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and videos).¹⁰ It also includes communication to the public of a performance of the work."¹¹

1.4.2 Paragraph 1

9. In US – Section 110(5) Copyright Act, the Panel agreed with the parties that a particular type of communication was covered by the exclusive rights set forth in Article 11(1) of the Berne Convention (1971):

"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)."¹²

10. In US – Section 110(5) Copyright Act (Article 25.3), the Arbitrators emphasized the difference between Members' respective obligations under Article 11(1)(ii) of the Berne Convention (1971) and right holders' exercise or exploitation of rights:

"For purposes of the present dispute, this means that the United States is under an obligation to make available to EC right holders the exclusive rights set forth in Articles 11 bis(1)(iii) and 11(1)(ii).¹³ It is important to bear in mind, however, that, while it is for the United States to provide EC right holders with the exclusive rights set forth in Articles 11 bis(1)(iii) and 11(1)(ii), it is for EC right holders to determine whether and how to exercise or exploit those rights."¹⁴

1.4.3 Relationship between Article 11 of the Berne Convention (1971) and other Articles of this Convention.

11. In US – Section 110(5) Copyright Act, the Panel found Article 11 to be a general rule concerning the communication of performances of works, while Article 11bis is provided a specific rule concerning a particular type of communication:

"Regarding the relationship between Articles 11 and 11bis, we note that the rights conferred in Article 11(1)(ii) concern the communication to the public of performances of works in general. Article 11bis(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."¹⁵

1.5 Article 11bis of the Berne Convention (1971) as incorporated in the TRIPS Agreement

1.5.1 Paragraph 1

12. In US – Section 110(5) Copyright Act, in interpreting Article 11bis(1), the Panel addressed

the subparagraphs of Article 11bis (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.

The right provided under subparagraph (i) of Article 11bis (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 wireless

1.5.4 Minor exceptions doctrine

16. In US – Section 110(5) Copyright Act , the Panel addressed the question whether the "minor exceptions doctrine" in the context of copyrights applied under the TRIPS Agreement. The Panel decided f

"The right of a government to control, or to prohibit the circulation, presentation, or exhibition of any work or production clearly includes censorship for reasons of public order.²² ...

The Panel accepts that the three terms 'circulation, presentation, or exhibition' are not necessarily an exhaustive list of the forms of exploitation of works covered by Article 17. However, a noticeable feature of these three terms is that they do not correspond to the terms used to define the substantive rights granted by the Berne Convention (1971), although they may be included within some of those rights²³ or they may refer to acts incidental to the exercise of some of those rights.²⁴ The word 'exhibition' is not even used in the provisions setting out the substantive rights granted by the Convention.²⁵ Therefore, it cannot be inferred that Article 17 authorizes the denial of all copyright protection in any work."²⁶

19. The Panel in *China – Intellectual Property Rights*, further elaborated on the scope of Article 17 as follows:

"A government's right to permit, to control, or to prohibit the circulation, presentation, or exhibition of a work may interfere with the exercise of certain rights with respect to a protected work by the copyright owner or a third party authorized by the copyright owner. However

1.7 Article 20 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

20. In US – Section 110(5) Copyright Act, the Panel declined to address Article 20 of the Berne Convention (1971), because – contrary to the European Communities' argument – the United States was not claiming that the TRIPS Agreement authorizes exceptions inconsistent with the Berne Convention (1971):

"In regard to the argument of the United States that the TRIPS Agreement authorizes exceptions inconsistent with the Berne Convention (1971), the Panel notes that the United States was not claiming that the TRIPS Agreement authorizes exceptions inconsistent with the Berne Convention (1971):