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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.

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]

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[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."

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).

(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 displa y 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]

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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

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, or5ded-0.1493er18

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

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:

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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

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[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

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

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."

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

(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

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

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

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. …"

(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

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

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

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

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[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.

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

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[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

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.d-0.23440tly so provided.

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]

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]

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

6.81

(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*

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

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

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

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

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[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.

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.

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

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[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.

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

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;

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[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.

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

(c)

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,

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

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

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

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

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

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[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".

owners under US copyright law,[168] in the US view, the residual limitation on some secondary uses of

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 or did 20on3iTD icative eds contai 09ned-85.5 -12.75 TD -r chith tbutb and,oit22 -e lsituan rel.31lmended Section 110

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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.

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)

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[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]

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 conD -0.1393 Tc 1.076exploita of Article 13.9, 892 Tj 90 2233

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

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]

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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

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

(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

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]

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

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.

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

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

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.

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.