THE BERNE CONVENTION

15. The U.S. view that Article 13 sets forth the standard governing all exceptions or limitations to exclusive rights is consistent with the context of Article 13, including TRIPS Article 2.2. It does not imply that TRIPS reduced the level of protection below the level permissible under Berne. Even though not explicitly stated, the Berne Convention permits minor exceptions to the exclusive rights provided for therein. As acknowledged by the EC in its response to Panel Question 11 to the EC, and Panel Question 5 to the US and EC, the minor reservation doctrine is well-established under Berne.[16]

16. Minor exceptions to the public performance right appear in the copyright laws of very many, if not virtually all, Berne members. Under Article 31 of the Vienna Convention, subsequent practice is to be "taken into account, together with the context" in interpreting treaty text.[17] Subsequent practice is important, according to the International Law Commission, because it "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[18] According to the Appellate Body, subsequent practice under Article 31(3)(b) includes practice that is "concordant, common, and consistent".[19] Although the United States has not been able to review the copyright laws of all Berne members, a large number of exceptions were cited in our response to Panel Question 16 to the United States. Additional countries that permit exceptions to the public performance right are cited in Exhibit US-22. This widespread practice of allowing minor exceptions to this particular Berne right illustrates its common acceptance among Berne members.

17. Relevant negotiating history of the Berne Convention has already been reviewed in this proceeding, and also clearly establishes the permissibility of minor reservations under Berne. Under

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[14] D. Gervais, The TRIPS Agreement: Drafting History and Analysis, 89-80 (1998).

[15] Exhibit EC-17 ("Contracting parties may, in relation to the rights conferred by a Articles 4, 5, 6, and 7 provide for limitations, exceptions and reservations as permitted by the Rome Convention . . .").

[16] The responses of the EC now assert that the existence of the minor reservations doctrine "is considered to be confirmed" by the General Report of the Stockholm Conference (1967) and that the EC "would not exclude that the 'minor reservations' doctrine has, by virtue of the Article 9(1) TRIPS, whatever its legal significance may be, become part to [sic] the TRIPS Agreement." EC Response to Panel Question 5 and 8 to the US and EC.

[17] Vienna Convention, Article 31(3).

[18] Yearbook of the International Law Commission, Vol. II, p. 221 (1966).

[19] Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 4 October 1996, at p. 13.

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Article 32 of the Vienna Convention, preparatory work of a treaty may be used to confirm the meaning of the text and context or to clarify ambiguities. The negotiating history regarding minor exceptions confirms that Berne members intended that exceptions be allowed to the exclusive rights provided in Articles 11 and 11*bis*.

18. Contrary to the EC's assertions, minor reservations under Berne are not limited to either: (a) the specific noncommercial uses listed in the General Reports – "religious ceremonies, performances by military bands and the requirements of child and adult education"; or (b) exceptions existing in the legislation of the member states of the Berne Union in 1967, at the latest.

19. First, there is no requirement that exempt uses be noncommercial. Although, as a general rule, noncommercial uses may be less prejudicial to right holders than commercial ones, this is not an absolute rule. Even the uses discussed in the General Reports are not necessarily noncommercial; for example, there are many educational institutions or training programs that are run for profit. Several of the public performance exceptions in EC member state laws exempt educational activities without specifying that the educational institution must be nonprofit. Exemptions in the laws of certain third parties to this dispute are also applicable to commercial uses. These include the Australian law that exempts secondary performances in hotels and guest houses, and the Canadian law that exempts performances at agricultural fairs and exhibitions.[20] These exceptions demonstrate that the commercial nature of a use cannot be dispositive.

20. Furthermore, the discussion of the minor reservations doctrine in the General Reports precludes the notion that the doctrine was limited to the exceptions specifically mentioned in those Reports. The General Reports only list several traditional exceptions to the public performance right of Article 11, such as military bands and religious ceremonies. However, the Reports also make certain to note that the minor reservation doctrine is <u>also</u> applicable to Article 11*bis*, 13 and 14, but do not provide any examples of permissible exceptions to those rights.[21] It must have been intended that the doctrine apply to exceptions not specifically listed in the Reports, otherwise that language would have no meaning.

21. Second, the EC's argument that the exceptions allowable under the minor reservations doctrine must be frozen in 1967 fails for a number of reasons. Notably, it is explicitly contradicted by the language in the Agreed Statement concerning Article 10 of the WCT, which states "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention." If the exceptions permissible under Berne were frozen in 1967, then this language would effectively contradict Article 1 of the WCT, which states that nothing in the Treaty shall derogate from the protection afforded under Berne.

22. Construing the minor reservation doctrine to apply only to exceptions in existence in 1967 also creates unfair results in regard to developing countries, and renders the Berne Convention less applicable in the modern world. Many developing countries that are now members of Berne had no copyright law at all, or only a rudimentary one, in 1967. If the EC's argument that countries can only "grandfather their pre-1967 exceptions" when acceding to Berne is accepted, then most developing countries will not be allowed to have any exceptions at all. In addition, the flexibility of the principles of copyright protection represented in Berne would be drastically undermined were they not allowed to respond to changes and developments in technology as well as practice. As provided in the WCT, countries must be able to appropriately extend and adapt exceptions to fit the realities of

[20] See U.S. response to Panel Question 16 to the Panel.

[21] Records of the Intellectual Property Conference of Stockholm, WIPO, Geneva, 1971, paras. 209-210, p. 1166.

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a changing world. The EC's interpretation of Berne, freezing it in 1967, would deprive it of much relevance in today's intellectual property environment.

E. SIGNIFICANCE OF BERNE ARTICLE 11*BIS*(2)

23. We note that there has also been some discussion, in third party submissions and in the questions from the Panel, about the relevance of Article 11*bis*(2) to the permissibility of Section 110(5). We reiterate our position, more fully articulated in the U.S. Response to Panel Question 6 to the US and EC, that Article 11*bis*(2) has no bearing on Section 110(5). Article 11*bis*(2) merely authorizes a country to substitute a compulsory license, or its equivalent, for an exclusive right under Article 11*bis*. Neither the negotiating history of Berne, nor the subsequent writings of commentators support the view that 11*bis*(2) authorizes outright exceptions to Article 11*bis*, or represents a standard against which to judge such exceptions.[22] Simply put, Article 11*bis*(2) is not related to the minor reservations doctrine, and does not bear upon the scope of exceptions permissible under that doctrine.[23]

24. Indeed, interpreting Article 11*bis*(2) to apply to exceptions as well as compulsory licenses leads to illogical and impractical results. For example, where an exception implicates several rights, such as Section 110(5), only one of which is subject to a right of equitable remuneration, it would be practically impossible to divide the exception into the different rights affected and then apply different standards to each right.

F. CONCLUSION

25. In conclusion, as the plain meaning of the provision suggests, Article 13 articulates the standard by which to determine the permissibility of "exceptions or limitations" to exclusive rights. By contrast, the EC interpretation of Article 13 is at odds with the text of that provision, as well as its negotiating history, and is not consistent with the WCT. Furthermore, minor exceptions to exclusive rights under Articles 11 and 11*bis* have always been permitted under the Berne Convention, and have not been limited to any particular purpose or date of enactment. TRIPS Article 13 articulates the standard governing such minor reservations, and thus is the appropriate focal point of the legal analysis in the case.

IV. SECTION 110(5) MEETS ARTICLE 13 CRITERIA

26. Sections 110(5)(A) and (B) are consistent with the principles of the minor reservations doctrine, and satisfy the TRIPS Article 13 standard. Section 110(5) applies to certain special cases, does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the right holder.

A. INTERPRETING THE ARTICLE 13 CRITERIA

27. Interpretation of the TRIPS Article 13 criteria requires a fact-intensive analysis by the Panel that takes into account all the circumstances of an individual case. Article 13 is intended to be a

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[22] The negotiating history of the TRIPS Agreement also supports the distinction between compulsory licenses and outright exceptions. Of interest is a late version of Article 13 which included a separate provision on rights of equitable remuneration, providing: "Any compulsory license (or any restriction of exclusive rights to a right of remuneration) shall provide mechanisms to ensure prompt payment and remittance of royalties." Status of Work in the Negotiating Group: Prepared by the chairman, No. 2341 (1 October 1990).

[23] The EC implicitly acknowledges the lack of a relationship between 11*bis*(2) and the minor reservations doctrine in its response to Question 12 of the Panel to the EC, in which the Panel asks the EC to provide examples of ways to provide "equitable remuneration" under 11*bis*(2) other than compulsory licensing. In response, the EC posits several mechanisms, such as royalty schemes and levy systems, that are the functional equivalent of compulsory licenses.

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flexible mechanism to evaluate numerous different exceptions in many different contexts and legal systems. It does not impose any "per-se" rules with respect to any of the criteria in the Article. Rather, the permissibility of exceptions under TRIPS Article 13 must necessarily be determined on a case-by-case basis.

28. In such an analysis, the market of the country imposing the exception is the most relevant. The United States and the EC are apparently in agreement regarding this issue.[24] Moreover, while both actual market conditions as well as potential market may be relevant to the analysis under Article 13, actual conditions are of primary importance. An analysis based on assumptions about a potential market is necessarily less reliable and subject to speculation. The EC, for example, argues that the Panel should consider the alleged 70% of exempt restaurants as the potential market for its right holders – even though there is no possibility that all such restaurants actually play radio music and would be licensed by ASCAP or BMI. The only way to avoid the danger of arbitrariness is to accord the greatest weight to actual existing market conditions.

B. SECTION 110(5)(A) AND (B) APPLY TO CERTAIN, SPECIAL CASES

29. As discussed in the U.S. Response to Panel Question 17 to the U.S., both Section 110(5)(A) and (B) represent exceptions that apply in certain special cases. The essence of this requirement is that exceptions be well-defined and of limited application. Both Sections 110(5)(A) and (B) are sufficiently definite. Section 110(5)(A) is defined by the equipment limitations, and the subsequent case law which has consistently enforced square footage limitations. Section 110(5)(B) is clearly defined in the statute by square footage and equipment limitations. Furthermore, to the extent that the purpose of the exception is relevant, it is only required that the exception have a specific policy objective. TRIPS does not impose any requirements on the policy objectives that a particular country might consider special in light of its own history and national priorities. In this case, both exceptions rest upon sound public policy objectives related to the social benefits of fostering small businesses and preventing abusive tactics by the collecting societies.

C. NEITHER SECTION 110(5)(A) OR (B) CONFLICTS WITH NORMAL EXPLOITATION

30. Neither Section 110(5)(A) nor Section 110(5)(B) conflict with the normal exploitation of a work. Section 110(5)(A), almost by definition, cannot conflict with normal exploitation, as it was intended precisely to exempt those establishments which would not have otherwise justified a commercial license.[25]

31. In evaluating normal exploitation, the Panel must look at the scope of the exception with respect to the panoply of exclusive rights, as well as with respect to the specific right which it exempts. As more fully explained in US Response to Panel Question 18 to the U.S., both perspectives are relevant. While the impact on the particular right affected is relevant, the proportion of that right to the rest of the exclusive rights is equally so. Notably, the TRIPS Article 13 test does not say "conflict with the normal exploitation of an exclusive right", but refers to the exploitation of the "work" as a whole.

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[24] EC Response to Panel Question 8 to both parties.

[25] The EC appears to find a contradiction in the fact that the PROs did not generally license small business establishments, and that there were many complaints about their licensing practices being abusive with regard to such establishments. No such contradiction exists. The PROs did not attempt to license the vast majority of small businesses. Nevertheless, there were complaints that when the PROs did attempt to obtain licenses from any business, they often did so in an arbitrary and abusive manner, without regard for existing law or good faith business practices. Small business, generally being the least sophisticated and having the fewest resources, are the least able to respond to such tactics or defend their rights.

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D. NEITHER SECTION 110(5)(A) OR (B) CAUSES UNREASONABLE PREJUDICE

32. Section 110(5)(A) and (B) do not cause right holders unreasonable prejudice, as the economic impact of the exceptions is minimal. The discussion below focuses primarily on Section 110(5)(B), since the EC aims most of its criticism, and the minimal empirical analysis it has conducted, at this subsection. It can be assumed, however, that the impact of subsection (A), the homestyle exemption, is a mere fraction of the numbers discussed below, as it affects fewer and smaller establishments than subsection (B). The United States also observes that, despite the more than 20 year history of the homestyle exemption, the EC has not provided any facts or data showing any prejudice to EC right holders as a result of the old homestyle exemption or amended Section 110(5)(A).[26]

1. Section 110(5)(B) does not cause unreasonable prejudice because any actual harm to EC right holders is minimal

33. The amount of prejudice resulting from Section 110(5)(B) is not unreasonable. In our first submission, the United States noted the irrelevance of the figures provided by the EC, and discussed the factors by which those figures must be reduced to yield a reasonable approximation of losses to EC right holders. The following empirical analysis supplements that already provided by the United States,[27] and is based on additional information recently received. It is designed to rebut the EC's assertions, particularly those made in its responses to the Panel's questions, that Section 110(5) is likely to cost EC right holders "millions" of dollars. The analysis demonstrates that the maximum loss to EC right holders of distributions from the largest U.S. collecting society, ASCAP, as a result of the Section 110(5) exemption is in the range of $294,113 to $586,332 – far less than the "millions" of dollars claimed by the EC. Especially in light of the size of the U.S. and EC markets, this figure is truly a minimal one, and does not establish any unreasonable degree of prejudice.

(a) Starting-point in the analysis: total royalties paid to EC right holders: $19.6 million - $39 million

34. To determine the degree of prejudice to EC right holders from the exemption, the logical starting-point is the total amount paid to EC right holders by the collecting societies. The EC has recently provided figures from ASCAP purporting to show that EC right holders received an average of $39,045,833 from ASCAP for the years 1996, 1997 and 1998.[28] According to the EC data, this figure of 39 million dollars represents an average of 13.7% of ASCAP's total distributions of domestic income for those three years. It must be noted here that in an earlier analysis conducted by the EC to determine the harm to EC right holders from Section 110(5) before it was amended in 1998, the EC used a figure of "less than 5%" for 1996, and noted that ASCAP's distributions to *all* foreign collecting societies were just 6.2%.[29] The EC estimate of "less than 5%" appears to be based on the figure "total domestic distributions for EU societies" (19,586,000)[30] as a percentage of total ASCAP distributions for 1996 (397,379,000)[31] Given the inconsistency in the EC methodology, the United States' analysis below will proceed based on a range for ASCAP's total payments to EC right holders of 19.6 million to 39 million.

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[26] See EC Response to Question 3 asked by the Panel.

[27] The data provided in the following analysis reflects that provided in the U.S. Responses to the Panel's Questions 9-11 to the United States. The empirical calculations above, however, replace those estimates provided in the U.S. Response to Panel Questions 11.b and 11.d.

[28] Exhibit EC-15 (average of three figures in line 4).

[29] European Commission, Examination Procedure Regarding the Licensing of Music Works in the United States of America, 27 (23 Feb. 1998).

[30] Exhibit EC-15 (line 2 for 1996).

[31] ASCAP Annual Report (1996) (Exhibit US-19).

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(b) After reducing for amount attributable to general licensing – losses to EC right holders: $3.7 - $7.4 million

35. To determine the potential impact of Section 110(5) on total payments to EC right holders, the figure for such total payments must be reduced to account for the fact that a relatively small proportion of licensing revenue collected in the United States is attributable to music played in restaurants, bars and retail establishments. As discussed in the U.S. responses to the Panel's questions, ASCAP's annual reports demonstrate that the majority – approximately 58% - of collecting society revenue comes from radio and TV broadcasters.[32] Another quarter of ASCAP's revenue comes from foreign collecting societies (25-26%). Interest, member dues and revenues from symphonies and concerts account for approximately 2%. All other licensing revenues account for only 14% of ASCAP total revenues from domestic and foreign sources. This 14% figure includes fees from commercial background music services, and a wide variety of licensees, including conventions and sports arenas, as well as all restaurants, bars and retail establishments. It represents average collections of $65,581,000 from general licensees[33] for 1995-97. The average amount collected from such general licensees ($65,581,000) in turn represents 18.9% of ASCAP's average total *domestic* receipts for 1995-97 ($346,981,000).[34]

36. Thus, the first step in determining the losses to EC right holders is to reduce the total payments to EC right holders to 18.9% of that total. This accounts for the fact that at least 81.1% of EC income from ASCAP is unaffected by Section 110(5). This analysis yields a potential range of loss to EC right holders from Section 110(5) of only 3,701,754 (18.9% of 19,586,000) to 7,379,662 (18.9% of $39,045,833).[35]

(c) After reducing to account for licensing revenue from general licensees that do not meet the statutory definition of an "establishment" – losses to EC right holders: $1.85 - $3.69 million

37. These estimates of losses to EC right holders must also be reduced to account for the fact that many general licensees are not eligible to take advantage of Section 110(5), regardless of whether they meet the square footage and equipment criteria or not. Section 110(5)(B) applies to "establishments", which are defined in the same statute as "a store, shop or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose". Many types of general licensees, for example, background music services, sporting events and conventions would seem not to fit this definition, and thus the royalties paid by these licensees must be excluded from the analysis of losses resulting from Section 110(5).

38. No data are available to the United States regarding the percentage of general licensees that might qualify as "establishments" under Section 110(5). It seems reasonable to assume, however, that the percentage of revenue from such "non-establishment" licensees is significant given their prevalence and size. For that reason, the United States will assume that 50% of general licensing revenue is attributable to such licensees. After reducing the potential losses to EC right holders to 50%, the resulting range of potential loss is: 1,850,877 (50% of 3,701,754) to 3,689,831 (50% of $7,379,662).

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[32] ASCAP Annual Reports 1995, 1996, 1997 (Exhibit US-19).

[33] *Id.* (average of figures for 1995, $63,227,000, 1996, $66,192,000, and 1997, $67,324,000).

[34] *Id.* (average of figures for 1995, $326,482,000, 1996, $356,035,000, and 1997, $358,428,000).

[35] This analysis assumes that distributions paid to EC right holders are attributable to the same sources of revenue in the same proportion as overall revenues. It is entirely possible, however, that distributions to EC right holders might by attributable to television and radio broadcasters or symphonies to a greater extent than general licensing.

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(d) After reducing to account for licensing revenue from general licensees that do not play the radio – losses to EC right holders: $.56 million - $1.13 million

39. In addition, it is obviously important to take into account the fact that much of the revenue from general licensees that qualify as establishments is not attributable to the playing of radio or TV music, but rather to public performances of music from media other than radio or TV broadcasts, such as tapes/CDs, live bands, and jukeboxes. According to the National Restaurant Association, approximately x% of all restaurants play the radio[36], but not necessarily exclusively (they may also sometimes use live bands or CDs, etc.). According to the National Licensed Beverage Association, 28% of its members play the radio, but again not necessarily exclusively. Taking an average of these two roughly comparable estimates, the United States assumes that 30.5% of establishments play radio music.

40. It is important to note that, given that establishments often play music from more than one source, this estimate – 30.5% of establishments that play the radio – does not correspond with the percentage of licensing revenue attributable to the playing of radio music, and indeed would significantly overstate such revenue. Nevertheless, for the purpose of deriving a conservative estimate and in light of the limited data available, the United States assumes for the sake of only this analysis that 30.5% of licensing revenue is attributable to the playing of radio music. Correspondingly, the losses to EC right holders from the Section 110(5) exemption for radio music must be reduced to this amount, and would range from $564,517 (30.5% of 1,850,877) to $1,125,398 (30.5% of 3,689,831).

(e) After reducing to account for licensing revenue from general licensee establishments that play the radio and meet size limitations of Section 110(5): losses to EC right holders: $294,113 to $586,332

41. Certainly the calculation of losses to EC right holders must also take into account that many eating, drinking and retail establishments that play radio music do not meet the square footage limits of Section 110(5)(B). Based on figures provided by the National Restaurant Association, 65.5% of restaurants meet the square footage criteria of the statute.[37] The United States has no data regarding the percentage of retail establishments that would meet the square footage criteria; however, the EC has presented a Dun & Bradstreet study commissioned by ASCAP purporting to demonstrate that 45% of retail establishments are exempt under Section 110(5)(B).[38]

42. According to the EC's own exhibit EC-16, Dun & Bradstreet estimated that there were 683,783 retail establishments in the United States, and 364,404 eating and drinking establishments.

43. Applying 45% to the total number of retail establishments (683,783) results in a total of 307,702 retail establishments that meet the square footage criteria of Section 110(5). Applying 65.5% to the total number of eating and drinking establishments (364,404) results in a total of 238,685 such establishments that meet the square footage criteria of Section 110(5). The total number of establishments (both retail and eating and drinking) meeting the square footage criteria of the statute is thus 546,387, which is 52.1% of all establishments. The loss to EC right holders is further reduced to $294,113 (52.1% of $564,517) to $586,332 (52.1% of $1,125,398).

[36] Confidential Exhibit US-18.

[37] The EC has presented a different figure, and estimates that 70% of eating and drinking establishments fall within the square footage limitations of the statute.

[38] EC first submission, para. 51; Exhibit EC-16.

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(f) The U.S. Methodology is Conservative

44. The above figure is a conservative one, based on available information. For a number of reasons, the true amount of economic prejudice to EC right holders is likely to be even less than $294,113 to $586,332. For example, the United States has assumed that where 30.5% of establishments play the radio, 30.5% of licensing revenue is attributable to radio-playing. This figure is obviously too high, given the large proportion of establishments that play music from more than one type of media. In addition, the United States assumed that the 65.5% of restaurants (and 45% of retail establishments) that fit within the square footage limits of the exception accounted for a 65.5% (and 45%) loss of revenue. In fact, the exempt restaurants and retail establishments are necessarily smaller establishments, and almost certainly represent a smaller proportion of licensing revenue.

45. In addition, the above analysis does not take into account steps that ASCAP and BMI might take to minimize any impact of Section 110(5), for example by focusing licensing resources exclusively on larger stores that generally pay larger fees, or by charging more for the playing of music from CDs and tapes. Similarly, the analysis does not take into account the establishments that could take advantage of the private agreement concluded by the PROs with the NLBA. Given the significant membership of the NLBA, and the fact that membership is open to any establishment that is licensed to serve alcoholic beverages, the NLBA Agreement should result in another significant reduction in any estimate of potential losses to EC right holders resulting from Section 110(5). Because the United States currently has no precise data on this factor, and is trying to keep estimates as conservative as possible, this element has not been figured into the loss calculation above.

46. The United States recognizes that the above estimates are losses from ASCAP distributions only. Little data has been available to the United States regarding revenues or distributions of the smaller of the two major U.S. collecting societies, BMI. While the total loss to EC right holders would obviously have to take into account the BMI figures, these figures will certainly be even less than those calculated for ASCAP. As indicated above in Section IV.1.B, average domestic revenue for ASCAP for the years 1995-97 was approximately $347 million. BMI's average domestic revenue in 1995 and 1996 was $260.5 million.[39] Thus, including the BMI figures will not dramatically increase the any loss to EC right holders.

47. The United States also recognizes that the analysis also does not take into account music played from the television. Given that few establishments rely exclusively on television for music, and that the proportion of restaurants using television sets is even lower than the proportion playing the radio,[40] these figures appear unlikely to significantly increase the loss to EC right holders. Finally, the United States notes that Section 110(5)(B) exempts establishments above the square footage limits if they meet certain equipment limits. No information, however, is currently available on this factor.

48. The United States has endeavored here to present the Panel with the best estimates possible from the limited data available. The resulting figures are well-founded in fact and logic, and indicate the insignificant amount of prejudice that EC right holders might actually suffer as a result of Section 110(5). The EC has not to date offered any concrete facts which rebut any of the assumptions made above. The only data offered thus far to support the EC's claim that its right holders have suffered unreasonable prejudice comes from a self-serving press release by the U.S. PROs asserting that their right holders will lose "tens of millions" of dollars. On the basis of this press release, the EC asks the Panel to conclude that EC right holders will suffer losses "in the sphere of millions of dollars".[41] The more rigorous analysis presented by the United States refutes this exaggerated and speculative claim, and establishes the minimal prejudice actually likely to occur.

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[39] Exhibit US-23.
[40] Exhibit US-18.
[41] EC Response to Panel Question 4 to the EC.

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2. Right holders themselves have viewed size limits comparable to Section 110(5)(B) as reasonable and voluntarily supported them

49. In considering whether the passage of Section 110(5)(B) has caused right holders any unreasonable prejudice, the private agreement between the PROs and the NLBA is also highly relevant. Notably, the PROs voluntarily agreed to a blanket exemption of 3500 square foot in the context of their private agreement with the NLBA. The fact that they were willing, voluntarily, to forego the collection of any revenue from such establishments must indicate that the administrative costs of doing so did not justify the likely returns, and that it was preferable from the right holders' perspective to seek a higher degree of compliance from non-exempt restaurants.

50. Indeed, throughout the legislative debate regarding Section 110(5)(B), the PROs were willing to conclude a private agreement with the National Restaurant Association that, like the NLBA deal, would exempt all restaurants under 3500 square feet from paying royalties for radio music. In addition, during legislative consideration of Section 110(5)(B), the "ASCAP and BMI proposal" revolved around an exemption for establishments smaller than 3500 square feet.

V. CONCLUSION

51. In conclusion, the applicable standard for determining the TRIPS consistency of Section 110(5) of the U.S. Copyright Act is TRIPS Article 13. Section 110(5) is a permissible exception to the public performance right based on the criteria articulated in Article 13. Therefore, the United States respectfully requests that the Panel find that both Section 110(5)(A) and (B) are consistent with the TRIPS Agreement.

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ATTACHMENT 2.6

ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING WITH THE PANEL

(7 December 1999)

I. INTRODUCTION

1. The exceptions permissible to exclusive rights, and the standard by which they will be governed are issues of tremendous importance under TRIPS. Article 13 of TRIPS is a key provision that limits WTO Members' ability to restrict exclusive rights, but also provides them with vital flexibility in implementing their TRIPS obligations. The proper application of this standard to Section 110(5)(A) and (B) of the U.S. Copyright Law results in a conclusion that these provisions are fully consistent with the TRIPS Agreement.

II. FACTUAL ISSUES

2. In our second submission, the United States addressed several factual inaccuracies put forward by the EC. We won't repeat those explanations here, except to note that where the parties are in agreement as to the facts, the Panel should not engage in speculation regarding alternative factual scenarios that do not in fact exist. The parties agree that Section 110(5)(A) does not apply to nondramatic musical works. The parties agree that the square footage limitations of Section 110(5)(B) do not apply to Section 110(5)(A). This is the plain language of the statutes; no U.S. court has ruled otherwise, and these are the only facts before the Panel.

III. TRIPS ARTICLE 13 IS THE APPLICABLE STANDARD FOR EVALUATING EXCEPTIONS

3. We start with Article 13. The plain language of Article 13 indicates that it is the appropriate standard by which to judge exceptions to exclusive rights such as Section 110(5). This interpretation of Article 13 is confirmed by the recently-concluded WIPO Copyright Treaty ("WCT"), as well as the negotiating history of the TRIPS Agreement.

4. The text of Article 13 is straight-forward and applies to "limitations or exceptions to exclusive rights". Not *some* limitations, not limitations to *some* exclusive rights. Just limitations or exceptions to exclusive rights. In light of the clear direction from the Appellate Body regarding the importance of the plain language of the text in the interpretation of WTO agreements, the EC should face a high hurdle to convince this Panel to disregard it.

5. The WCT represents further evidence of the applicability of the Article 13 standard to exclusive rights provided under Berne. The EC's submission indicates that the EC "does not understand" the relevance of this agreement. We submit, however, that where 99 Berne Members get together and adopt by consensus a document stating that the same standard of TRIPS Article 13 applies to Berne rights, it is highly relevant and extremely important. Under the Vienna Convention, subsequent agreements and subsequent practice are important tools in treaty interpretation. In the *Japan taxes* case, the WTO Appellate Body emphasized that subsequent practice can be established

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by concordant pronouncements that establish a pattern implying the agreement of the parties regarding a treaty's interpretation.[1]

6. Like TRIPS, the WCT is an agreement explicitly designed to provide a higher level of protection than Berne. It says explicitly that it is a "Special Agreement" within the meaning of Berne Article 20, that it does not derogate from existing obligations under Berne, and it specifically requires compliance with Articles 1-21 and the Appendix of the Berne Convention.

7. Article 10(2) of the WCT specifically states that "when applying the Berne Convention" Contracting Parties shall confine limitations to those that meet the same test set out in TRIPS Article 13. The preparatory materials of the WCT are also enlightening, as the Basic Proposal for the '96 Diplomatic Conference specifically discusses the application of the 3-step TRIPS test to minor reservations under Berne.

8. The U.S. view that Article 13 provides the standard governing all exceptions or limitations to exclusive rights is consistent with the context of Article 13, including TRIPS Article 2.2. It does not imply that TRIPS reduced the level of protection below the level permissible under Berne. The Berne Convention permits minor exceptions to exclusive rights.

9. As described at some length in the U.S. Answers to the Panel's Questions and the U.S. rebuttal submission, the subsequent practice of Berne members indicates widespread acceptance of the notion that exceptions to Article 11 and 11*bis* rights are permissible. Furthermore, the negotiating history of Berne, in particular from the Brussels and Stockholm conferences, confirms that Berne members intended that exceptions be allowed to the exclusive rights provided in Articles 11 and 11*bis*.

10. Commercial uses are not excluded *per se* from the scope of the minor reservations doctrine. The uses discussed in the General Reports may themselves be commercial in certain circumstances. The specific examples of minor reservations given were never intended to be an exhaustive list. To quote Ricketson: "The examples of uses given in the records of the Brussels and Stockholm Conferences are in no way an exhaustive list or determinative or which particular exceptions will be justified." (p. 536) The discussion of the minor reservations doctrine in the General Reports actually precludes the notion that the doctrine was limited to the exceptions specifically cited. The General Reports only list several traditional exceptions to the public performance right of Article 11. However, the Reports also make certain to note that the minor reservation doctrine is <u>also</u> applicable to Article 11*bis*, 13 and 14. It must have been intended that the doctrine apply to exceptions not specifically listed in the Reports, otherwise that language would have no meaning.

11. Nor is the applicability of the minor reservations doctrine frozen in 1967. Again, the WCT provides useful guidance on this issue. The Agreed Statement concerning Article 10 of the WCT states that Contracting Parties can "carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws" that have been considered acceptable under Berne. We note that the EC was a signatory of both the WCT and the Agreed Statement.

12. Construing the minor reservation doctrine to apply only to exceptions in existence in 1967 also creates inequitable results, and renders Berne less relevant to the modern world. Many developing countries that are now members of Berne had no copyright law, or only a rudimentary one, in 1967. If the EC's argument is accepted, then most developing countries will not be allowed to have any exceptions. In addition, the flexibility of the principles of copyright protection represented in Berne would be drastically undermined were they not allowed to respond to changes and developments in technology as well as practice.

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[1] Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 4 Oct. 1996, at p. 25.

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13. For the sake of completeness, I'll now briefly address Article 11*bis*(2). This is a compulsory licensing provision. Compulsory licenses are characterized by the requirement of equitable remuneration. It is not a wholly separate standard governing exceptions. It does not apply in lieu of TRIPS Article 13 and it doesn't affect the applicability of TRIPS Article 13 to this case. Article 11*bis*(2) can, and should, be read consistently with TRIPS Article 13.

14. Article 11*bis*(2) applies to "conditions" on 11*bis* rights. Ricketson writes that "the reference to 'conditions' in article 11*bis*(2) is usually taken to refer to the imposition of compulsory licenses". (p.525). The WIPO Guide to the Berne Convention (p. 70), the WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights (pp. 50, 248), and even the title of 11*bis*(2) assigned by WIPO also refer to that provision as a compulsory licensing provision. It is highly significant that the World Intellectual Property Organization – the entity that administers the Berne Convention – has expressed this clear and consistent view.

15. Article 11*bis*(2) simply has no bearing on Section 110(5). Neither the negotiating history of Berne, nor the subsequent writings of commentators support the view that 11*bis*(2) represents a standard against which to judge exceptions to exclusive rights. If Article 11*bis*(2) had permitted and governed exceptions, there would have been no need for the negotiators at the Brussels and Stockholm conferences to reference Article 11*bis* in discussions about the minor reservations doctrine at all. Article 11*bis*(2) is not related to the minor reservations doctrine, and does not bear upon the scope of exceptions permissible under that doctrine.

IV. SECTION 110(5) MEETS THE ARTICLE 13 CRITERIA

16. I'll turn now to the applicability of Article 13 to Sections 110(5)(A) and (B). These sections apply to different works and have a different scope. Thus, they must be examined separately. Both provisions apply to certain special cases, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

A. INTERPRETING THE ARTICLE 13 CRITERIA

17. Interpretation of the TRIPS Article 13 criteria requires a fact-intensive analysis by the Panel. Article 13 is intended to be a flexible mechanism to evaluate numerous different exceptions in many different contexts and legal systems. It demands a 'rule of reason' approach. The permissibility of exceptions under TRIPS Article 13 must necessarily be determined on a case-by-case basis, taking into account all the circumstances of an individual case.

18. In such an analysis, the market of the country imposing the exception is the most relevant. The United States and the EC agree on this issue. Moreover, while both actual losses and potential losses may be relevant to the analysis under Article 13, the key is a realistic appraisal of the conditions that prevail in the market. An analysis based on unrealistic and counter-factual assumptions is not reliable, is speculative, and basically unfair. The only way to avoid the danger of arbitrariness is to base the analysis on realistic market conditions.

B. SECTION 110(5)(A) AND (B) APPLY TO CERTAIN, SPECIAL CASES

19. Both Section 110(5)(A) and (B) represent exceptions that apply in certain special cases. The essence of this requirement is that exceptions be well-defined and of limited application. Both sub-sections (A) and (B) are sufficiently definite. Section 110(5)(A) is defined by the equipment limitations, and the subsequent case law. Section 110(5)(B) is clearly defined in the statute by square footage and equipment limitations.

20. Furthermore, to the extent that the purpose of the exception is relevant, it is only required that the exception have a specific policy objective. TRIPS does not impose any limitations on the policy objectives that a particular country might consider special in light of its own history and

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national priorities, and a Panel should be loathe to imply them. In this case, both U.S. exceptions rest upon sound public policy objectives related to the social benefits of fostering small businesses and preventing abusive tactics by the collecting societies.

C. NEITHER SECTION 110(5)(A) OR (B) CONFLICTS WITH NORMAL EXPLOITATION

21. Neither Section 110(5)(A) nor Section 110(5)(B) conflict with the normal exploitation of a work. The Panel's analysis of the issue of normal exploitation should be a broad one. There is no textual support in TRIPS for confining the analysis concerning normal exploitation to one exclusive right. The impact of an exception on a particular exclusive right is relevant, but no more relevant than the effect of the exception on the exploitation of the work as a whole. When considered in context, neither Section 110(5)(A) nor Section 110(5)(B) conflict with the normal exploitation of the works that they cover.

22. Section 110(5)(A) does not conflict with normal exploitation, as it was intended precisely to exempt those establishments which would not have otherwise justified a commercial license. More generally, the market to which Section 110(5) applies was never significantly exploited by the PROs. During Congressional consideration of Section 110(5)(B), ASCAP and BMI themselves advocated an exemption for establishments under 3500 square feet. (*Exhibit US – 16, CRS study comparing Aiken standard to "ASCAP/BMI proposal"*). In addition, they voluntarily signed a private agreement with the NLBA with the same square footage limitations. And they offered the same deal to the NRA. These actions by the PROs constitute important evidence that Section 110(5)(B) does not conflict with a normal exploitation of a work in the United States market.

D. NEITHER SECTION 110(5)(A) OR (B) CAUSES UNREASONABLE PREJUDICE

23. Finally, we turn to the last prong of the TRIPS Article 13 standard: unreasonable prejudice. The economic effects of Section 110(5)(A) and (B) are minimal. Neither of these provisions cause EC right holders unreasonable prejudice. In fact, the EC has yet to provide a shred of evidence that Section 110(5)(A) causes its right holders *any* prejudice whatsoever. Given this situation, our empirical analysis will focus, as has the EC, on Section 110(5)(B).

24. In our first submission, the United States noted the irrelevance of the figures provided by the EC, and discussed the factors by which those figures must be reduced to yield a reasonable approximation of possible losses to EC right holders. The EC responded by asserting generally that the exception was costing its right holders millions of dollars. Thus, in our second submission, the United States has provided rebuttal evidence that Section 110(5)(B) is not costing EC right holders millions, but rather an amount that is insignificant. The analysis demonstrated that the maximum loss to EC right holders of distributions from the largest U.S. collecting society, ASCAP, as a result of the Section 110(5) exemption is in the range of 294 to 586 thousand dollars. This is in the range of 1%.

25. The United States has presented the Panel with the most precise estimates possible regarding the economic prejudice caused by Section 110(5). We've used data from ASCAP, from the NRA, from the NLBA, and even from the EC. Our analysis is based on the best information available, and has a firm factual and logical basis.

26. The EC has not to date offered any facts that rebut in any meaningful way any of the assumptions on which the U.S. analysis is based. The only "data" on losses offered by the EC thus far is a statement from a self-serving press release issued by ASCAP and BMI. In its answers to the Panel's questions, the EC makes some assertions regarding the music licensing market in Ireland. We do not believe that Ireland is a comparable market to the United States. And even if it was, actual data from the United States is certainly more relevant to the issue at hand.

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27. The Panel's job is to weigh the facts presented. It must weigh the detailed evidence presented by the United States, which indicates prejudice in the range of a few hundred thousand dollars, against the assertions of the EC about Ireland. We respectfully submit that the U.S. analysis is the more credible one, and that it demonstrates that the amount of prejudice suffered by the EC is not unreasonable – in fact, it is barely measurable.

28. Our analysis is laid out in our Second Submission in significant detail. With the aid of US-exhibit 24, I will review it here briefly. Exhibit 24 has two pages – one for ASCAP and one for BMI. We've prepared these exhibits as an aid to this oral presentation, and you'll note that most of the numbers are rounded off. The precise figures are cited in the U.S. Second Submission. To simplify the presentation, I'll focus on the ASCAP analysis. As we noted in our brief, however, the numbers for BMI are even smaller. BMI collects less in annual revenues and collects for a lower percentage of EC right holders.

1. Starting-point: royalties paid to EC right holders: $19.6 million - $39 million

29. The logical starting-point is the total amount paid to EC right holders by the collecting societies. In conducting an internal analysis of the effect of Section 110(5) on EC right holders in 1998, the EC based its calculations on distributions from the U.S. PROs to EC collecting societies. In 1996, such distributions were a bit under 19.6 million dollars. [2]

30. In its response to the Panel's questions, however, the EC argues that the relevant number is far higher, and cites figures from ASCAP purporting to show that EC right holders received an average of $39 million from ASCAP for the years 1996 – 98. Given the inconsistency in the EC methodology, the United States' analysis proceeds based on a range of 19.6 million to 39 million. (*line 1 of Exhibit US-24*).

31. Now these total figures – 19.6 – 39 million – represent payments from all licensees, including those that are not affected at all by Section 110(5)(B). So obviously it does not represent a realistic number for the potential loss to EC right holders. The only loss could come from establishments that meet the size and equipment limitations and play the radio. So we will take it step by step to reduce that total figure to exclude revenues that are unaffected by Section 110(5).

2. Reduce to amount attributable to general licensing - $3.7 - $7.4 million

32. Step One – You've got to exclude revenues from TV and radio broadcasting. Nothing in Section 110(5)(B) touches these revenues. And in fact license fees paid by TV and radio broadcasters are by far the largest portion of ASCAP's revenues. Licensing fees from establishments covered by Section110(5)(B) are considered general licensing fees. We know from ASCAP's Annual Reports that general licensing fees make up only 14% of ASCAP's total revenues. That's 18.9% of ASCAP's domestic revenues. So as you can see under Line 1 of the exhibit, right away you have to reduce the total amount paid to EC right holders to just 18.9% of that total, or 3.7 – 7.4 million dollars.

[2] The starting figure for BMI was taken from the EC's 1998 Trade Barriers Regulation Investigation Report, which indicated that of BMI's total distributions to rightholders of 217.3 million in 1996, 5.6% went to foreign collecting societies. We've made the realistic assumption that two-thirds of these foreign distributions are paid to EC right holders (217.3 * .056 * .67 = 8.15), and then followed the same calculations as described for ASCAP.

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3. Reduce to account for licensing revenue from general licensees that do not meet the statutory definition of an "establishment" – losses to EC right holders: $1.85 - $3.69 million

33. Step Two – Section 110(5)(B) does not apply to all general licensing. General licensing is a very broad category. It essentially applies to anyone that is not a radio or television station. ASCAP's A-Z list of general licensees is Exhibit US-25. As you can see, this category includes everything from background music services, colleges and universities, conventions, football teams, music-on-hold, private clubs, theme parks, trade shows, training seminars and tractor pulls. Restaurants are certainly included on the list, but so are many other types of licensees. The royalties paid by these licensees must be excluded from the analysis of losses resulting from Section 110(5)(B).

34. In accounting for this factor, the United States has made an assumption that 50% of general licensing revenue is attributable to such licensees. Given the variety of exclusive licensees and significance of some of the excluded ones, this figure is a conservative one. In Step Two on the exhibit, you can see that after reducing the potential losses to EC right holders to 50%, the resulting range of potential loss is about 1.8 million to 3.7 million.

4. Reduce to account for licensing revenue from general licensees that do not play the radio – losses to EC right holders: $.56 million - $1.13 million

35. Now we go to step three. Obviously many restaurants, bars and retail stores do not play radio music. For most establishments, radio programming – with all of its advertisements, talk and interruptions – is an unattractive option. Who wants their customers to hear advertisements for their competitors? Much of the revenue from general licensees that qualify as establishments is not attributable to the playing of radio or TV music, but rather to public performances of music from media such as tapes/CDs, live bands, and jukeboxes.

36. The National Restaurant Association and the National Licensed Beverage Association estimate that approximately 33% and 28% of their members, respectively, play the radio. Such radio use is often not exclusive. Many establishments that play the radio will often play music from other sources as well. Taking an average of these two roughly comparable estimates, we have assumed that 30.5% of establishments play radio music.

37. It is important to note that, given that establishments often play music from more than one source, this estimate – 30.5% of establishments that play the radio – does not correspond with the *percentage of licensing revenue* attributable to the playing of radio music. Revenue from radio music is going to be much less. Nevertheless, we are being very conservative in these calculations, and have assumed for the sake of this analysis that 30.5% of licensing revenue is attributable to the playing of radio music. Correspondingly, the losses to EC right holders from the Section 110(5) exemption for radio music must be reduced to this amount. In line 3, you can see that this would range from about half a million to 1.1 million dollars.

5. Reduce to account for licensing revenue from general licensee establishments that play the radio and meet size limitations of Section 110(5): losses to EC right holders: $294,113 to $586,332

38. In Step Four, we take a final reduction to take into account the fact that many eating, drinking and retail establishments that play radio music do not meet the square footage limits of Section 110(5)(B). According to figures provided by the National Restaurant Association, 65.5% of restaurants meet the square footage criteria of the statute. According to the EC, there are 364,404 eating and drinking establishments in the United States. That means that about 239 thousand meet the square footage requirements of the statute.

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39. On the retail side, the EC has presented a study commissioned by ASCAP purporting to demonstrate that about 45% of retail stores meet the square footage limits of the statute. The EC also alleges that there are 683,783 retail establishments in the United States. 45% of 684 thousand is about 307 thousand.

40. So, even using EC figures for the sake of today's analysis, we have about 239 thousand exempt restaurants and 307 thousand exempt retail stores. That's a total of 546 thousand exempt establishments, which is 52.1% of all establishments. In line 4, we've reduced the possible losses to EC right holders to 52.1%, which is about 294 – 586 thousand dollars.

41. If you follow the same four-step analysis for BMI, the result is a paltry 122 thousand dollars.

6. The U.S. Methodology is Conservative

42. As explained in the U.S. submission, these calculations are conservative and – if anything – overstate the true amount of economic prejudice to EC right holders. Some of the reasons these figures are conservative include:

- The United States has assumed that where 30.5% of establishments play the radio, 30.5% of licensing revenue is attributable to radio-playing. This figure is obviously too high, given the large proportion of establishments that play music from more than one type of media.

- Similarly, the United States assumed that the 65.5% of restaurants (and 45% of retail establishments) that fit within the square footage limits of the exception accounted for a 65.5% (and 45%) loss of revenue. In fact, the exempt restaurants and retail establishments are necessarily smaller establishments, and almost certainly represent a smaller proportion of licensing revenue.

- The analysis also does not take into account steps that ASCAP and BMI might take to minimize any impact of Section 110(5).

- Similarly, the analysis does not take into account the establishments that could take advantage of the private agreement concluded by the PROs with the NLBA.

7. Any minimal prejudice from Section 110(5)(B) is reasonable in light of ASCAP and BMI's advocacy of an exemption of almost identical scope

43. Finally, in considering whether the passage of Section 110(5)(B) has caused right holders any unreasonable prejudice, the private agreement between the PROs and the NLBA is again relevant. The PROs voluntarily agreed to a blanket exemption of 3500 square feet. They offered the same deal to the NRA. Perhaps most significantly, during Congress' consideration of Section 110(5)(B), the "ASCAP and BMI proposal" also revolved around an exemption for establishments smaller than 3500 square feet. Presumably, ASCAP and BMI would not have proposed an exemption of 3500 square feet if they felt that such an exemption would cause their members any real prejudice.

V. CONCLUSION

44. To sum up, the applicable standard for determining the TRIPS consistency of Section 110(5) of the U.S. Copyright Act is TRIPS Article 13. Section 110(5) is a permissible exception to the public performance right based on the criteria articulated in Article 13. Therefore, the United States respectfully requests that the Panel find that both Section 110(5)(A) and (B) are consistent with the TRIPS Agreement.

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45. Furthermore, the United States requests that the Panel clearly delineate its findings regarding sub-section (A) and sub-section(B) of Section 110(5), in order to provide maximum guidance to WTO members regarding the interpretation of the TRIPS provisions at issue.

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ATTACHMENT 2.7

COMMENTS ON THE LETTER FROM THE DIRECTOR GENERAL OF WIPO TO THE CHAIR OF THE PANEL

(12 January 2000)

1. The United States appreciates this opportunity to comment on the material provided to the Panel by the International Bureau of the World Intellectual Property Organization (WIPO). The United States further appreciates the Panel's communication of January 10, 2000, regarding the deadline for submitting comments on these materials.

2. In the view of the United States, the extensive material provided by WIPO does not raise issues not already addressed by the Parties and discussed in the two Panel meetings in this case. The material further confirms the importance that Berne negotiators attached to the permissibility of exceptions under Articles 11 and 11*bis*, and the existence of the minor reservations doctrine. *See, e.g.*, Annexes X, XII and XIII. For this reason, the United States considers that these documents support the U.S. position in this case.

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3.1 AUSTRALIA

3.1.1 WRITTEN SUBMISSION OF AUSTRALIA

(1 November 1999)

SYNOPSIS

- Exceptions or limitations to the right of authorising public communication of broadcast copyright works under the TRIPS Agreement must conform with:

  - the general conditions set by TRIPS Article 13, and

  - the specific conditions set by Article 11*bis* of the Berne Convention as incorporated in TRIPS,

  consistent with the general objectives and principles of TRIPS, in particular Article 7.

- It would be valuable to clarify the relationship between TRIPS and Berne as they apply to this specific right:

  - there is no hierarchy of authority between TRIPS Article 13 and Berne Article 11*bis*(2), but the latter provision provides more direct guidance as to the present case;

  - any exception or limitation would still need to conform with each of the two provisions;

  - this right is to be considered differently from other rights – such as the general reproduction right – in the light of the specific guidance provided by Berne 11*bis*(2);

  - 11*bis*2 specifies that conditions on this right shall in no circumstances be prejudicial to the author's entitlement to equitable remuneration.

- The diplomatic history of the Berne Convention provides further guidance as to how the "conditions" allowable under Berne 11*bis*(2) should be interpreted:

  - the right of equitable remuneration was strongly emphasised;

  - the only apparent exceptions considered were "minor reservations" relating to use of the work in a private setting or associated with public interest objectives, such as in educational or religious contexts.

- Consistent application of these two provisions to the right of public communication of broadcast works would entail giving due weight to Berne 11*bis*(2):

  - hence, the test established under TRIPS Article 13, applied to this right, should be coloured by the specific requirement for equitable remuneration;

  - by setting conditions on the exercise of this right, and establishing a minimum standard involving equitable remuneration, 11*bis*(2) prescribes how rights and obligations are balanced, and exceptions and limitations are

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set, that is a specific instance of the general balance of interests that is required in TRIPS Article 7 and also expressed in Article 13;

- Article 9(2) of Berne, by contrast, has only limited and indirect relevance to the determination of the scope of allowable exceptions and limitations to this right.

- Equitable remuneration in relation to the right of public communication of broadcast works should entail recognition of any specific commercial benefits that are intended to result from public communication made for commercial objectives:

  - the confinement of this right to an entitlement to equitable remuneration represents a significant constraint on the exercise of the right, allowing exclusion of the right to prohibit public communication and to seek inordinate remuneration, and allowing for it to be implemented through compulsory licensing;

  - equitable remuneration in this context maintains the balance of rights and objectives called for in TRIPS Article 7;

  - it also clarifies the nature of "unreasonable prejudice" in the application of TRIPS Article 13 to the right of public communication of broadcast works.

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I. POLICY BACKGROUND

1.1 Historically, at a national level, copyright and related rights have been developed, enforced, and subject to limitations and exceptions with the overall goal of serving the broader public interest through the provision of effective and appropriate private rights. The WTO Agreement on Trade-Related Aspect of Intellectual Property Rights ("TRIPS") articulates this balance, already present in the established copyright norms of the Berne Convention for the Protection of Literary and Artistic Works ("Berne"),[1] sets it explicitly into an international trade context, and obliges WTO Members to observe it in a number of specific contexts in their implementation of intellectual property law. TRIPS is founded on the understanding that distortions and impediments to trade, and other forms of detriment to legitimate interests, are the consequence of disturbances to this balance.

1.2 Hence TRIPS affirms that a "balance of rights and obligations" is a key objective of the "protection and enforcement of intellectual property rights" (Article 7), and it provides for exceptions and limitations to be imposed on intellectual property rights, including copyright and related rights (Article 13). Any exceptions to the basic framework established by TRIPS should be aimed at sustaining this mutually beneficial balance, and should also be consistent with the specific provisions of TRIPS (including those provisions of other instruments incorporated within TRIPS by reference).

1.3 The present case concerns an exemption from the requirement to pay royalties to music composers and songwriters for the playing of radio and television broadcasts of their compositions in certain public places – exceptions to the right of communication to the public of broadcast copyright works, a right which has, in the Berne Convention, been clearly distinguished from the broadcast right itself. On the basis of the two first submissions, there appears to be no issue as to the initial scope of the rights, and the present case is more concerned with the legitimate scope of certain statutory exceptions to that right: hence it has less to do with the underlying nature of the right than with the degree to which that right can be limited or qualified, with reference to the questions of normal exploitation of a copyright work, unreasonable prejudice to the right holder's interests, and the right holder's entitlement to equitable remuneration.

1.4 The case therefore raises questions about the interaction of private intellectual property rights (IPR) and broader public policy goals, the way in which the broad objectives of TRIPS are to be reflected in national intellectual property systems, and how certain key provisions are to be implemented in individual jurisdictions. Since the case relates to key provisions of Berne, it also raises the question of how the diplomatic and interpretative history of relevant provisions of that Convention should be taken into account when interpreting obligations under TRIPS.

1.5 The General Report of the Rome Conference, in discussing the introduction of the new right of communication to the public through broadcasting (the "most important result" of that Conference[2]), notes that the text adopted by the Conference "had the characteristic of a compromise between two opposing tendencies": that of "entirely assimilating the broadcasting right into the other exclusive rights of the author", and that of considering the right "as the subject for intervention by the public authorities to protect the cultural and social interests linked to this new and special form of popular dissemination of intellectual works, especially musical works".[3] This is a clear instance of the broader "balance of interests" noted in TRIPS 7, with specific bearing on the particular right at issue in the present case. The Report of the Sub-committee on Broadcasting at Rome notes that this provision reconciles "the general public interest of the State with the interests of authors",[4] the public

[1] For convenience and brevity, this submission generally cites provisions of TRIPS in the format "TRIPS 13", for "Article 13 of TRIPS", and "Berne 11*bis*(2)", for "paragraph 11*bis*(2) of Berne".

[2] Proceedings of the Conference Convened at Rome, BIRPI, Berne, 1929, p. 210.

[3] loc. cit.

[4] op. cit. p.184.

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interests under consideration being the potential use of the new medium of broadcasting for the dissemination of cultural works.

1.6 Australia's involvement as a third party in this case reflects:

- an immediate trade interest in ensuring that Australian composers and songwriters can obtain equitable remuneration in relation to the public communication of broadcasts of their musical works in the important US market;[5] and

- the need to preserve the integrity of the rules relating to trade-related IPRs: that is, ensuring that TRIPS (and, in this case, specifically the Berne provisions it incorporates) is interpreted and applied in national law in a manner that ensures that the common standards are fully respected, while maintaining a legitimate scope for public policy exceptions to IPRs, in a way that preserves the balance of interests enshrined in TRIPS and promotes its objectives.

Australia's approach is accordingly governed by the concern that there should be no unreasonable diminution of the legitimate interests of copyright owners, including the right to equitable remuneration where this is explicitly provided for; and that governments should have sufficient latitude to maintain the underlying balance of rights and obligations while giving full effect to specific TRIPS obligations.

1.7 In June 1998, the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs tabled a report on the public performance and broadcast rights in relation to small business.[6] A key issue considered by the Committee was the international legal obligations concerning public performance and broadcast rights set out in TRIPS and Berne. As elements of this Committee's work may be of use in the present Panel's deliberations, a synopsis of this report is attached (Annex A). Australia continues to place strong emphasis on the continuing consistency of its own domestic intellectual property system with international obligations, and welcomes the opportunity that the present case provides to clarify and confirm those obligations as they apply to the right of public communication of broadcast works.

II. LEGAL ISSUES

2.1 The question before the Panel is whether the recently amended S.110(5) of the US Copyright Act ("S.110(5)") is in breach of TRIPS 9(1), which requires WTO Members to comply with Berne Articles 1 through 21 (save for 6*bis*), and the Berne Appendix. This obligation is potentially affected by TRIPS Article 13 which sets bounds within which any limitations and exceptions to copyright and related rights under TRIPS must be confined. This submission sets out an approach to dealing with the legal issues of this case in a manner that should preserve both the legitimate interests of copyright holders and the public interest, as well as maintaining the integrity of the composite TRIPS-Berne system. Given that this is the first case before the WTO DSB to consider substantive TRIPS provisions on copyright, and in particular the linkages between specific Berne provisions and broader TRIPS provisions, this submission offers some considerations on interpretative questions.

[5] According to one industry estimate, the potential annual loss from the introduction of S.110(5) of the US Copyright Act would exceed AUD 1 million, a sum likely to rise given current market trends.

[6] *Don't Stop the Music*, http://www.aph.gov.au/house/committee/laca/Inquiryincopy htm.

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The scope and objective of Berne Article 11*bis*: the right of public communication of broadcast works, and conditions on that right

2.2 S.110(5) provides that certain forms of public communication of broadcast works shall not infringe copyright. This creates a clear exception to the right established in accordance with Berne 11*bis*(1) which provides to authors of literary and artistic works (including musical works) the exclusive right of authorizing *inter alia* "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work".[7] This is subject to the provision (Article 11*bis*(2)) that it "shall be a matter for legislation in the countries of the [Berne] Union to determine the conditions under which [this right] may be exercised… [These conditions] shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority". This last provision bears the facilitative heading "Compulsory Licences". The context of the 11*bis*(2) suggests that it is intended in particular to ensure that arrangements for compulsory licensing of broadcast works do not deprive the right holder of equitable remuneration. This particular focus was confirmed at the Stockholm Conference. In addition, the scope of Berne 11*bis* is potentially affected by the so-called "minor reservations", discussed below (from 3.4), that form part of its negotiating history.

The scope and objective of TRIPS Article 13: general limitations and exceptions on copyright

2.3 TRIPS 13 covers limitations and exceptions to exclusive rights pertaining to copyright works in general. Its immediate objective is to "confine" such limitations or exceptions. It has some important differences from parallel provisions in relation to trade marks (Article 17), designs (Article 26.2) and patents (Article 30) - these only cover exceptions, and not limitations, to exclusive rights. The need to confine limitations in TRIPS 13 as well as exceptions may be a consequence of the different nature of copyright compared with industrial property rights, entailing the broader range of legitimate non-commercial usages of copyright material, and the widespread use of compulsory and mechanical licensing in the exploitation of copyright works. Such measures limit the operation of the right rather than necessarily create exceptions. TRIPS 13 recognises the need to govern the way in which legislative restrictions on such rights operate, so as to maintain an appropriate balance of interests.

2.4 The notion of "limitation", in contrast to an "exception", accords with the operation of Berne 11*bis*(2), which sets bounds on the "conditions" which national legislation may set for the exercise of the specific rights provided in Berne 11*bis*(1).

Berne Convention obligations in a TRIPS context

2.5 How, and to what extent, do the history and accumulated interpretative material concerning the Berne Convention apply to Berne provisions within TRIPS when considered under the WTO DSU? This is not raised specifically as an issue by either party, but is implicit in the use made of background material about Berne in both first submissions. In interpreting the provisions at issue, the EC submission has drawn on the diplomatic history of Berne; the US submission (para 22) refers to the objective of TRIPS (Article 7), draws on scholarly commentary on Berne 9(2) in its detailed elucidation of TRIPS 13, and invokes the Berne doctrine of "minor reservations" that is not a specific Berne provision but was established in diplomatic conferences on Berne (para 18).

2.6 On the face of it, the Berne provisions at issue should be assessed as obligations arising through the effect of TRIPS, and not as Berne obligations in their own right. TRIPS binds WTO Members to certain provisions of a distinct international instrument, the Berne Convention.

[7] Berne 11 is also relevant, in that it covers any public communication of the work, but Berne 11*bis* provides more specific guidance on the context at issue in this case.

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TRIPS 2.2 provides that TRIPS does not derogate from existing obligations under Berne: this suggests that any rights or exceptions permitted under TRIPS should be consistent with Berne in its own right. TRIPS was negotiated with a background understanding of the scope of the provisions of Berne, and, while there is not necessarily a direct linkage with the interpretative history of Berne, it is unquestionable that the Berne negotiations form part of customary international law in this area. Moreover, the inclusion of Berne provisions in TRIPS indicates that the object and purpose of TRIPS extend to the promotion of the full and effective implementation of those provisions.

2.7 It is submitted that both the interpretative history of Berne and the specific objectives of TRIPS are relevant to the application of overlapping TRIPS and Berne provisions, in the absence of any contradiction between the two. There are in fact certain instances where the background of Berne helps elucidate the way interests are balanced in TRIPS. In dealing with the complex issues at stake in this case, it would be useful to articulate more clearly how this linkage should operate.

Berne Article 11*bis*(2) and TRIPS Article 13: reconciling the general and specific provisions

2.8 There are compelling policy and legal reasons to maintain consistency between Berne 11*bis* and TRIPS 13 when they are applied to the same right. This question has not been explicitly raised by either party, but is implicit in the interpretations made in their submissions. There is a need for clarity and consistency of application, particularly given that overlapping Berne and TRIPS provisions have not before been considered in a WTO DSU context.

2.9 The first question relates to their respective scope - does TRIPS 13 encompass Berne 11*bis*(2), or are they co-extensive in relation to broadcast works? A WIPO commentary on the relationship between TRIPS 13 and exceptions and limitations in Berne remarks that:

> None of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the normal exploitation of the work and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder. Thus, generally and normally, there is no conflict between the Berne Convention and TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned.[8]

2.10 This suggests that no fundamental conflict need exist, and that all limitations and exceptions already allowed under Berne would also comply with TRIPS 13; but that does not mean that the exceptions or limitations ("conditions") afforded by one are coextensive with those allowed under the other. Ricketson[9] has suggested that TRIPS 13 is broader in scope than specific exceptions allowable under Berne. However, even if an exception to the right of public communication of broadcast works were found to be consistent with TRIPS 13, then the more specific Berne 11*bis*(2) would still apply and maintain the requirement for equitable remuneration. In effect, this would either add an additional step to the "three step" test of Article 13 when it is applied to public communication of broadcast works, or would more precisely determine the way that test is applied in this context.

2.11 There is no hierarchy of authority between TRIPS 13 and Berne 11*bis*(2). In the context of the conclusion of TRIPS, both provisions were adopted at once and have simultaneous effect as TRIPS obligations. However, Berne 11*bis*(2) has not been addressed so far in the submissions put to the panel, and the focus appears to be on TRIPS 13 only.[10]

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[8] *Implications of the TRIPS Agreement on Treaties Administered by WIPO* (1996) Geneva, page 22-23.

[9] Ricketson, Staniforth, *The Law of Intellectual Property*, LBC, Sydney, 1999, 16.560.

[10] See for instance paragraph 17 of the first submission of the US.

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2.12 Further, TRIPS 13, as a general provision, cannot override the more specific Berne 11*bis*(2): it is more likely that the latter provision indicates how the parties considered the general principle would apply in these circumstances, and there is no evidence to suggest that the general was intended to override the specific in this particular case; hence the specific provision should prevail in the event of any unclarity. This legal principle - *generalia specialibus non derogant* – is well established in common law and can be drawn on in the international context.[11] Further, TRIPS 13 provides that limitations and exceptions are to be *confined* in a certain way: this does not rule out further, more focussed constraints, based on specific Berne provisions. Since the two provisions are equally binding on WTO Members, and can be interpreted without conflict between them, an exception or limitation to the right of public performance of broadcast works should comply with both TRIPS 13 and Berne 11*bis*(2).

2.13 The incorporation of Berne 11*bis* establishes this right under TRIPS; it would follow that any provision allowing limitations to that right (such as 11*bis*(2)) would also be significant in determining related TRIPS obligations. The General Report of the Brussels Conference states that Berne 11*bis*(1), "with its three separate items, is inseparable from paragraph 2".[12]

2.14 It is submitted that the preferable approach would be to acknowledge that Berne 11*bis*(2) influences the application of TRIPS 13 to rights established under Berne 11*bis* (but not its application to other rights). This would promote consistency of interpretation between the key provisions of TRIPS and of Berne incorporated within TRIPS. Berne 11*bis*(2) provides the clearest, most authoritative guidance as to how acceptable limitations and exceptions under TRIPS 13 apply to the right of public communication of broadcast works; at the same time, it establishes a direct test for TRIPS-consistency of any exception or limitation on that right.

III. ANALYSIS OF BERNE ARTICLE 11*BIS*

Scope of the specific limitations in Berne Article 11*bis*: interpretative background

3.1 The right of public communication of broadcast works was incorporated into the Berne Convention at the Brussels Conference (1948) with no significant opposition,[13] confirming that a distinct right existed over and above the broadcast right itself.

> The rationale for this is that the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting.[14]

3.2 The Brussels Conference considered the limitations that national legislation may place on this right, leading to the adoption of Article 11*bis*(2). Three delegations had made drafting proposals seeking to clarify that the right did not apply when the communication to the public was not in a

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[11] The authority for relying on the principle of *generalias specialibus non derogant* is Article 38 of the Statute of the International Court of Justice which is generally regarded as a complete statement of the sources of international law. Article 38(1)(c) indicates that a valid source of international law is "the general principles of law recognised by civilized nations".

[12] *Records of the Conference Convened in Brussels*, quoted in Berne Convention Centenary, WIPO, Geneva, 1986, p. 181.

[13] Ricketson, Staniforth (1987), *The Berne Convention for the protection of literary and artistic works: 1886-1986*, London: Eastern Press Ltd, page 453.

[14] WIPO Guide, Para. 11*bis* .12.

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commercial context, was made in a family or domestic circle, or was in a scholastic context.[15] These were withdrawn on the understanding that such reservations could be accommodated within the proposed text of Article 11*bis*(2), but subject to the understanding in the Broadcasting Sub-committee's report that exercise of the prerogative "will in no circumstances be prejudicial to the author's … right to receive equitable remuneration".

3.3 Inasmuch as this provides guidance as to the nature of the TRIPS (and Berne within TRIPS) obligation, it is clear that no exception was contemplated that would allow public communication of broadcast works in the pursuit of commercial objectives without the possibility of securing equitable remuneration. The Brussels Conference General Report mentioned "free-of-charge exceptions made for religious, patriotic or cultural purposes"[16] as related to allowable conditions. The Stockholm Conference[17] clarified that this provision referred to "the compulsory licence which national legislations may impose, subject to just remuneration". The provision does not appear to extend to the effective extinguishment of the right in circumstances when equitable remuneration could be expected. As Ricketson notes, "the power to impose conditions on the exercise of rights set out in Article 11*bis*(1) does not carry with it the power to deny those rights".[18]

Minor reservations under Berne Article 11*bis*

3.4 Since the first submissions by both parties refer to "minor reservations" under Berne,[19] it may be useful to clarify how such "reservations" would apply in a TRIPS context. It was in relation to Berne 11 - Right of Public Performance - that the issue of minor reservations first arose. During the Brussels Conference (1948) it was proposed that a general provision be inserted into the Berne Convention under which it would be permissible for State Parties to retain minor reservations that already existed in their national laws (e.g. religious ceremonies and performances by military bands at public fetes). The drafters of the Brussels Revision rejected this proposal on the basis that the adoption of such a general provision would encourage those nations which had not recognised such exceptions to incorporate them into their laws.[20] It was agreed that rather than dealing with this matter in the Convention itself, it would be dealt with in the General Report of the meeting as follows:

> Your rapporteur general has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark, and Finland, the Delegate of Switzerland and the Delegate of Hungary, have all mentioned these limited exceptions allowed for religious ceremonies, military bands and the needs of the child and adult education. These exceptional measures apply to articles 11*bis*, 11*ter*, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principles of the right.[21]

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[15] *Records of the Conference Convened in Brussels*, BIRPI, Berne, 1951: proposal of the Netherlands on p.279; proposal of Monaco, p.278; proposal of Hungary, p. 278.

[16] *Records of the Conference Convened in Brussels*, quoted in Berne Convention Centenary, WIPO, Geneva, 1986, p. 181.

[17] *Records of the Stockholm Conference*, WIPO, Geneva, 1971, Main Committee I Report, p.1167.

[18] Ricketson (1987), page 525.

[19] EU submission, para 73; US submission, para 18.

[20] Ricketson (1987), page 533.

[21] *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986*,WIPO, Geneva, 1986, page 181.

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The last sentence underscores the *de minimis* nature of the types of exceptions that could fall under the minor reservations doctrine in relation to this particular right.

3.5 At the Stockholm Conference (1967) it was again agreed that the Berne Convention did not prevent State Parties from maintaining existing exceptions in their law on the basis that they qualified as minor reservations.[22] The Nordic countries proposed inserting into the General Report a sentence to the effect that the possibility allowed for in the Brussels Conference General Report for the making of minor reservations was still valid. The Record of the Stockholm Conference accordingly reads:

> In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands, and the requirements of education and popularization. The exceptions also apply to articles 11*bis*, 11*ter*, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle in the right.
>
> It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference.[23]

3.6 Both the Brussels and Stockholm Conferences considered the minor reservation doctrine as applying to Article 11*bis* among other provisions. The legal status of the minor reservations is not entirely clear: are they strictly "reservations" to the application of the treaty to the countries expressing them, or are they implicit interpretations of the treaty language? Given that TRIPS does not permit formal reservations (Article 72), it is possible that TRIPS 13 was intended to provide the same degree of latitude that these minor reservations permitted under Berne; alternatively, the minor reservations could be seen as casting light on the practical interpretation of Berne 11*bis*(2). For instance, a "reserved" use could be deemed to be one for which the appropriate remuneration can be deemed equitably to be nil - given their non-commercial nature, and their private setting or their use in relation to a common public interest, it could be deemed inequitable to charge for such communications.

"Equitable remuneration" under Article 11*bis*(2)

3.7 Article 11*bis*(2) provides that, whatever conditions are imposed on the exercise of the right of public communication of broadcast works, "in any circumstances" two clear entitlements should be preserved - moral rights (which appear not to apply in the TRIPS context, owing to their exclusion from TRIPS 9(1)), and the right to obtain equitable remuneration. Neither first submission directly addresses the question of equitable remuneration. It merits consideration, firstly because exceptions and limitations to the right of public communication of broadcast works need to be assessed against Article 11*bis*(2), and secondly because Article 11*bis*(2) should inform the application of TRIPS 13 to that right.

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[22] *WIPO Guide to the Berne Convention.* (1978) WIPO, Geneva, page 65.
[23] *Records of the Intellectual Property Conference of Stockholm* WIPO, Geneva, 1971, page 1166.

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3.8 The distinct nature of the public communication of a broadcast work creates an expectation of a distinct reward for the creator of the work. This was summarised in a submission to the recent Australian Parliamentary inquiry as follows:

> [the law gives] recognition that there are two levels of benefit. The radio station is gaining a benefit from broadcasting into people's homes. If someone at the point of reception chooses to gain a second commercial benefit by playing the music through the use of reception, then that is something that should attract some return for the author or composer.[24]

Hence the notion of 'equitable remuneration' should be informed by this expectation of a separate reward. The same inquiry report observed:

> Many composers emphasised the importance of their public performance royalties in allowing them to continue to compose music. … There was a strong feeling that the value of the royalty was not just in its quantum, but in the knowledge that they were receiving some sort of financial reward for their work. In many cases, the principle of reward was considered to be as important as the money.[25]

3.9 Given the clear direction of Berne 11*bis*(2), equitable remuneration, either by agreement or the determination of an appropriate authority, is required for the public communication of broadcasts even in connection with relatively modest commercial objectives. The appropriate fee may also be very modest for individual small businesses seeking to secure commercial benefits from the broadcast works.[26] The level of equitable remuneration may be linked in a general way to the commercial benefits achieved by the business user - for instance, in attracting and retaining additional clientele, in creating a particular ambience, and in drawing on the popular appeal of a musical work. Representing a major group of users of copyright works, the US National Licensed Beverage Association (NBLA) has acknowledged the commercial benefits of music:

> The use of music in your business establishment is one way you can enhance your business, influence your customers' eating and drinking habits, and increase your profits.[27]

3.10 Equitable remuneration is not simply the level of return that the right holder (or its agent) wants - Berne 11*bis*(2) notes that a competent authority can adjudicate on this point in the absence of agreement, and the right holder is not in a monopolistic bargaining position. Some objective assessment of the value of the use of the work to the business enterprise may be called for. At the same time, it is well recognised that enforcement of intellectual property rights should not be burdensome. The need for administrative efficiency has accordingly led to the creation of collective or "blanket" licensing arrangements.

3.11 It is inconsistent with the requirement for equitable remuneration to remove any legal possibility for securing appropriate returns for the public communication of broadcast works in

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[24] Submission of APRA, cited in *Don't Stop the Music*, pp 67-68.

[25] *Don't Stop the Music*, p.68.

[26] The license fee charged by the collecting society ASCAP in the US for the small business exempted by the recent revision to S.110(5) was $30, for instance (see Annex US-7 to the First Submission of the US, 26 October).

[27] NLBA News, April 1997, p.2, supplied as Annex US-6 to the First Submission of the US, 26 October 1999.

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contexts which are clearly and substantially commercial in nature, and when commercial benefits arise from use of the music, often as a conscious commercial judgement (such as the contexts noted by the NBLA, 3.9 above). For example, broadcast musical works are communicated to members of the public for their entertainment and for commercial gain, such as through increased patronage (even if no direct or distinct charge is levied for the communication of the broadcast as such), as an alternative to commercial music services or licenses for other forms of commercially-motivated public communication of works.

3.12 It would be consistent with the notion of "equitable remuneration" for the revenue to be scaled, within practical bounds, according to the overall commercial interests engaged. As discussed in para 3.6, equitable remuneration may even be determined to be nil for certain public-interest or *de minimis* public communications (such as those cited at the Brussels Conference). The matter is less clear in relation to incidental use of broadcast works, and in particular in the context of so-called "homestyle" reception of broadcasts on the premises of small businesses, especially when the public communication is incidental or unintended, and is not specifically directed at clientele in the course of pursuing commercial activities. In certain such limited contexts, "equitable remuneration" may also be effectively nil.[28] Nonetheless, the situation is clearer for significant and unambiguous commercial use of the copyright work. It would be difficult to maintain that, in the present case, the effective elimination of the public communication of broadcast right in a wide range of commercial settings amounts to a determination by the authorities, in the absence of agreement, that nil remuneration is the most equitable outcome in all those commercial settings. There was no consent to the removal of the public communication right or the entitlement to obtain equitable remuneration on the part of the right holders' representatives in the present case:

> ASCAP is totally committed to overturning the "Music Licensing Amendment" which allows for-profit restaurants, bars, grills and retailers to avoid paying for music performed over radio and television speakers. Very simply, it is not fair that any of us should be forced to work for free.[29]

3.13 The right in question is "to obtain" remuneration, and does not entail an obligation on the part of the user to pay remuneration when it is not as a matter of fact sought in any way (including through collective mechanisms) by the right holder. The first submission of the US points to situations in which right holders, or the collecting societies representing them, elect not, for practical or other reasons, to pursue their entitlement to equitable remuneration; but that should be distinguished from an outright abrogation of that right through legislation. The practical possibilities for collecting revenues, and the consequent degree to which right holders may choose to seek remuneration, are contingent matters which may change in the light of technological and commercial developments. The fact that it may be inconvenient to exercise a right in a particular commercial context does not in itself justify the removal of that right. Such exceptions need to be justified on public policy grounds in line with established principles.

3.14 In addition, there is a question as to how national treatment is observed in the situation where the right to obtain remuneration is denied in a foreign market, especially given the voluntary nature of collecting societies as a means of exercising the right of public communication of broadcast works.

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[28] For instance, the Australian collecting society APRA has agreed to issue complimentary licenses in relation to small businesses when broadcasts are received on standard receivers and are not intended to be heard by the public.

[29] Marilyn Bergman, ASCAP President and Chairman of the Board, http://www.ascap.com/meeting99/audiobackup html.

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The nature of public communication

3.15 Article 11*bis* provides no further definition of the nature of "public communication": it is a matter that is still determined according to national legislation and judicial interpretation. Some of the "minor reservations" cited at the Brussels Conference in the context of 11*bis* (especially those relating to use in the family or domestic circle) may in fact have bearing on the way "public communication" is defined. This matter is apparently not at issue (paragraph 17 of the US submission), but Annex B of this submission sets out some background considerations on this issue should it be considered by the Panel.

IV. TRIPS ARTICLE 13 AND THE PUBLIC COMMUNICATION OF BROADCASTS

4.1 TRIPS 13 applies in general to limitations and exceptions to rights under Section 1 of Part II of TRIPS, and accordingly provides a test for the TRIPS consistency of limitations and exceptions to the right of public performance of broadcast works. When TRIPS 13 was drafted, the terms used closely followed Berne 9(2). Because of this textual linkage, the two provisions are often compared, and, on the face of it, the test established in TRIPS 13 does not appear to differ materially from the three-step test contained in Berne 9(2).[30] For instance, the first submission of the US draws on material relating to Berne Article 9(2) in its interpretation of TRIPS Article 13.

4.2 There are nonetheless clear differences between the two provisions, especially when TRIPS 13 is applied to the right of public performance of broadcast works. In this context, therefore, Berne 9(2) refers to a different right, a different form of exploitation of a work and a different set of interests; it also refers to outright exceptions to the reproduction right, rather than to conditions or limitations on the right. The nature of the normal exploitation of works and of unreasonable prejudice to legitimate interests may significantly differ between the reproduction right and the right of public communication of broadcast works. The matter would be different if the case concerned an exception to the reproduction right.

4.3 Berne 9(2) may nonetheless give general or indirect guidance as to the application of TRIPS 13 to the public communication of broadcasts, especially in any endeavour to interpret the exact terms used. As far as the legal effect of TRIPS 13 and its object and purpose are concerned in relation to the right of public communication of broadcast works, then Berne 11*bis*(2) provides more direct and authoritative guidance. Berne 11*bis*(2) governs this specific right directly, and a coherent application of TRIPS would require consistency between TRIPS 13 and Berne 11*bis*(2).

4.4 In adopting Berne 9(2), the Stockholm Conference commented:

> If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not conflict with a normal exploitation of the work, but it may not unreasonably

[30] Blakeney, Michael (1996) Trade-Related *Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement.* London: Sweet and Maxwell, page 49.

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> prejudice the legitimate interests of the author, provided that , according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.[31]

In relation to the first criterion of a "special case" in the three-step test, Ricketson notes:

> The words 'in certain special cases' embody a general criterion, and this can be seen as possessing two distinct aspects. First, the use in question must be for a quite specific purpose: a broad kind of exemption would not be justified. Secondly, there must be something special about this purpose, 'special' here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance.[32]

4.5 The second and third criteria were placed in that order to aid in the application of the rule. In other words, it is first necessary to decide whether there is a "conflict with a normal exploitation of the work". Only if this is answered in the negative is it necessary to consider whether there is "unreasonable prejudice to the legitimate interests of the author".[33]

4.6 Little guidance is provided on the meaning of the expression "normal exploitation of the work", although the Stockholm Conference records cited above in 4.4 indicate that making a very large number of copies may conflict with the "normal exploitation of a work".[34] In relation to this second criterion, Ricketson makes the following useful comment:

> Common sense would indicate that the expression normal exploitation refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be certain kinds of use which do not form part of his normal mode of exploiting his work - that is, uses for which he would not ordinarily expect to receive a fee - even though they fall strictly within the scope of his reproduction rights.[35]

4.7 Turning to the last criterion of "unreasonable prejudice", the question is not whether there is prejudice or not. It is a question of degree as to whether the use in the particular circumstances, is reasonable or not. The WIPO Guide on the Berne Convention provides the following examples:

> All copying is damaging in some degree: a single photocopy may mean one copy of the journal remaining unsold and, if the author had a share in the proceeds of publication he lost it. But was this prejudice unreasonable? Here scarcely. It might be otherwise if a monograph, printed in limited numbers, were copied by a large firm and the copies distributed in their thousands to its correspondents throughout the world. Another example is that of a lecturer who, to support his theme, photocopies a short article from a specialist journal and reads it to his audience: clearly this scarcely prejudices the circulation of the review. It would be different if he had run off

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[31] *Records of the Intellectual Property Conference of Stockholm*, Report on the Work of Main Committee I, WIPO, Geneva, 1971, p.1145.

[32] Ricketson (1987), page 482.

[33] *WIPO Guide to the Berne Convention*. WIPO, Geneva, 1978, page 55.

[34] *Records of the Intellectual Property Conference of Stockholm* (1971) Geneva, page 1146.

[35] Ricketson (1987), page 483.

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large number of copies and handed them out, for this might seriously cut in on its sales.

Berne Article 11*bis*(2) as a guide to the application of TRIPS Article 13

4.8 As discussed above (2.14, 4.3), Berne 11*bis*(2) has more direct bearing on how TRIPS 13 should be applied in the present case. It stipulates that "conditions" applying to the public communication of broadcast works "shall not be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority". This sheds light on how "normal exploitation", "unreasonable prejudice" and "legitimate interests" should be interpreted in relation to this particular right. For instance, it suggests that compulsory licenses may be consistent with normal exploitation. It lays emphasis on the author's moral rights and right to obtain equitable remuneration as legitimate interests in this context, and it implies that "unreasonable prejudice" would occur if those interests were impaired through the legislative application of any condition on the exercise of an Article 11*bis*(1) right.

TRIPS Article 13 in relation to the objectives of TRIPS

4.9 Ultimately, the interpretation of TRIPS Article 13 must be consistent with the objectives of TRIPS itself, as the first submission of the US notes (para 22). The key provisions in this context are Article 7 ("Objectives") and Article 8 ("Principles"); elements of the preamble may also be relevant. Article 7 focusses particularly on technological innovation, the transfer and dissemination of technology, and the interests of producers and users of technological knowledge, which are not directly at issue in this case. It also points to the need for protection and enforcement of intellectual property rights to be "conducive to social and economic welfare, and to a balance of rights and obligations". Concerns were expressed at the Rome Conference that the development of the then new technology of radiodiffusion as a means of promoting social and cultural welfare should not be impaired by a restrictive application of the new broadcasting right.

4.10 While not in the foreground of the TRIPS negotiations, the history of Berne suggests that the specific balance of interests involved in relation to the public performance of broadcast works appears to be between the right of the author to remuneration,[36] and the need for broadcasting media to develop and contribute to social and economic well-being. What factors should be considered in maintaining this balance? Clearly, it was not intended to give the author the right to prohibit the public communication of the broadcast of the work, as this would be an unreasonable constraint on the use of broadcast material. Some *de minimis* or public interest exceptions to the right were also entertained in relation to some jurisdictions at least – use within the family or domestic circle, in religious or educational contexts. The author, also, did not have an unlimited right to obtain remuneration – in effect, the author was not given monopoly bargaining power, and it was acknowledged that an independent authority may establish the level of remuneration that would be equitable.

4.11 Hence the balance struck was for an undiminished right of equitable remuneration in relation to use of works that did not fall within the "minor exception" or *de minimis* category. When, at the Rome Conference, Article 11*bis* was introduced in its initial form, the Sub-Committee on Broadcasting reported that the Article was intended "to bring the author's rights into harmony with the general public interests of the State, the only ones to which specific interests are subordinate,"[37] while it 'emphatically confirms the author's right".

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[36] As well as the author's moral rights, if they are not excluded in this context - however, the reference to moral rights in Berne 11*bis*(2) is likely caught by the exclusion of "rights derived" from Berne Article 6*bis* in TRIPS Article 9(2).

[37] *Proceedings of the Conference Convened at Rome*, BIRPI, Berne, 1929, p.183.

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4.12 It is submitted that this approach is wholly consistent with the broader objectives of the TRIPS agreement, and is in fact an exemplary application of the "balance" required by Article 7.

V. S.110(5) OF THE US COPYRIGHT ACT IN RELATION TO TRIPS

5.1 General considerations are now offered in relation to the TRIPS consistency of the legislative provision at issue. As suggested earlier, S.110(5) needs to be assessed against Berne 11*bis*(2) as well as TRIPS 13, and in particular against a reading of TRIPS 13 that gives full weight to the equal authority of Berne 11*bis*(2). If an exception to the right of public performance of broadcast works is considered inconsistent with Berne 11*bis*(2), then it would be ineffectual to claim that it was nonetheless consistent with TRIPS 13.

S.110(5) and Berne 11*bis*(2): the need to maintain equitable remuneration

5.2 The detailed commentary already provided suggests that it would be inconsistent with Berne 11*bis*(2) effectively to remove the right of authorising public communication of broadcast works when this is for specifically commercial objectives, given that no condition or reservation to this right has been contemplated which would amount to the denial of equitable remuneration in such a context. This may hinge on how "equitable remuneration" is to be determined, but it is difficult to envisage how no entitlement to remuneration for the author can be reconciled with intentional and direct use of copyright works for specifically commercial purposes.

Application of the minor reservations doctrine

5.3 The present case relates to an exception to the Berne 11*bis*(1)(iii) right which precludes right holders from seeking equitable remuneration in connection with public communication of the broadcast musical work in a wide range of commercial settings – according to the US Congressional Research Service, some 70% of bars and restaurants in the United States.[38] Whatever the precise proportion, this exception clearly covers a substantial portion of the market for communication to the public of broadcast musical works; nor does it relate to communications essentially unrelated to commercial objectives. The "minor reservations" cited in the development of the Berne Convention (discussed from para 3.4) are distinct from this form of commercial usage in a portion of the market which is neither commercially negligible nor legally *de minimis*.

S.110(5) and the three-step test of TRIPS 13

5.4 If it is considered relevant or necessary to consider consistency with TRIPS 13, the following analysis seeks to apply the above interpretation of that Article to the present case.

Special Case

5.5 S.110(5) provides an outright exemption for a wide range of establishments including food service, drinking and other establishments. There is no indication that the criteria chosen to define this exception were driven by public policy objectives, comparable to use in a research, educational or religious context. Equally, S.110(5) appears to provide a blanket exemption for such establishments rather than dealing with certain special cases: no special quality is conferred upon an establishment, and the nature of the use of a copyright work is not rendered less directly commercial, by the floorspace of the establishment. There does not appear to be any identification of "special use" or "exceptional circumstances" behind the S.110(5) exemption as is called for in the analysis above (4.4). Rather, the threshold applied is justified by contingent considerations about the practicalities of collecting royalties.

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[38] Cited at www.ascap.com/legislative/legis_qa html.

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Conflict with a normal exploitation of the work

5.6 S. 110(5) allows food service, drinking and other establishments to communicate broadcasts of musical work to the public in the direct pursuit of commercial gain. Broadcasts of musical work are often used by such establishments to attract, entertain and create an ambience for patrons. The right to equitable remuneration from the public communication of broadcasts in such commercial settings is a normal exploitation of musical work, distinct form other forms of exploitation. It is possible that right holders may, for practical reasons, elect not to seek such remuneration in certain commercial circumstances, but it is consistent with normal exploitation for them to have that choice, provided the principle of equitable remuneration is not denied. The US submission (para. 34) suggests that licensing fees for the establishments excluded under s.110(5)(A) "would likely be the lowest in the range"; this is arguably more consistent with equitable remuneration in the context of normal exploitation than there being no right to obtain fees at all. "Equitable remuneration" may be at an appropriately low level, but should also recognise the direct commercial gain made from public communication of broadcast works when this is applicable.

5.7 S.110(5) only conflicts with the rightholder's right to authorise the public communication of a broadcast of musical work and derive equitable remuneration from public communications, and does not interfere with the rightholder's other exclusive rights such as the right to reproduce, publish, broadcast or make an adaptation of the work. In this regard s.110(5) could be said to interfere only in a limited way with the rightholder's overall ability to exploit the work. However, Article 13(2) refers to conflict with a (in the sense of 'any') normal exploitation of the work – rather than to conflict with the overall commercialisation of the work. The right of public communication of a broadcast work has been explicitly recognised in the Berne Convention as a distinct right, giving rise to a distinct right of remuneration which forms one of the normal exploitations of the work.

Unreasonable prejudice to the legitimate interest

5.8 We have suggested that in this context, Berne 11*bis*(2) clearly sets out considerations that apply to determination of unreasonable prejudice to the legitimate interests of right holders. A compulsory licensing system, a denial of monopolistic bargaining power, a *de minimis* or public interest educational exception are all forms of prejudice to legitimate interests that would be reasonable: Berne 11*bis*(2) suggests that denial of the right of *equitable* remuneration and of moral rights would be unreasonable.

5.9 It may be argued that any prejudice to rightholders is only minimal because they would receive royalties from broadcasting stations. S.110(5) allows many food service, drinking and other establishments to obtain commercial benefit through the broadcast of musical works by attracting and entertaining their patrons without any compensation to the right holders form whom they derive this commercial benefit. There is a strong argument that, just as for other inputs into a business, such as electricity and water, establishments should pay for the public communication of broadcasts of musical work when that communication is for commercial purposes, consistent with the principle of equitable remuneration. In this context, a "reasonable prejudice" to the interests of the rightholder would be a denial of the rightholders capacity to prohibit, or charge excessive fees for, public communication of their broadcast works. Given these more limited forms of conditions on this right, and for the reasons cited above, Article 11*bis*(2) suggests that the denial of equitable remuneration for such public communication is a more serious prejudice to legitimate interests.

5.10 If a provision entitles a wide range of establishments to communicate the broadcast of musical work to the public for immediate commercial objectives without paying any royalties to the authors, then some form of unreasonable prejudice could be established. The "unreasonableness" of s.110(5) may hinge on the magnitude of the directly commercial usage of copyright works to which the US hospitality and retail industry would be able to apply this exemption. Since this provision

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provides an absolute exemption for copyright infringement in a wide range of commercial contexts, it rules out any possibility for obtaining the equitable remuneration consistent with reasonable prejudice to their interests.

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ANNEX A

"Don't stop the music!"
A report of the inquiry into copyright, music and small business

In June 1998 the Australian House of Representatives Standing Committee on Legal and Constitutional Matters tabled a report on the public performance and broadcast rights in relation to small business. This report was titled "Don't Stop the Music". The Committee's role was to inquire into and report on the collection of copyright royalties for licensing the playing of music in public by small business. Apart from considering the role played by copyright collection societies, the Committee considered the desirability of amending the Australian Copyright Act in relation to public performance and broadcast rights in a small business context. The Committee made a number of recommendations the following of which are of relevance to the matters before this Panel.

The Committee considered a number of submissions on the royalty scheme for the use of background music. The Committee noted that many small businesses felt that they should be exempt from having to pay a fee for the playing of music in their business. While the Committee was sympathetic to some of their arguments, the Committee did not consider that small businesses should be exempt from paying copyright royalty fee for the public performance of music.

The Committee noted that in some circumstances the use of music in a small business was only intended to be heard by one member of staff and there was a strong case in favour of exempting such businesses from paying licence fees. In this regard, the Committee recommended that the relevant collecting society consider granting a complimentary licence when:

- the means of performance is by the use of a radio or television set; and

- the business employs fewer than 20 people; and

- the music is not intended to be heard by customers or the business or by the general public. That is, neither the radio or television set nor any speakers are located in an area that is accessible to customers or the general public and any performance inadvertently heard by customers or the general public is manifestly unintentional.

However, the Committee found that for most small businesses, music is used to attract, entertain and create ambience for customers. Creating a blanket exemption for small businesses would mean that those businesses using music in a manifestly commercial manner would be exempt from paying licence fees. The Committee considered that this would not be an inequitable outcome and recommended against this course of action.

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ANNEX B

Definition of "in public"

The rights contained in article 11*bis*(1)(iii) of the Berne Convention refer to the *public* communication of a broadcast of work. The question arises as to whether the circumstances envisaged by s.110(5) would amount to a *public* communication of a broadcast of work.

The Berne Convention does not provide a definition as to what is meant by the term *public* communication. The Brussels Conference (1948) provided some guidance in defining the *public* for broadcasting and communication rights:

> above all, where people meet: in the cinema, in restaurants, in tea rooms, railway carriages....It also appears from the programme that perhaps the most important of these "public places" were those where people worked and conducted their business, such as factories, shops and offices.[39]

On this point the WIPO Guide to the Berne Convention notes:

> In places where people gather (cafes, restaurants, tea-rooms, hotels, large shops, trains, aircraft etc) the practice is growing of providing broadcast programmes.... The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.
>
> The Convention's answer is "no". Just as in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (10 (ii)) so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.[40]

The Australian Copyright Act, like the Berne Convention, does not provide a definition of the term *in public*. However, the expression has been considered by the Australian courts over many years.[41]

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[39] Ricketson (1987), page 453.

[40] *WIPO Guide to the Berne Convention*, WIPO, Geneva, 1978, page 68.

[41] The most recent judicial comment on the meaning of their term 'in public' has been by the High Court in the 1997 case of APRA v Telstra. Justices Dawson and Gaudron in their joint judgement concluded: "Lying behind the concept of the copyright owner's public is recognition of the fact that where a work is performed in a commercial setting, the occasion is unlikely to be private or domestic and the audience is more appropriately to be seen as a section of the public. It is in a commercial setting that an unauthorised performance will ordinarily be to the financial disadvantage of the owner's copyright in a work because it is in such a setting that that owner is entitled to expect payment for the work's authorised performance."

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Under existing Australian case law, it is clear that the Australian courts will take into account the following factors in determining whether a performance is in public:

- First, a performance is "public" unless it takes place in a "domestic and private" setting;

- Secondly, where the performance occurs as an adjunct to a commercial activity, it will be in public;

- Thirdly, the audience in question clearly forms part of the copyright owner's public.

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3.1.2 ORAL STATEMENT BY AUSTRALIA AT THE THIRD PARTY HEARING

(9 November 1999)

Australia welcomes the opportunity to put its views on this case to the panel and the two parties.

Our submission is motivated by the direct trade interests related to equitable remuneration for public communication of broadcast musical works of Australian composers and songwriters. It is also intended to promote the integrity of the TRIPS Agreement, including the balance of rights and obligations that should serve the interests of producers and users of intellectual property.

Exceptions or limitations to the right of authorising public communication of broadcast works should conform with the general conditions set by TRIPS Article 13, and the specific conditions set by Article 11*bis* of the Berne Convention. They should also be consistent with the general objectives and principles of TRIPS, in particular Article 7.

We submit that it would be valuable to clarify the relationship between TRIPS and Berne as they apply to this specific right. There is no hierarchy of authority between TRIPS Article 13 and Berne Article 11*bis*, as the two provisions are on an equal footing as TRIPS obligations and both apply to this case. However, Berne 11*bis* does provide more direct guidance on the present case, which relates to a right which is defined and regulated distinctly from other rights such as the general reproduction right. 11*bis*(2) specifies that conditions on this right shall in no circumstances be prejudicial to the author's entitlement to equitable remuneration.

The diplomatic history of the Berne Convention provides further guidance as to how the "conditions" allowable under Berne 11*bis*(2) should be interpreted. The undiminished right of equitable remuneration has been strongly emphasised, and the only apparent exceptions considered were "minor reservations" relating to use of the work in a private setting or associated with public interest objectives, such as in educational or religious contexts.

The two tests - TRIPS 13 and Berne 11 *bis*(2) - could be applied in parallel to the right of public communication of broadcast works. However, the most consistent and systemically sound approach would be to give due weight to Berne 11 *bis*(2) in applying TRIPS 13 in this specific context. Accordingly, the TRIPS 13 test, applied to this right, should be subject to the specific requirement for equitable remuneration. Berne 11 *bis*(2) also suggests how the objectives of TRIPS 7 can be maintained in this context.

- By setting conditions on the exercise of this right, and establishing a minimum standard involving equitable remuneration, 11*bis*(2) prescribes how rights and obligations are balanced, and exceptions and limitations are set. This is a specific instance of the general balance of interests that is required in TRIPS 7 and expressed in TRIPS 13;

- Article 9(2) of Berne, by contrast, has only limited and indirect relevance to the determination of the scope of allowable exceptions and limitations to this right.

Equitable remuneration in relation to the right of public communication of broadcast works should entail recognition of any specific commercial benefits that are intended to result from public communication made for commercial objectives

- equitable remuneration in this context is consistent with the balancing of rights and obligations called for in TRIPS 7;

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- it also clarifies the nature of "unreasonable prejudice" in the application of TRIPS Article 13 to the right of public communication of broadcast works.

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3.1.3 RESPONSES OF AUSTRALIA TO WRITTEN QUESTIONS FROM THE PANEL

(19 November 1999)

Australia welcomes the opportunity to provide further background information on this case in response to the Panel's questions. It notes, however, that the copyright law and practice in Australia and in countries other than the US are not at issue in this case, and submits that TRIPS obligations should not be determined by the approach taken in any one national system, practice or tradition.

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine.

It is not evident in general which exceptions within copyright laws are based expressly on the minor reservations doctrine, as exceptions may be implicit in the definition of the right or may be justified in other ways. The clearest examples of the application of this doctrine can be found in the diplomatic records which acknowledge and confirm the existence of minor reservations, for instance:

> The Delegates of Norway, Sweden, Denmark and Finland, the Delegate of Switzerland and the Delegate of Hungary have all mentioned these limited exemptions allowed for religious ceremonies, military bands and the needs of child and adult education. These exceptional measures apply to Articles 11*bis*, 11ter, 13 and 14.[42]

Q.2. Is the communication to the public of music contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

This response is limited to this question as it relates to the communication to the public of musical works contained in broadcasts (as this is the subject matter of the case directly before the Panel), and does not consider the separate instances of playing music live or from sound recordings (which may be subject to different considerations.)

2(i) Existence of the right

The communication to the public of music contained in broadcasts is subject to exclusive rights in Australia, essentially through the operation of Sections 27 and 31 of the Copyright Act (1968). Section 27 provides, in part:

> (1) Subject to this section, a reference in this Act to performance shall:
>
> (a) be read as including a reference to any mode of visual or aural presentation, whether the presentation is by the operation of wireless telegraphy apparatus, by the exhibition of a cinematograph film, by the use of a record or by any other means …
>
> …

[42] General Report, Conference in Brussels, 1948, in *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986, WIPO,* 1986, page 181.

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> (3) Where visual images or sounds are displayed or emitted by any receiving apparatus to which they are conveyed by the transmission of electromagnetic signals (whether over paths provided by a material substance or not), the operation of any apparatus by which the signals are transmitted, directly or indirectly, to the receiving apparatus shall be deemed not to constitute performance or to constitute causing visual images to be seen or sounds to be heard but, in so far as the display or emission of the images or sounds constitutes a performance, or causes the images to be seen or the sounds to be heard, the performance, or the causing of the images to be seen or sounds to be heard, as the case may be, shall be deemed to be effected by the operation of the r0eceiving apparatus.
>
> (4) Without prejudice to the last two preceding subsections, where a work or an adaptation of a work is performed or visual images are caused to be seen or sounds to be heard by the operation of any apparatus referred to in the last preceding subsection or of any apparatus for reproducing sounds by the use of a record, being apparatus provided by or with the consent of the occupier of the premises where the apparatus is situated, the occupier of those premises shall, for the purposes of this Act, be deemed to be the person giving the performance or causing the images to be seen or the sounds to be heard, whether he or she is the person operating the apparatus or not.

Section 31 of the same Act provides, in part:

> (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:
>
> (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
>
> (i) to reproduce the work in a material form;
>
> (ii) to publish the work;
>
> (iii) to perform the work in public;
>
> (iv) to broadcast the work;
>
> (v) to cause the work to be transmitted to subscribers to a diffusion service;
>
> (vi) to make an adaptation of the work;
>
> (vii) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (i) to (v), inclusive; …

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2(ii) Exercise of the right

The current domestic arrangement in Australia is that the rights in respect of public performance of broadcast musical works are exercised by a collective management organization. The right to authorise public performance of broadcast musical works is in practice exercised by the Australasian Performing Right Association Limited (APRA).[43] In exercising these rights, APRA provides for licenses for broadcast musical works on a scale linked with the extent of the public performance, as determined by the number of TV or radio sets and additional loudspeakers. To authorise musical performances at the premises by radio or TV sets, including TV sets used to show videos, free to air TV, satellite TV broadcasts and cable TV, for background and listening purposes only, the annual license fee for each radio set is $37.62 (and each additional speaker $0.94); and for each television set $37.62 (and each additional speaker $0.94). A distinct license is available to authorise performances of music in the workplace for the benefit of employees, at the annual rate of 56 cents per full-time employee, with a minimum annual fee of $37.62.

APRA issues a complimentary licence in instances where:

(a) the means of performance is by the use of a radio or television set; and

(b) the business employs fewer than 20 people; and

(c) the music is not intended to be heard by customers of the business or by the general public. That is, neither the radio or television set nor any speakers are located in an area that is accessible to customers or the general public and any performance inadvertently heard by customers or the general public is manifestly unintentional.

The following are illustrative examples of situations in which APRA would grant a complimentary licence in the exercise of this right:[44]

- A family run milk bar or corner store which has a radio or television behind the counter or in the back room of a composite shop/dwelling. The volume is such that customers may hear some music in the public access areas but the intention is to entertain staff during quiet trading periods.

- A chemist employing five staff with a radio located in the secure dispensing area for the benefit of the pharmacist. Some sound may be audible to customers.

- A service station with 12 employees playing the radio in a workshop and/or with a television behind the counter near the cash register. Customers fuelling cars, leaving vehicles for repair or paying for purchases may overhear music.

- A small hairdresser with a radio in the backroom of the salon which may at times be overheard by clients. The location of the radio shows that this is unintentional.

- A real estate agent where the receptionist has a radio on the desk. While the performance is audible to customers, the radio is for the receptionist's own enjoyment.

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[43] The following information is drawn from the APRA website, www.apra.com.au.

[44] Quoted from the 1998 report of the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs *Don't Stop the Music*, http://www.aph.gov.au/house/committee/laca/Inquiryincopy.htm.

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- A café playing a radio in the staff-only food preparation areas. The location of the radio and the volume indicate that, while music may sometimes be overheard by customers, it is not played for their benefit.

- A small hardware store with three employees where a radio is located in the storage/supply area behind the counter for the benefit of employees.

- A laundromat with five staff playing a radio in an open work area behind the counter. There are no additional speakers and the performance is intended for the benefit of employees.

- An owner/operator tailor with a television in the working area behind the counter. Performance is for the benefit of the owner.

- A doctor's surgery. The receptionist plays a radio at low volume. Music is not clearly audible to patients in the waiting room.

Q.3. Please explain which individual exclusive rights under which specific provisions of Articles 11(1) and 11 *bis*(1) of the Berne Convention are affected to what extent by which specific provision of Subsection (A) and/or (B) or Section 110(5).

Section 110(5) creates exceptions to the right of communication to the public of certain broadcast musical works, by providing that certain use made of the works is not infringement of copyright. It is apparently not in contention that this use is communication to the public.

Communication to the public is covered in general terms under Article 11(1) of Berne, and this would, on the face of it, include the forms of communication excepted under Section 110(5). Broadcasting itself could be viewed as a particular form of public communication of a work.

Article 11*bis* was introduced at the 1928 Rome Conference to provide international rules governing the broadcasting of literary and artistic works. It is therefore submitted that this is the more directly relevant provision. The WIPO *Guide to the Berne Convention* (p.65) comments:

> The second leg of this right [Article 11(1)] is the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 11*bis*. For example, a broadcasting organisation broadcasts a chamber concert. Article 11*bis* applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11.

Subsections A and B relate to the public communication of broadcast musical works, so that Article 11*bis* applies to both subsections. In particular, while Subsection A relates to potentially more limited forms of public communication, it was explicitly intended to cover intentional and direct communication to the public, and in particular to allow business proprietors to communicate broadcasts "for their customers' enjoyment"[45]

Q.4. In your view, what is the relationship between Article 13 of the TRIPS Agreement and Article 11*bis*(2) of the Berne Convention?

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[45] Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976), cited.

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Please see section 2 of the Australian submission, in particular paras 2.11-2.12.

Does Article 13 of the TRIPS Agreement prevail over the exception in Article 11*bis*(2) with respect to the exclusive rights conferred by Article 11*bis*(1)(i-iii) of the Berne Convention in the sense that when the three conditions of Article 13 are met, no requirement to pay equitable remuneration arises?

No. There is no basis for ascribing greater authority to TRIPS Article 13 and for overruling or nullifying the effect of Berne Article 11*bis*(2), which was adopted upon the conclusion of the TRIPS Agreement in parallel with TRIPS Article 13.

Do the requirements of Article 11*bis*(2) of the Berne Convention prevail as a *lex specialis* over the requirements of Article 13 of the TRIPS Agreement, in the sense that if equitable remuneration is paid, there is no need to comply with the three-conditions test under Article 13?

This interpretation is possible, given that the two provisions appear to overlap and that Article 11*bis*(2) applies more specifically to the situation at issue (see paragraph 2.12 of Australia's third party submission). However, such an interpretation would only be necessary if it were concluded that there is conflict or contradiction between the two provisions. It is submitted that the test established by Article 11*bis*(2) could be viewed as a special application of the broader factors under consideration in the Article 13 test: in effect, the requirement for equitable remuneration (as opposed to unlimited or unconditional exercise of the right) provides a safeguard that limitations on the right are in accordance with the general requirements of Article 13.

Do the requirements of Article 13 and Article 11*bis*(2) apply on a cumulative basis in the sense that, on the one hand, even if the three-condition test of Article 13 is fulfilled, there is an additional, fourth requirement to pay equitable remuneration, and on the other hand, even if equitable remuneration is paid consistently with Article 11*bis*(2), it is necessary to comply in addition with the three conditions of Article 13? Please explain.

The preferred interpretation of the two provisions operating in conjunction should be that:

- both tests need to be fulfilled, independently if necessary; but that, if at all possible;

- Berne 11*bis*(2) should be seen as defining, in relation to the rights provided under 11*bis*(1), those limitations or exceptions that would - in the terms of TRIPS 13 - not be an unreasonable prejudice to the legitimate interests of the right holder in this context; that is, that the denial of equitable remuneration would automatically amount to an unreasonable prejudice to those interests in relation to this form of exploitation of the right to public communication of a broadcast musical work.

Q.5. In your view, to what extent has the Berne Convention become part of customary international law, and, if so, in particular which part of the Articles 1-21 of the Berne Convention?

No direct answer to this question is provided in this response. The rights and obligations currently at issue, including the relevant paragraphs of Berne, are direct treaty obligations, namely Article 9 of the TRIPS, and by reference Article 11*bis*(iii), Article 11*bis*(2) of the Berne Convention and Article 13 of TRIPS.

Q.6. Has the "minor exceptions" doctrine under the Berne Convention, and especially in the context of Article 11*bis*(1) and 11(1), acquired the status of customary international law? What is the legal significance of the "minor exceptions" doctrine under the Berne Convention in the

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light of subparagraphs (3)(a-c) or paragraph (4) of Article 31 of the VCLT or in the light of Article 32 of the VCLT? Has the "minor exceptions" doctrine or any other implied exception been incorporated, by virtue of Article 9.1 of the TRIPS Agreement, together with Articles 1-21 of the Berne Convention into the TRIPS Agreement? Please explain.

This response does not venture a conclusion on whether the minor reservations doctrine is part of customary international law. On the facts of this case, S. 110(5) of the US Copyright Act is unlikely to come within the scope of what was intended to be covered by the minor reservations doctrine. A clear sense of the limited scope of the minor reservations principle is provided by the General Report of the Conference in Brussels thus:

> Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark and Finland, the Delegate of Switzerland and the Delegate of Hungary have all mentioned these limited exemptions allowed for religious ceremonies, military bands and the needs of child and adult education. These exceptional measures apply to Articles 11*bis*, 11ter, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principle of the right.[46]

This was confirmed at the Stockholm Conference in the following terms:

> In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands, and the requirements of education and popularization. The exceptions also apply to articles 11*bis*, 11*ter*, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle in the right.
>
> It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference.[47]

[46] General Report, Conference in Brussels, 1948.
[47] *Records of the Intellectual Property Conference of Stockholm* WIPO, Geneva, 1971, page 1166.

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3.2 BRAZIL

3.2.1 ORAL STATEMENT AT THE THIRD PARTY HEARING

(9 November 1999)

On behalf of the Government of Brazil I thank you for your attention to this matter. Brazil welcomes the opportunity to participate in this Panel as a third party. What motivates Brazil to intervene in this dispute is essentially a systemic interest on the implications to the interpretation on the scope of exceptions contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). At the same time, our participation stems from concrete interests, since the portion of the market in the United States for Brazilian music has increased substantially over the last few years. Brazilian composers have complained that the US "Fairness in Music Licensing Act" is hurting their legitimate interests in that market.

As argued by the European Communities / Member States (EC/MS) in its first submission, the exemptions for commercial establishments provided by Section 110(5) of the US Copyright Act are, in Brazil's view, incompatible with multilateral obligations that stem from the TRIPS Agreement, insofar as this Agreement incorporates articles 1 through 21 of the Berne Convention for the Protection for the Literary and Artistic Works (1971).

By means of **Article 9 (1) of TRIPS**, these obligations have become an integral part of WTO rules, being fully subject to the dispute settlement mechanism of the Organization. **Article 11*bis*(1)(iii) of the Berne Convention** states that "*authors of literary and artistic works shall enjoy the exclusive right of authorizing (…) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work*". **Article 11(1)(ii) of the Berne Convention** provides that "*Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing any communication to the public of the performance of their works*". Finally, **Article 11*bis*(2) of the Berne Convention** establishes that "*it shall be a matter of legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceeding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority*."

The United States claims that the point in question here is that Section 110(5) of the US Copyright Act creates a "minor" exception to the exclusive right over public performance. In this context, the US submission attempts to justify that those exceptions would be covered by Article 13 of the TRIPS Agreement on limitations and exceptions to copyrights and related rights. Brazil, however, is of the opinion that **this panel should consider Section 110(5) in light of the most specific provisions, which are those covered by Articles 11*bis*(1)(iii), 11(1)(ii) and 11*bis*(2) of the Berne Convention**. The US submission fails to explain how Section 110 (5) could be compatible with its commitments under those specific provisions.

The submissions by the European Communities and Australia provide some valuable contribution for this panel to understand the conflict between the exceptions to copyrights in the US legislation and the existing provisions under TRIPS and the Berne Convention.

Brazil concurs with the European Communities that the situations covered by Section 110 (5) refer (explicitly, in the case of Subsection (A), or implicitly, in the case of Subsection 7(B)) to "public communication" in the sense of Article 11*bis*(1)(iii) and Article 11(1)(ii) of the Berne Convention. Consequently, by denying protection under those provisions, the US is violating its commitments related to TRIPS Article 9 (1).

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Most importantly, Brazil endorses the legal argumentation provided by the Australian submission that Article 11*bis*(2) of the Bern Convention provides more specific guidance to the panel on the application of Section 110(5). Bearing the burden of proof to invoke the exception, the US fails to explains the consistency (if any) between Section 110(5) and that provision.

Section 110(5) is admittedly a circumstance that is prejudicial to the author's right to obtain equitable remuneration. The denial of that right is recognized in paragraph 29 of the US submission.[1] When the US Copyright Act, as amended by the "Fairness in Music Licensing Act", permits the broadcasting of radio and television music in public places without the payment of a royalty fee, it is actually exempting owners from the application of a mandatory rule whose exceptions are not applicable to this case. Article 11*bis*(2) of the Berne Convention, however, defines that "in any circumstances" the conditions to the right of public communication should be prejudicial to the author's right to obtain equitable remuneration. In doing so, the US is violating of a mandatory rule on clear prerogatives of right holders.

As noted in the Australian submission, the scope of the exception provided by Section 110(5) is much larger than envisaged in the negotiating history of the Berne Convention. The Brussels Conference of 1948 emphasized the limitations of the concept of "minor reservations" as exceptional measures. Such reservations, later confirmed by the Stockholm Conference of 1967, aimed at situations such as, for instance, religious ceremonies, performances by military bands and the requirements of education and popularization - mostly characterized by their non-commercial nature. Such is not the case of Section 110(5), where establishments that benefit from the "homestyle exemption" are essentially commercial. The size of the establishment or the number of loudspeakers in a limited area, as defined by Section 110(5), does not characterize the nature of the use of the broadcasted work as non-commercial. To the contrary, such use is admittedly aimed at attracting customers and consequently improving the profits of the owners of the establishment.

The EC also notes that Since Section 110(5) entitles 70% of all drinking and eating establishments and 45% of all retail establishments in the US to play music from the radio and TV for the enjoyment of their customers without any limitation of any kind, it is more than reasonable to argue that the normal exploitation of the works is at risk and that the legitimate interests of the right holders can be prejudiced. In its submission, the US were unable to produce statistics that prove that the impact on right holder's revenues of the "Fairness in Music Licensing Act" is negligible. Brazil considers, however, that even if such statistics were available, the task of examining Section 110 (5) would still be unrelated to quantitative limitations on the size of the area of the establishments or the number of loudspeakers. Brazil considers that the most important task of this panel is to judge the legitimacy of the exception provided by Section 110 (5) in light of its essentially commercial nature.

[1] "Section 110(5) does not affect a copyright owner's right to be compensated for these types of exploitation [i.e., primary performance]. Rather, it affects only secondary uses of broadcasts. Moreover, it does not exempt all secondary performance, but only those in establishments that use homestyle receiving equipment, or meet the square footage and other criteria in the statute".

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3.2.2 RESPONSES OF BRAZIL TO WRITTEN QUESTIONS FROM THE PANEL

(17 November 1999)

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine.

In the Brazilian legislation there are a few examples of exceptions in the sense of the "minor reservations" doctrine mentioned in this question. Those are cases where there would be no violation of copyright, such as: (a) the reproduction in the daily or periodical press of news or informative articles, from newspapers or magazines, with a mention of the name of the author, if they are signed, and of the publication from which they have been taken; (b) the reproduction in newspapers or magazines of speeches given at public meetings of any kind; (c) the reproduction of literary, artistic or scientific works for the exclusive use of the visually challenged, provided that the reproduction is done without gainful intent, either in braille or by means of other process using a medium designed for such users; (d) the use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers, provided that the said establishments market the materials or equipment that make such use possible.

Q.2 Is the communication to the public contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

According to the new Brazilian Law on Copyrights and Related Rights (Law 9.610, dated 19 February 1999), authors have the exclusive right to use their literary, artistic and scientific works, to derive benefit from them and to dispose of them. Authors and the owners of related rights may form non-profit-making associations for the exercise and defense of their rights. These associations of authors and of the owners of related rights shall jointly maintain a single central office ("Escritório Nacional de Arrecadação de Direitos - ECAD") for the collection and distribution of the royalties generated by the public performance of musical works with or without words and phonograms, including performance by broadcasting and transmissions by any means and by the presentation of audiovisual works. This central office shall not have any profit-making purpose and shall be directed and managed by the associations of which it is composed.

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3.3 CANADA

3.3.1 WRITTEN SUBMISSION

(1 November 1999)

This dispute raises important issues of copyright protection, including the role of limited exceptions. Canada remains highly interested in these issues and looks forward to the outcome of the panel's deliberations.

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3.4 JAPAN

3.4.1 WRITTEN SUBMISSION

(1 November 1999)

1. The European Communities and their member States claim that Section 110(5) of the United States Copyright Act is not in conformity with the US' obligations under the TRIPS Agreement, particularly with its Article 9(1), under which WTO Members must comply with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.

2. Japan hereby submits its views on compatibility of Subsection (A) of Section 110(5) of the US Copyright Act with the US' obligations stemming from Article 9(1) of the TRIPS Agreement.

3. In considering the compatibility, it is necessary to examine relevant provisions of the Berne Convention and the TRIPS Agreement.

(i) Articles 11*bis* and 11 of the Berne Convention

As is stated in the "Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)" published by the World Intellectual Property Organization (WIPO) in 1978, it has been agreed that the Berne Convention did not stop member countries from preserving their law on exceptions which come under the heading of "minor reservations" with regard to Articles 11*bis* and 11 of the Convention. However, to examine the relevant provision of the TRIPS Agreement will be helpful to clarify the meaning of "minor reservations".

(ii) Article 13 of the TRIPS Agreement

Article 13 of the TRIPS Agreement (Limitations and Exceptions) stipulates that WTO members can contain in their legislation limitations or exceptions to exclusive rights, provided that these limitations or exceptions are confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder (three-step test).

4. Although relationship between "minor reservations" and Article 13 of the TRIPS Agreement is not perfectly clear, there is persuasive authority that three-step test can be used in determining whether particular exception is in the boundary of "minor reservations." For example, Chairman Liedes of the Committee of Experts of WIPO once stated to the effect that all limitations and exceptions which were permissible under the Berne Convention would survive if they were in conformity with Article 13 of the TRIPS Agreement (Diplomatic Conference on Certain Copyright and Neighboring Rights Questions on December 10, 1996). Japan, therefore, considers that if Subsection A of Section 110(5) US Copyright Act covers only certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder, the Subsection in question can be regarded as compatible with Article 13, and thus with Article 9(1), of the TRIPS Agreement.

5. In applying three-step test to the Subsection in question, Japan concurs with the United States on the conclusion that it is in conformity with Article 13 of the TRIPS Agreement.

6. For the reasons stated, Japan is convinced that Subsection (A) of Section 110(5) US Copyright Act is fully consistent with Article 9(1) of the TRIPS Agreement.

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3.4.2 RESPONSES BY JAPAN TO WRITTEN QUESTIONS FROM THE PANEL

(19 November 1999)

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine.

In general, various conditions are complicatedly combined in provisions for limitations of and exceptions to copyright, and how copyrighted works are used under such provisions considerably differs from nation to nation. This makes it difficult to determine applicability of "minor reservations" doctrine to the related provisions of each domestic law and requires careful consideration thereupon.

Under these circumstances, Japan has so far examined only Subsection A of Section 110(5) of the United States Copyright Act which is under discussion in this Panel, and has no further adequate examples to present.

Q.2 Is the communication to the public of music contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

In Copyright Law of Japan, such uses of music are subject to exclusive rights, and such rights are exercised either by the right holders or by their collective management organizations. The latter generally exercise such rights as trustees of the former under trust agreements.

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3.5 SWITZERLAND

3.5.1 ORAL STATEMENT AT THE THIRD PARTY HEARING

(9 November 1999)

I. INTRODUCTION

1. The complaint brought by the European Communities and their member States against the United States of America is based on the consideration that certain aspects of the US legislation relating to the protection of copyrighted works are incompatible with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The provision which is the subject matter of contention is Section 110(5) of Title 17 of the US Copyright Act, as amended by the "Fairness in Music Licensing Act of 1998". The contended provisions allow for the so-called "homestyle exemption", lately extended to use in wider public places without the authorization of the copyright owner, an exception sometimes also referred to as the "business exemption". Both types of exemptions are summarized in the first submission made by the European Communities and their member States on 5 October 1999 in a very comprehensive manner. Instead of citing the contended provisions, I refer to the summary made by the European Communities and their Member States to avoid repetition. Under the Sections of the US Copyright Act subject matter of this panel procedure, the copyright owner cannot exercise his exclusive right of public communication of broadcast works in the case of establishments which are open to the public and play radio or TV on their premises for the enjoyment of their customers in accordance with certain conditions set out by the Law. In other words, if these conditions are met, the rightholder cannot claim royalty fees.

2. Switzerland has notified under Article 10(2) of the Dispute Settlement Understanding (DSU) its interests in the matter before the panel requested by the European Communities and their member States as established on 26 May 1999. Switzerland holds the view that the above-mentioned measures are in violation of US's obligations under Article 9(1) of WTO TRIPS Agreement in conjunction with Articles 11(1) and 11*bis* of the Berne Convention and cannot be justified under Article 13 of the TRIPS Agreement. Switzerland takes great interest in this case, not only desiring to safeguard the claims of Swiss rightholders of musical works to obtain equitable remuneration for the communication of their works to the public in the important US market, but also to ensure that the TRIPS provisions, and by reference and incorporation also the relevant provisions of the Berne Convention, are construed and implemented in national laws consistently with the international obligations as agreed in the multilateral framework of WTO.

II. GENERAL REMARKS ON THE CASE BEFORE THE PANEL AND ON THE SUBMISSION OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

3. Switzerland concurs with the content of the comprehensive submission made by the European Communities and their member States regarding the historical background, case law developments, legal and economic analysis regarding Section 110(5) A and B of the US Copyright Act.

4. The WTO Members agreed in the negotiations of the Uruguay Round to incorporate the Berne Convention (Articles 1 to 21) into the TRIPS Agreement by way of reference. Therefore, protection must be provided in accordance with the Berne Convention, unless the TRIPS Agreement provides explicitly for a different level of protection. The whole TRIPS Agreement has been, and is, commonly referred to as a "major advance" in the field of intellectual property law at the international level. The Berne Convention - compared to other international treaties in the field of copyright - was deemed at that time to be the international treaty which offered a relatively satisfactory level of protection. The only "Berne Minus" provision in the TRIPS Agreement is Article 9.1, sentence 2, which excludes *expressis verbis* Article 6*bis* (moral rights) of the Berne

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Convention. All other TRIPS provisions on Copyright were introduced in the Agreement for purposes of clarification or improving the corresponding provisions of the Berne Convention, not of diminishing the level of protection.

III. ARTICLE 13 TRIPS; RELATIONSHIP WITH ARTICLES 9(2) AND 11*BIS* BERNE CONVENTION

5. Article 13 of the TRIPS Agreement has to be understood as a Berne-plus element. It contains safe-guard-rails for all kind of limitations and exceptions by extending the three-steps impairment test of Article 9(2) Berne Convention from the reproduction right to all the exclusive rights covered by Section 1 of Part II of the TRIPS Agreement. Consequently, Article 13 of the TRIPS Agreement limits also the scope of "minor reservations" with regard to Articles 11*bis* and 11 of the Berne Convention. This is also confirmed by the fact that the WIPO Copyright Treaty explicitly clarifies that the three-step-test applies to all limitations and exceptions of the Berne Convention and those under WCT. Therefore in the case submitted to the panel, exceptions are only permitted:

- in certain special cases,

- if there is no conflict with the normal exploitation, and

- if there is no unreasonable prejudice to the legitimate interests of the right holder.

Referring to the detailed and in-depth analysis of the three-step-test by Australia, the Swiss delegation submits that none of the steps of the impairment test are fulfilled.

6. Furthermore, limitations and exceptions concerning Article 11*bis*(1) of the Berne Convention have to be consistent with Article 11*bis*(2) of the Convention. It stipulates that conditions regarding the exercise of the broadcasting and related rights "shall not be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration...". To be consistent with the protection guaranteed by Article 9 (1) TRIPS Agreement containing explicitly only one Berne-minus-element in respect of Article 6*bis* of the Berne Convention, Article 13 of the TRIPS Agreement cannot allow limitations of Article 11*bis*(1) of the Berne Convention going beyond the limits fixed in Article 11*bis*(2).

7. In other words, limitations as in the case submitted to the panel are prejudicial to the legitimate interests of the right holders, because they do not respect the authors' right to obtain equitable remuneration.

IV. OTHER CONSIDERATIONS

8. As far as Article 7 of the TRIPS Agreement (Objectives) is concerned, it would be useful to remind that this provision is a "*lex generalis*", Article 13 TRIPS being a "*lex specialis*". Careful balance is already struck in the latter provision. One should first analyze whether the conditions set out by this Article are fulfilled or not. If they are not, it seems that there would be no need to refer to Article 7 TRIPS.

9. Furthermore, Switzerland wishes to point out that, after ratification of the WTO Agreement (and the TRIPS Agreement), the "homestyle exemption", which had previously posed problems, should not have been further extended in such an unjustifiable way as through Section 110(5) and the so-called "business exemption".

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V. CONCLUDING REMARK

10. Switzerland concurs with the position of the European Communities and their member States and supports the pertinent arguments put forward by Australia.

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3.5.2 RESPONSES OF SWITZERLAND TO WRITTEN QUESTIONS FROM THE PANEL

(19 November 1999)

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine.

Art. 22 Par. 1 of the Swiss Copyright Law (CRL[1]) provides an exception with regard to cable distribution and to communication to the public of broadcast works. These limitations comply with Art. 11*bis*(2) of the Berne Convention (BC) in the sense that they do not abolish or diminish the right of the author to obtain equitable remuneration for the exploitation of his work.

Q.2 Is the communication to the public of music contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

According to Art. 22 Par. 1 CRL, the right of communication to the public of broadcast works (all categories of works, not only musical works) is an exclusive right, but it is subject to compulsory collective management by collecting societies. It should be underlined that this legal construction is not a legal licence.

The right of communication to the public of music played from sound recordings or live is an exclusive right as well and is also exercised by the collecting societies. For works other than musical works, this right of communication is exercised individually by the author.

The collecting societies collect the copyright remuneration based on tariffs, which have to be approved by the Federal Arbitration Board for the Exploitation of Authors' Rights and Neighbouring Rights.

Q.3 Please explain which individual exclusive rights under which specific provisions of Articles 11(1) and 11*bis*(1) of the Berne Convention are affected to what extent by which specific provision of Subsection (A) and/or (B) of Section 110(5)?

Subsection (A) and (B) of Section 110(5) both affect the exclusive right of public communication of broadcast works as provided by Art. 11*bis*(1)(iii) BC because both provisions do not comply with the conditions under which Art. 11*bis*(2) BC allows exceptions to the exclusive right of public communication of broadcast works.

Q.4 In your view, what is the relationship between Article 13 of the TRIPS Agreement and Article 11bis(2) of the Berne Convention? Does Article 13 of the TRIPS Agreement prevail over the exception in Article 11bis(2) with respect to the exclusive rights conferred by Article 11bis(1)(i-iii) of the Berne Convention in the sense that when the three conditions of Article 13 are met, no requirement to pay equitable remuneration arises? Do the requirements of

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[1] Text of Art. 22 CRL (Translation by the International Bureau of WIPO):

The right to make broadcast works perceivable simultaneously and unaltered or to rebroadcast them within the framework of the rebroadcast of a transmitted program may only be asserted through the approved collecting societies.

The rebroadcasting of works over technical installations that are intended to serve a small number of receivers, such as installations in houses with more than one occupier or in a private building, shall be permitted.

This Article shall not apply to the rebroadcasting of subscription television programs or of programs that cannot be received in Switzerland.

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Article 11bis(2) of the Berne Convention prevail as a *lex specialis* over the requirements of Article 13 of the TRIPS Agreement, in the sense that if equitable remuneration is paid, there is no need to comply with the three-conditions test under Article 13? Do the requirements of Article 13 and Article 11bis(2) apply on a cumulative basis in the sense that, on the one hand, even if the three-condition test of Article 13 is fulfilled, there is an additional, fourth requirement to pay equitable remuneration, and on the other hand, even if equitable remuneration is paid consistently with Article 11bis(2), is it necessary to comply in addition with the three conditions of Article 13? Please explain.

Switzerland is of the opinion that Art. 13 TRIPS and Art. 11 *bis*(2) BC apply on a cumulative basis in the sense that Art. 13 TRIPS makes the limitations that were acceptable under Art. 11*bis*(2) BC even narrower. When a remuneration is paid, it can usually be admitted that the third condition of the "3 steps-test" is fulfilled (it does not unreasonably prejudice the legitimate interests of the right holder). Nevertheless one of the two remaining conditions of the "3 steps-test" could not be fulfilled, in particular the first one providing that the limitations should be confined to "certain special cases".

Q.5 In your view, to what extent has the Berne Convention become part of customary international law, and if so, in particular which part of the Articles 1–21 of the Berne Convention?

We think the question whether the Berne Convention has become customary international law is irrelevant because Art. 1-21[2] of this Convention have been incorporated into the TRIPS Agreement and, as such, make fully part of the Agreement and are applicable between the Parties to the Agreement (Art. 9 Par. 1 TRIPS).

Q.6 Has the "minor exceptions" doctrine under the Berne Convention, and especially in the context of Articles 11*bis*(1) and 11(1) of the Berne Convention, acquired the status of customary international law? What is the legal significance of the "minor exceptions" doctrine under the Berne Convention in the light of subparagraphs (3)(a-c) or paragraph (4) of Article 31 of the VCLT or in the light of Article 32 of the VCLT? Has the "minor exceptions" doctrine or any other implied exceptions been incorporated, by virtue of Article 9.1 of the TRIPS Agreement, together with Articles 1-21 of the Berne Convention into the TRIPS Agreement? Please explain.

Neither the legal status nor the scope of the "minor exceptions doctrine" are very clear. In the past, this doctrine has served - in the context of the successive revisions of the BC - to justify the maintaining of exceptions that already existed in national laws and that might have been problematic with regard to the improvements of the level of protection. Those "minor exceptions" are usually exceptions justified by a public interest and they are limited to very specific cases, reflecting national particularisms. However the "minor exceptions doctrine" cannot be based upon in order to justify the introduction of new exceptions which do not comply with Art. 11 *bis*(2) BC and 13 TRIPS.

[2] Except Art. 6*bis* BC.

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4.1 LETTER FROM THE CHAIR OF THE PANEL TO THE DIRECTOR GENERAL OF WIPO

(15 November 1999)

At its meeting on 26 May 1999, the WTO Dispute Settlement Body established a panel pursuant to the request by the European Communities and its member States (please see the attached document WT/DS160/5), in accordance with Article 6 of the Dispute Settlement Understanding. On 6 August 1999, a Panel was composed to examine this complaint (please see the attached document WT/DS160/6).

The EC complaint relates to Section 110(5) of the United States Copyright Act, as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998, which exempts, under certain conditions, the communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes (subparagraph A) and, also under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public (subparagraph B) from obtaining an authorization to do so by the respective right holder. The EC claims that Section 110(5) of the US Copyright Act appears to be inconsistent with the United States' obligations under the TRIPS Agreement, including, but not limited to, Article 9.1 of the TRIPS Agreement.

The Parties to the dispute refer to the provisions of the Paris Act 1971 of the Berne Convention for the Protection of Literary and Artistic Works, the substantive provisions of which (with the exception of Article 6*bis* on moral rights and the rights derived therefrom) have been incorporated into the TRIPS Agreement by Article 9.1. These provisions include, in particular, Articles 11 and 11*bis*, as well as the limitations applicable thereto. Given that the International Bureau of WIPO is responsible for the administration of that Convention, the Panel would appreciate any factual information available to the International Bureau on the provisions of the Berne Convention (1971) relevant to the matter, in particular the negotiating history and subsequent developments and practice concerning those provisions referred to by the Parties to the dispute.

The Parties have also referred to the so-called "minor reservations" doctrine (in particular in relation to Articles 11 and 11*bis*). The Panel would be interested in any factual information relevant to the status of this doctrine within the Berne Convention as reflected in the materials of Diplomatic Conferences as well as any other documentation relating to the Berne Union or work under the auspices of WIPO on copyright matters, as well as the state practice of the Berne Union members in this regard.

Furthermore, the Parties have referred to Article 13 of the TRIPS Agreement, which uses much of the language of Article 9(2) of the Berne Convention (1971). Even though the latter provision applies to the reproduction right, which is not at issue in this dispute, given the similarity of the language used in the two provisions, the Panel would appreciate any background information on the negotiating history of Article 9(2) and subsequent developments and practice concerning the provision.

It would facilitate the work of the Panel if such factual information could be made available by Wednesday 24 November 1999.

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4.2 LETTER FROM THE DIRECTOR GENERAL OF WIPO TO THE CHAIR OF THE PANEL

(22 December 1999)

I have the honour to refer to your letter of November 15, 1999, relating to an ongoing dispute which is being dealt with by a panel under the Dispute Settlement Body of the World Trade Organization (WTO).

Please find attached a Note and Annexes, prepared by the International Bureau of the World Intellectual Property Organization (WIPO) in response to your questions. As indicated in paragraphs 18, 20 and 23 of the Note, the International Bureau of WIPO is prepared to furnish additional information, at your request.

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NOTE

on Certain Questions Regarding the Berne Convention
raised by the World Trade Organization

1. This Note contains the observations of the International Bureau of the World Intellectual Property Organization (WIPO) in response to a request made by H.E. Mrs. Carmen Luz Guarda, Chair, Panel on United States - Section 110(5) of US Copyright Act, World Trade Organization (WTO), in a letter of November 15, 1999, addressed to Dr. Kamil Idris, Director General of WIPO.

2. The requested information, related to the dispute in the above-mentioned Panel under the WTO Dispute Settlement Body, is the following:

> (1) regarding Articles 11 and 11bis of the Berne Convention, as well as the limitations applicable thereon: "any factual information available to the International Bureau on the provisions of the Berne Convention (1971) relevant to the matter, in particular the negotiating history and subsequent developments and practice concerning those provisions referred to by the Parties to the dispute;"
>
> (2) regarding the so-called "minor reservations" doctrine (in particular in relation to Articles 11 and 11bis): "any factual information relevant to the status of this doctrine within the Berne Convention as reflected in the materials of Diplomatic Conferences as well as any other documentation relating to the Berne Union members in this regard;"
>
> (3) regarding Article 9(2) of the Berne Convention, given the similarity of the language used in that provision and in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement): "any background information on the negotiation history of Article 9(2) and subsequent developments and practice concerning the provision."

Question 1: Articles 11 and 11*bis* and the limitations applicable thereon

3. The origin of Article 11 of the Berne Convention (1971) is, as regards non-dramatic musical works, Article 9(3) of the Berne Convention (1886) which granted national treatment to authors of such unpublished works—and published works if a prohibition of performance was indicated on the title page. The Draft Convention, adopted at a conference organized by the International Literary Association in Berne in 1883, contained the following provision:

> "Article 5: Authors who are nationals of one of the Contracting States shall, in all the other States of the Union, enjoy the exclusive right of translation throughout the duration of the rights in their original works.

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"That right shall include the rights of publication or performance."[1,2]

4. The Program proposed by the Swiss Federal Council for the International Conference for the Protection of Authors' Rights which was held from September 8 to 19, 1884, in Berne, contained in its Article 7 an identical provision, apart from an added alternative proposal regarding the right of translation.[3] Discussions of that proposal have been identified in the minutes of the Third Meeting of the Conference, where the Conference discussed a questionnaire of the German Delegation. An excerpt is attached to this Note as Annex I.[4] The Records of the Conference do not contain minutes or other records of the work of the Committee to which references are made in the text in Annex I, other than the report from that Committee which was presented at the fifth Meeting of the Conference. In the Committee's proposal, the reference to performance in Article 7 of the program had been taken out of the context of translation and placed separately in the draft Article 11. The relevant part of the Minutes of that meeting, dealing with that Article and with draft Article 2, to which reference is made in draft Article 11, are attached to this Note as Annex II.[5] (The reservation made by a Delegate in relation to draft Article 6 is not included, as it relates only to the question of formalities for protection.)

5. At the Second International Conference for the Protection of Literary and Artistic Works, in Berne, from September 7 to 18, 1885, discussions were based on the draft prepared by the 1884 Conference.[6] The opening discussion at the Conference of Articles 2 and 11 is attached to this Note as Annex III.[7] Excerpts of the Report of the Committee of the Conference as regards these Articles (Article 11 of the 1884 draft was renumbered to become Article 9 in the Committee's proposal) and as regards the Recommended Principles for Subsequent Unification are attached to this Note as Annex IV.[8] The Conference adopted Articles 2 and 9 without discussion, as proposed by the Committee.[9]

6. The Records of the Third International Conference for the Protection of Literary and Artistic Works, in Berne, from September 6 to 9, 1886, reflect that the Conference discussed a declaration from France regarding, *inter alia*, Article 9 of the Convention. An excerpt of the minutes of the Conference rendering the declaration and the discussion is attached to this Note as Annex V.[10]

7. The official Records of the Berne Conferences do not contain indexes, and the preceding selection of negotiation history is based on a review of the records. As regards the following Conferences, the selections are partly based on the indexes of the official Records, partly on a review of the Records. As regards the 1967 Stockholm Conference, the selection is solely based on the indexes.

8. The Diplomatic Conference in Paris, from April 15 to May 4, 1896, adopted the Paris Additional Act and Interpretative Declaration, 1896. That Act and Declaration did not amend Article 9 of the Berne Act, but it amended Article 2, to which Article 9 refers, and it discussed certain amendments of Article 9 which were not adopted, and a proposal for a new Article 4*bis* which would have ruled out non-voluntary licenses for public performances. Annex VI to this Note contains

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[1] The English translations used in the following, except for the Records of the 1967 Stockholm Conference which were published in English, are WIPO translations from: "1886—Berne Convention Centenary—1986," WIPO Publication No. 877 (E), in the following referred to as "Berne Centenary"

[2] Berne Centenary, pp. 83f.

[3] Berne Centenary, p. 85.

[4] Source: Berne Centenary, p. 91.

[5] Source: Berne Centenary, pp. 94f and 100.

[6] Rule 2, Rules of Procedure, Berne Centenary, p. 110.

[7] Source: Berne Centenary, pp. 111, 113 and 116.

[8] Source: Berne Centenary, pp. 118f, 121 and 125.

[9] Berne Centenary, p. 127.

[10] Source: Berne Centenary, p. 132.

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excerpts of the Report on the work of the Committee of the Diplomatic Conference, prepared by Mr. Louis Renault, dealing with those Articles and proposal.[11] Annex VII to this Note contains the following excerpts of the Records of the Conference relevant to the proposed amendments of Article 9 and the proposed new Article 4*bis*:[12]

(1) proposals made by the French authorities and the International Bureau, regarding Articles 5 and 9;[13]

(2) wishes (vœux) expressed by various congresses and meetings since the adoption of the Convention;[14]

(3) the proposal for a new Article 4*bis* made by the Delegate of Germany;[15]

(4) summary minutes of the general discussion, regarding Article 9;[16]

(5) analytic table of the proposals, made at the Conference, regarding Article 9;[17]

(6) discussion and adaptation of the wishes of the Conference.[18]

9. The Berlin Act of the Convention, adopted at a Diplomatic Conference from October 14 to November 14, 1908, included a partial renumbering of the Articles, whereby the previous Article 9 became Article 11, in which paragraphs (1) and (3) related to performance of musical works. Those paragraphs had the following wording:

> "(1) The provisions of this Convention shall apply to the public performance of dramatic or dramatico-musical works, and of musical works, whether such works are published or not.
>
> "(3) In order to enjoy the protection of this Article, authors shall not be bound in publishing their works to forbid the public performance thereof."

10. Annex VIII to this Note contains excerpts from the General Report Presented to the Conference on Behalf of its Committee by Mr. Louis Renault dealing with this Article.[19] Annex IX to this Note contains the following excerpts from the Records of the Conference relevant to Article 11 of the 1908 Berlin Act of the Convention:

(1) proposal by the Government of Germany and the International Bureau, with notes[20] and Annex regarding the "vœux" expressed by the 1896 Paris Conference;[21]

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[11] Source: Berne Centenary, pp. 136ff, 140, and 142.

[12] Excerpts of the Records regarding the discussions on Article 2 are not included here, but can be provided at request.

[13] Source: Actes de la conférence réunie à Paris du 15 avril au 4 mai 1896 (in the following referred to as "Actes 1896"), pp. 39f and 42f.

[14] Source: Actes 1896, pp. 60ff.

[15] Source: Actes 1896, p. 114.

[16] Source: Actes 1896, p. 116.

[17] Source: Actes 1896, p. 124.

[18] Source: Actes 1896, p. 145.

[19] Source: Berne Centenary, pp. 154f.

[20] Source: Actes de la conference féunie à Berlin du 14 octobre au 14 novembre 1908 (in the following referred to as "Actes 1908"), p. 46.

[21] Source: Actes 1908, p. 53.

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(2) wishes (vœux) expressed by various congresses and meetings since the adoption of the 1896 Act of the Convention;[22]

(3) excerpts of the Minutes of the Conference regarding a presentation of the proposal of the Government of Germany, made by Professor, Dr. Osterrieth;[23]

(4) excerpts of the Minutes of the Conference regarding an oral proposal by the Delegation of Switzerland;[24]

(5) excerpts of the Minutes of the Conference containing an observation by the Delegation of Great Britain in connection with the adoption of Article 11, as proposed by the Commission.[25]

11. The 1914 Additional Protocol to the Convention was signed in Berne without a conference of revision. It did not amend Article 11 of the Convention.

12. The Rome Act of the Convention, adopted at a Diplomatic Conference from May 7 to June 2, 1928, did not amend Article 11, but it added Article 11*bis*, dealing with the right of broadcasting, which had the following wording:

> "(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-diffusion.
>
> "(2) The legislations of the countries of the Union shall determine the conditions under which the right mentioned in the preceding paragraph may be exercised, but the effect of those conditions shall apply only in the countries where they have been prescribed. This shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain an equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority."

13. Annex X to this Note contains the Report of the Sub-committee on Broadcasting[26] and excerpts of the General Report of the Drafting Committee (Rapporteur Mr. Edoardo Piola Caselli) relating to Article 11*bis*[27]. Annex XI to this Note contains the following excerpts from the Records of the Conference relevant to Article 11*bis* of the 1928 Rome Act of the Convention:

(1) excerpts from the Program of the Conference, containing the proposal of the Government of Italy and the International Bureau, regarding Articles 11 (for which no amendment was proposed) and 11*bis*;[28]

(2) observations of the Government of Germany;[29]

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[22] Source: Actes 1908, pp. 88f.
[23] Source: Actes 1908, pp. 162 and 167.
[24] Source: Actes 1908, p. 180.
[25] Source: Actes 1908, p. 216.
[26] Source: Berne Centenary, p. 165.
[27] Source: Berne Centenary, pp. 173f.
[28] Source: Actes de la conférence réunie à Rome du 7 mai au 2 juin 1928 (in the following referred to as "Actes 1928"), pp. 75 and 76f.
[29] Source: Actes 1928, p. 88.

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(3) proposed Article 11*bis* of the Government of Austria;[30]

(4) proposal for amendment of Article 11 of the Government of Great Britain;[31]

(5) proposed Article 11*bis* of the Government of France;[32]

(6) proposal for amendment of Article 11*bis* of the Government of Hungary[33]

(7) general observations and observations regarding Articles 11 and 11*bis* of the Government of the Netherlands;[34]

(8) proposal for amendment of Article 11*bis* of the Government of Norway;[35]

(9) observations of the Government of Sweden;[36]

(10) excerpts of the summary of the proposals and the discussion, prepared by the Berne Bureau, relating to Articles 11 and 11*bis*;[37]

(11) excerpts of the Minutes of the Conference regarding discussion and adoption of Articles 11 and 11*bis*.[38]

14. The Brussels Act of the Convention, adopted at a Diplomatic Conference from June 5 to 26, 1948, amended Article 11 in which paragraphs (1) and (3) related to performance of musical works. Those paragraphs had the following wording:

> "(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works; (ii) any communication to the public of the performance of their works. The application of the provisions of Articles 11*bis* and 13 is, however, reserved.
>
> "(3) In order to enjoy the protection of this Article, authors shall not be bound, when publishing their works, to forbid the public performance thereof."

The Brussels Act also amended Article 11*bis* of the Convention. Paragraphs (1) and (2) which relate to the right of broadcasting, were given the following wording:

> "(1) Authors of literary and artistic works shall have the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public, by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an

[30] Source: Actes 1928, p. 89.
[31] Source: Actes 1928, p. 93.
[32] Source: Actes 1928, p. 100.
[33] Source: Actes 1928, p. 105.
[34] Source: Actes 1928, pp. 108 and 109.
[35] Source: Actes 1928, pp. 111f.
[36] Source: Actes 1928, pp. 123f.
[37] Source: Actes 1928, pp. 254ff.
[38] Source: Actes 1928, p. 294.

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> organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.
>
> "(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

15. Annex XII to this Note contains:

(1) excerpts from the General Report on the Work of the Brussels Diplomatic Conference for the Revision of the Berne Convention, presented by Mr. Marcel Plaisant, Rapporteur-General, relating to Articles 11 and 11*bis*, and discussing in this connection also the so-called "minor reserves";[39]

(2) Report by the Sub-Committee on Broadcasting and Mechanical Instruments;[40]

(3) Report by the Sub-Committee on Articles 11 and 11*ter*.[41]

Annex XIII to this Note contains the following excerpts from the Records of the Conference relevant to Articles 11 and 11*bis* of the 1948 Brussels Act of the Convention, including the discussions regarding the so-called "minor reserves":

(1) excerpts from the Minutes of the Conference containing statements made at the adoption of Articles 11 and 11*bis*;[42]

(2) excerpts from the Records of the Conference, containing, under A, the proposals of the Government of Belgium and the Berne Bureau, under B, proposals, counter-proposals and observations made by Governments of countries, member of the Berne Union, and, under C, summary of the discussions and the outcome of the Conference, relating to Articles 11, including the so-called "minor reserves," and Article 11*bis* of the Convention;[43]

(3) wishes (vœux) expressed by various congresses and meetings between 1927 and 1935, relating to the right of public performance and the right of broadcasting;[44]

(4) wishes expressed by various congresses and meetings between 1936 and 1948;[45]

(5) Memorandum of "l'Organisation internationale de radiodiffusion".[46]

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[39] Source: Berne Centenary, p. 181.
[40] Source: Berne Centenary, pp. 185ff.
[41] Source: Berne Centenary, p. 191.
[42] Source: Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948 (in the following referred to as "Documents 1948"), p. 82.
[43] Source: Documents 1948, pp. 252 to 304.
[44] Source: Documents 1948, pp. 448 to 454.
[45] Source: Documents 1948, pp. 492f.
[46] Source: Documents 1948, pp. 522 to 527.

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16. The Stockholm Act of the Convention, adopted at the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, adopted Articles 11 and 11*bis* in the same wording as that which appears in the Paris Act (1971). Annex XIV to this Note contains the following excerpts from the Records of that Conference (references relating solely to Article 11*bis*(3) have been omitted):

(1) excerpts from Proposals for Revision of the Substantive Copyright Provisions (Articles 1 to 20), Proposal by the Government of Sweden with the Assistance of BIRPI (the Basic Proposal), relating to Articles 11 and 11*bis*;[47]

(2) comments from the Government of the Federal Republic of Germany concerning Article 11 of the Basic Proposal;[48]

(3) comments from the Government of Israel concerning Article 11 and 11*bis* of the Basic Proposal;[49]

(4) comments from the Government of Portugal concerning Article 11 of the Basic Proposal;[50]

(5) comments from the Government of the United Kingdom concerning Article 11*bis* of the Basic Proposal;[51]

(6) comments from the Government of Switzerland concerning Article 11*ter* of the Basic Proposal, containing a reference to Article 11;[52]

(7) excerpts of summary of observations of governments, prepared by the BIRPI Bureau, as regards Articles 11 and 11*bis*;[53]

(8) proposal from the Government of Greece concerning Article 11(1);[54]

(9) comments from the Government of India concerning Article 11*bis* of the Basic Proposal;[55]

(10) proposal regarding the regime of cinematographic works, submitted by the Working Group of Main Committee I to Main Committee I;[56]

(11) proposals from the Government of Brazil concerning Article 11*bis* of the Basic Proposal;[57]

(12) proposals from the Secretariat to the Drafting Committee, concerning Articles 11 and 11*bis*;[58]

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[47] Source: Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (in the following referred to as "Records 1967"), pp. 120 to 122.
[48] Source: Records 1967, p. 618.
[49] Source: Records 1967, p. 622.
[50] Source: Records 1967, pp. 627f.
[51] Source: Records 1967, p. 630.
[52] Source: Records 1967, p. 664.
[53] Source: Records 1967, pp. 670f.
[54] Source: Records 1967, p. 689.
[55] Source: Records 1967, pp. 690f.
[56] Source: Records 1967, p. 710.
[57] Source: Records 1967, p. 715.
[58] Source: Records 1967, pp. 721f.

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(13) Report of the Drafting Committee to Main Committee I;[59]

(14) Additional Report of the Drafting Committee to Main Committee I;[60]

(15) Draft Report of the Rapporteur of Main Committee II to the Committee with addendum, revision and a correction of the revision, relating to preferential rules for developing countries, and Draft Report (final version);[61]

(16) excerpts from the Report of the Work of Main Committee I (Rapporteur Svante Bergström) relating to Articles 11 and 11*bis*, including the general Introduction,[62] and excerpts from the Records showing the corrections made in the Draft Report of the Committee;[63]

(17) excerpts of the Summary Minutes of Main Committee I;[64]

(18) excerpts of the Summary Minutes of the Plenary of the Berne Union.[65]

17. The Diplomatic Conference for the Revision of the Berne Convention which took place in Paris from July 5 to 24, 1971, did not amend the Articles discussed above, and the Records of that Conference have therefore not been analyzed for this Note. Such an analysis can be provided if requested.

18. The request made by H.E. Mrs. Carmen Luz Guarda regarding Articles 11 and 11*bis* of the Berne Convention, as well as the limitations applicable thereon, concerns also other "factual information available to the International Bureau," and "subsequent developments and practice concerning those provisions referred to by the Parties to the dispute." This request covers a vast amount of material which is not available in a systematic and detailed indexed form. Any selection of material considered relevant for the dispute will invariably imply risks of interpretations of the material which would be incompatible with the neutral status of WIPO in relation to the dispute. In order to fulfill the request neutrally, it would be necessary to carry through a complete review of major parts of the copyright and related rights activities of WIPO during the period of so-called

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[59] Source: Records 1967, p. 726.
[60] Source: Records 1967, p. 735.
[61] Source: Records 1967, pp. 735 to 739 and 760 to 762.
[62] Source: Records 1967, pp. 1131 to 1134, 1146, 1165 to 1168 and 1181f.
[63] Source: Records 1967, pp. 739, 740, 742f and 744.
[64] Source: Records 1967, pp. 851f (in the context of discussions regarding the right of reproduction, reference to Article 11*bis*(2) is made in paragraph 653.2), 856 (in the context of discussions regarding the right of reproduction, reference to Article 11 is made in paragraph 711.4), 865f (in the context of discussions regarding cinematographic works), 883 to 885 (in the context of discussions regarding the right of reproduction, reference to Article 11(3) is made in paragraph 1069.1 and to Article 11*bis* in paragraph 1063.1), 893, 902, 902 to 904, 904 to 905 (in the context of discussions regarding the right of public recitation, reference to Article 11 is made in paragraphs 1323.3, 1332, 1335 and 1336), 916 to 917 (in the context of discussions regarding reproduction of lectures, addresses and similar works, references to Article 11*bis* are made in paragraphs 1498.2, 1499.3 to 1500 and 1501.2), 921f (in the context of discussions on exceptions to translation rights, references to Article 11*bis* are made in paragraphs 1565.3 to 1567.3), 923 to 924 (in the context of discussions regarding the principle of equivalent protection in regard to the right of translation, reference to Article 11 is made in paragraph 1607), 926f (in the context of discussions regarding exceptions to the exclusive right of translation, references to Article 11*bis* is made in paragraphs 1652.1 to 1652.2, 1653.2 and 1658.1 to 1658.2), 928, 930 (in the context of the adoption of the Report of the Work of Main Committee I, reference to Article 11 is made in paragraph 1749), 936f (in the context of the adoption of the adoption of the Report of Main Committee I).
[65] Source: Records 1967, p. 805.

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"guided development"[66] from 1967 to 1991 and a general review of the implementation of the treaty provisions in all national laws of Berne Union Member States. Such research would take a long time, and it has therefore not been undertaken. The International Bureau is, however, prepared to furnish any non-confidential material in its possession which is specified in such a way that it can be identified without the need for the International Bureau to make any interpretations of the substantive provisions of the Berne Convention.

Question 2: The so-called "minor reservations" doctrine

19. The discussions regarding the so-called "minor reservations" doctrine apparently all took place in the context of the discussions regarding Article 11 of the Berne Convention. As regards this question reference can therefore be made to the materials referred to under Question 1.

20. The request made by H.E. Mrs. Carmen Luz Guarda regarding the "minor reservations" doctrine pertains to "any factual information relevant to the status of this doctrine within the Berne Convention as reflected in the materials of Diplomatic Conferences as well as any other documentation relating to the Berne Union members in this regard." As regards material other than what is referred to in the preceding paragraph, reference is made to the remarks made in paragraph 18, above.

Question 3: Article 9(2) of the Berne Convention

21. Article 9 of the Paris Act of the Berne Convention, granting the right of reproduction and regulating exceptions and limitations to that right was introduced at the Stockholm Conference. Annex XV to this Note contains the following excerpts from the Records of that Conference:

(1) excerpts from Proposals for Revision of the Substantive Copyright Provisions (Articles 1 to 20), Proposal by the Government of Sweden with the Assistance of BIRPI (the Basic Proposal);[67]

(2) comments from the Government of Austria to the Basic Proposal;[68]

(3) comments from the Government of Belgium to the Basic Proposal;[69]

(4) comments from the Government of Czechoslovakia to the Basic Proposal;[70]

(5) comments from the Government of Denmark to the Basic Proposal;[71]

(6) comments from the Government of France to the Basic Proposal;[72]

(7) comments from the Government of the Federal Republic of Germany to the Basic Proposal;[73]

(8) comments from the Government of Ireland to the Basic Proposal;[74]

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[66] A term used by Sam Ricketson in: "The Berne Convention, for the Protection of Literary and Artistic Works, Centre for Commercial Law Studies, Kluwer, 1987, p. 919.
[67] Source: Records 1967, pp. 111 to 116.
[68] Source: Records 1967, p. 611.
[69] Source: Records 1967, p. 612.
[70] Source: Records 1967, p. 613.
[71] Source: Records 1967, p. 615.
[72] Source: Records 1967, p. 615.
[73] Source: Records 1967, p. 618.

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(9) comments from the Government of Israel to the Basic Proposal;[75]

(10) comments from the Government of Italy to the Basic Proposal;[76]

(11) comments from the Government of Japan to the Basic Proposal;[77]

(12) comments from the Government of Portugal to the Basic Proposal;[78]

(13) comments from the Government of South Africa to the Basic Proposal;[79]

(14) comments from the Government of United Kingdom to the Basic Proposal;[80]

(15) comments from the Government of Luxembourg to the Basic Proposal;[81]

(16) excerpts of summary of observations of governments, prepared by the BIRPI Bureau, as regards Article 9;[82]

(17) amendment to the Basic Proposal, proposed by the Government of Austria;[83]

(18) amendment to the Basic Proposal, proposed by the Government of the United Kingdom;[84]

(19) amendment to the Basic Proposal, proposed by the Governments of Czechoslovakia, Hungary and Poland;[85]

(20) amendment to the Basic Proposal, proposed by the Government of Greece;[86]

(21) amendment to the Basic Proposal, proposed by the Government of Monaco;[87]

(22) amendment to the Basic Proposal, proposed by the Government of the Federal Republic of Germany;[88]

(23) amendment to the Basic Proposal, proposed by the Government of France;[89]

(24) amendment to the Basic Proposal, proposed by the Governments of Austria, Italy and Morocco;[90]

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[74] Source: Records 1967, p. 620.
[75] Source: Records 1967, p. 622.
[76] Source: Records 1967, p. 623.
[77] Source: Records 1967, p. 624.
[78] Source: Records 1967, p. 627.
[79] Source: Records 1967, p. 629.
[80] Source: Records 1967, p. 630.
[81] Source: Records 1967, p. 663.
[82] Source: Records 1967, pp. 669f.
[83] Source: Records 1967, p. 683.
[84] Source: Records 1967, p. 687.
[85] Source: Records 1967, p. 688.
[86] Source: Records 1967, p. 689.
[87] Source: Records 1967, p. 690.
[88] Source: Records 1967, p. 690.
[89] Source: Records 1967, p. 690.
[90] Source: Records 1967, p. 690.

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(25) amendment to the Basic Proposal, proposed by the Government of India;[91]

(26) amendment to the Basic Proposal, proposed by the Government of Rumania;[92]

(27) amendment to the Basic Proposal, proposed by the Government of Japan;[93]

(28) amendment to the Basic Proposal, proposed by the Government of the Netherlands;[94]

(29) amendment to the Basic Proposal, proposed by the Government of India;[95]

(30) amendment to the Basic Proposal, proposed by the Working Group of Main Committee I;[96]

(31) text given to the Drafting Committee;[97]

(32) new text prepared for the Drafting Committee by the Secretariat;[98]

(33) Report of the Drafting Committee to Main Committee I;[99]

(34) final text submitted by the Drafting Committee to Main Committee I;[100]

(35) Additional Report of the Drafting Committee to Main Committee I;[101]

(36) additional text proposed by the Secretariat to the Drafting Committee;[102]

(37) additional text submitted by the Drafting Committee to Main Committee I;[103]

(38) excerpts from the Report of the Work of Main Committee I (Rapporteur Svante Bergström) relating to Article 9, including the general introduction,[104] and excerpts from the Records showing the corrections made in the Draft Report of the Committee;[105]

(39) excerpts of the Summary Minutes of Main Committee I;[106]

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[91] Source: Records 1967, pp. 690f.
[92] Source: Records 1967, p. 691.
[93] Source: Records 1967, p. 691.
[94] Source: Records 1967, p. 691.
[95] Source: Records 1967, p. 692.
[96] Source: Records 1967, p. 696.
[97] Source: Records 1967, p. 709.
[98] Source: Records 1967, p. 720.
[99] Source: Records 1967, p. 726.
[100] Source: Records 1967, p. 734.
[101] Source: Records 1967, p. 735.
[102] Source: Records 1967, p. 757.
[103] Source: Records 1967, p. 758.
[104] Source: Records 1967, pp. 1131 to 1134, 1142 to 1146, 1147 to 1149, 1164f.
[105] Source: Records 1967, pp. 739, 740, 740f, 742f.
[106] Source: Records 1967, pp. 837f, 851 to 855, 856 to 860, 860f (in the context of discussions regarding lawful quotations, reference is made to Article 9 in paragraph 776), 862, 881f (in the context of discussions regarding protection of official texts, reference is made to Article 9 in paragraph 1031), 883 to 885, 892 (in the context of discussions regarding reproduction of lectures, sermons, etc., reference is made to Article 9 in paragraphs 1145 and 1152.1), 901f (in the context of discussions regarding the right of translation, reference is made to Article 9 in paragraph 1275), 905 to 907 (in the context of discussions regarding

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(40) excerpts of the Summary Minutes of the Plenary of the Berne Union.[107]

22. The Diplomatic Conference for the Revision of the Berne Convention which took place in Paris from July 5 to 24, 1971, did not amend Article 9, and the Records of that Conference have therefore not been analyzed for this Note. Such an analysis can be provided if requested.

23. The request made by H.E. Mrs. Carmen Luz Guarda regarding Article 9(2) of the Berne Convention pertains to "any background information on the negotiation history of Article 9(2) and subsequent developments and practice concerning the provision." As regards material other than what is referred to in the preceding paragraphs, reference is made to the remarks made in paragraph 18, above.

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mechanical reproduction rights, several references are made to Article 9), 922f (discussion of Article 9 in the context of its application on translations), 926 to 928, 931.

[107] Source: Records 1967, pp. 804f.

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