WORLD TRADE ORGANIZATION

WT/DS160/ARB25/1
9 November 2001

(01-5417)

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

RECOURSE TO ARBITRATION UNDER ARTICLE 25 OF THE DSU

AWARD OF THE ARBITRATORS

The award of the Arbitrators in *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU* is being notified to the Dispute Settlement Body and the TRIPS Council where any Member may raise any point relating thereto, pursuant to Article 25.3 of the DSU. The award is being circulated as an unrestricted document from 9 November 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1).

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
A. PROCEEDINGS 1
B. PROCEDURAL ISSUES WHICH AROSE IN THE COURSE OF THE PROCEEDINGS 3
1. Treatment of replies to questions asked by the Arbitrators to some US collective management organizations 3
2. Admissibility of some pieces of evidence submitted by the United States 4
3. Treatment of business confidential information submitted by the parties 6
II. SCOPE OF THE MANDATE OF THE ARBITRATORS 6
A. JURISDICTION UNDER ARTICLE 25 OF THE DSU TO ADDRESS THE ISSUE REFERRED TO THE ARBITRATORS BY THE PARTIES 6
III. CONCEPTUAL ISSUES 8
A. NATURE AND LEVEL OF BENEFITS NULLIFIED OR IMPAIRED 8
B. ROYALTIES COLLECTED *VERSUS* ROYALTIES DISTRIBUTED 16
IV. CALCULATION 20
A. OUTLINE OF THE METHODOLOGY FOLLOWED BY THE ARBITRATOR 20
1. "Bottom-up" *versus* "top-down" approach 20
2. Point in time at which benefits nullified or impaired should be assessed 23
3. Elements not considered in the calculation 25
(a) Approach of the Arbitrators 25
(b) Elements not considered in the calculation 26
(i) "Indirect" or "potential" harm to other rights of EC right holders 26
(ii) Activities of SESAC 27
(iii) Music broadcast through Internet 27
B. CALCULATION 27
1. General observations 27
2. Total royalties paid to EC right holders 28
3. Royalties from eating, drinking and retail establishments 31
4. Royalties attributable to the playing of radio and television music 31
5. Royalties from establishments that meet the requirements of the statutory exemption 32
6. Further adjustments 33
V. AWARD OF THE ARBITRATOR 34
ANNEX I 35
ANNEX II 37

I. INTRODUCTION

A. PROCEEDINGS

1.1 On 23 July 2001, the European Communities (EC)[1] and the United States (hereinafter also the "parties") 1dm4Tf -0.1875 Tc 0f75 ri8 11.250 TDisptm4Tf I2

> 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."[7]

1.3 The parties requested the Chairman of the DSB to contact the original panelists in the dispute, to determine their availability to serve as arbitrators.[8] The Chairperson of the original panel, Mrs. Carmen Luz

5 September 2001. Replies to questions of the Arbitrators were received on 11 September. Parties were allowed to comment on each other's replies by 14 September 2001.[12]

1.8 The Arbitrators issued their award to the parties on 12 October 2001. The award was notified to the DSB and the TRIPS Council in application of Article 25.3 of the DSU on 9 November 2001.

B. PROCEDURAL ISSUES WHICH AROSE IN THE COURSE OF THE PROCEEDINGS

1. Treatment of replies to questions asked by the Arbitrators to some US collective management organizations

1.9 On 5 September 2001, the **Arbitrators** decided to seek additional information from two of the US collective management organizations[13]: the American Society of Authors, Composers and Publishers (ASCAP) and Broadcast Music Inc. (BMI).[14] The Arbitrators consulted the parties on the questions asked to those CMOs. The parties did not object to the Arbitrators seeking such information.[15] The Arbitrators agreed that the parties might comment on any information submitted by the US CMOs. ASCAP and BMI were given until 14 September to reply. However, no reply was received on that date.

1.10 The Arbitrators were mindful of the particular circumstances which may have delayed any reply and considered that, should ASCAP and/or BMI provide at a later stage any information likely to influence significantly the calculations to be performed, the Arbitrators would seek comments from the parties on such information before finalizing their award. BMI submitted some information on 25 September 2001. However, BMI attached a number of conditions to the use of that information, in particular the obligation for the Arbitrators to submit "any proposed public document" to BMI's counsel in order for it to confirm that the confidentiality of the information submitted by BMI was effectively protected. The Arbitrators understood that the term "any proposed public document" could apply to their award. Having regard to their Working Procedures and to general practice under public international law, they considered that such a condition was incompatible with the confidentiality of their deliberations, which extends to the content of their report until it is made public. The Arbitrators also feared that such conditions, if they were accepted, could make access to evidence more difficult in future cases under the DSU. As a result, they decided not to use the information submitted by BMI on 25 September 2001.

1.11 ASCAP submitted its responses on 3 October 2001. On 4 October, the Arbitrators sought the views of the parties as to whether the information submitted should be taken into consideration. The **European Communities** considered that the information received from ASCAP did no more than repeat and confirm information already submitted by the parties to the Arbitrators and the Panel and did not justify delaying the issue of the award. The **United States** said that it would not object if the Arbitrators were to take into account the information from ASCAP but also stated that the new information merely confirmed the reasonableness of the US calculations.

---

[12] The United States submitted comments on that date. The European Communities did not, but later contested the admissibility of certain pieces of evidence submitted by the United States. Regarding subsequent procedural issues, see Section I.B.1. below.

[13] Hereafter referred to as "CMOs".

[14] A third CMO is involved in this sector: the Society of European Stage Authors and Composers (SESAC). However, for reasons explained *infra*, the parties did not include SESAC's activities in their calculations. SESAC itself did not cooperate in the proceedings before the Panel. Having regard to the explanations given by the parties, the Arbitrators did not find it necessary to request information from SESAC.

[15] The request for information was conveyed in a letter addressed to the President and Chairman of the

1.12

> showing of good cause. In such cases, the other party shall be accorded a period of time for comments, as appropriate;'
>
> The Arbitrators note that the United States has submitted new materials in the form of exhibits US ARB-25 and US ARB-26, as part of the comments which the parties were allowed to make on each other's replies to the questions of the Arbitrators. The Arbitrators also note that the EC has submitted comments both on the admissibility and on the substance of these exhibits. The Arbitrators conclude that, without prejudice to any ultimate decision they may take regarding the EC request, the EC has not been deprived of the possibility to comment under paragraph (f) of our Working Procedures.
>
> Under those circumstances, the Arbitrators deem it appropriate to address the issues raised by the EC claims contained in the letter of 17 September 2001 in the arbitration award."

1.16 On 20 September 2001, the United States commented on the EC letter of 17 September, stating that it had good cause to submit the exhibits at issue, since they were intended to rebut statements made by the European Communities in its response to the written questions of the Arbitrators. In the opinion of the United States, these EC statements introduced new factual issues. The United States also contested the right of the European Communities to submit new arguments which did not respond to the rebuttals.

1.17 The Arbitrators note that the United States did not try to justify the submission of exhibits US ARB-25 and US ARB-26 in terms of paragraph (f) requirements when it submitted them. The United States claimed that it had good cause to submit those exhibits only in a subsequent letter of 20 September 2001. The Arbitrators are of the view that paragraph (f) should normally be interpreted to require the showing of good cause before or at the moment new evidence is presented, at the time or after the rebuttal submission. However, the circumstances of this case, the conditions under which the exhibits were submitted and the European Communities' reaction are special and justify that paragraph (f) be interpreted with some limited flexibility.

1.18 First, in a case where relevant information was scarce, and given the time-frame within which the Arbitrators were supposed to complete their work, any additional information was welcome at any time and *a priori* important in the light of the Arbitrators' duty to provide an objective assessment of the facts.

1.19 Second, the additional information was adduced by the United States as part of a rebuttal of EC arguments contained in its reply to questions of the Arbitrators, as agreed with the Arbitrators at the hearing. The Arbitrators note that the EC did not claim that the exhibits were not related to the rebuttal of EC arguments contained in its reply to questions from the Arbitrators.

1.20 Finally, whilst the US justification for its production of exhibits US ARB-25 and US ARB-26 was belated, in its response the European Communities did in fact deal with the substance of these exhibits. As the Chairman noted in his letter of 19 September 2001 to the parties, the EC has thus not been deprived of the opportunity to comment on the US exhibits.

1.21 Given these special circumstances, the Arbitrators hold that exhibits US ARB-25 and US ARB-26 are admitted in the procedure. As far as the substance of these pieces of evidence is concerned, the Arbitrators will revert to it as necessary in the course of this award.

3. Treatment of business confidential information submitted by the parties

1.22 Both parties have submitted some information on a confidential basis which they requested should not be communicated to private parties.[17]

1.23 The Arbitrators recall that the Panel agreed to treat some information from the European Communities and the United States as confidential, while also recalling that the designation of information as confidential did not assist the Panel in its responsibility to make findings that will best enable the DSB to perform its dispute settlement functions.[18]

1.24 In the absence of specific requests from the parties as to how confidentiality of business confidential information should be preserved, the Arbitrators will rely generally on the practice of the Appellate Body on this matter.[19] To the extent that confidential information may appear as such in the award in order to support the findings of the Arbitrators, the Arbitrators decided that two versions of the award would be prepared. One, for the parties, would contain all the information used in support of the determinations of the Arbitrators. The other, which would be circulated to all Members, would be edited so as not to include the information for which, after consultation with the parties, the Arbitrators would conclude that confidentiality for business reasons was sufficiently warranted. The information which the Arbitrators would consider to be business confidential would be replaced by "x".[20]

II. SCOPE OF THE MANDATE OF THE ARBITRATORS

A. JURISDICTION UNDER ARTICLE 25 OF THE DSU TO ADDRESS THE ISSUE REFERRED TO THE ARBITRATORS BY THE PARTIES

2.1 The Arbitrators note that this is the first time since the establishment of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU.[21] Whereas the DSB establishes panels or refers matters to other arbitration bodies, Article 25 provides for a different procedure. The parties to this dispute only had to *notify* the DSB of their recourse to arbitration. No decision is required from the DSB for a matter to be referred to arbitration under Article 25. In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system.[22] As recalled by the Appellate Body in *United States – Anti-Dumping Act of 1916*[23], it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative. The Arbitrators believe that this principle applies also to arbitration

---

[17] US first and second written submissions, exhibits US ARB-5, 7, 8, 9, 10, 12.

[18] See the Panel Report on *US - Section 110(5) Copyright Act*, *supra*, para. 6.208 and footnote 192, and para. 6.233 and footnote 209.

[19] See, in particular, the Appellate Body Report on *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, paras. 141-147.

[20] This approach was used in one Article 22.6 arbitration and does not seem to have met with objections in the DSB. See the Decision of the Arbitrators on *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* (hereafter "*Brazil – Aircraft (22.6)*"), WT/DS46/ARB, 28 August 2000, para. 2.14.

[21] The Arbitrators recall that arbitration was seldom used under GATT 1947.

[22] In particular, the Arbitrators believe that this arbitration should not be applied so as to circumvent the provisions of Article 22.6 of the DSU (See Article 23.2(c) of the DSU).

[23] See the Appellate Body Report on *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, para. 54, footnote 30.

bodies.[24] In case there be any question as to the jurisdiction of the Arbitrators to deal with this dispute, we provide brief reasons for our conclusion that we do have the necessary jurisdiction.

2.2 The Arbitrators recall that this arbitration has been called upon to address a particular issue resulting from the implementation of the DSB rulings and recommendations on the basis of the Panel Report on *US – Section 110(5) Copyright Act.* In that context, our mandate is to "determine the level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)(B) of the US Copyright Act".[25]

2.3 The Arbitrators first note that, pursuant to the text of Article 25.1, arbitration under Article 25 is an "*alternative* means of dispute settlement".[26] The term "dispute settlement" is generally used in the WTO Agreement to refer to the complete process of dispute[27] resolution under the DSU, not to one aspect of it, such as the determination of the level of benefits nullified or impaired as a result of a violation. It may be argued that the procedure provided for in Article 25 is actually an alternative to a panel procedure. This would seem to be confirmed by the terms of Article 25.4, which provides that "Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards."[28] Article 22.2 itself, unlike Article 21.3(c), does not refer to arbitration as an alternative to the negotiation of mutually acceptable compensation. It could then be argued that arbitration under Article 25 is not intended for "determin[ing] the level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)(B) of the US Copyright Act."

2.4 While being mindful of these elements of interpretation, the Arbitrators are of the view that they are outweighed by other elements, based on the fact that none of the provisions concerned expressly excludes recourse to arbitration under Article 25 in the particular context in which they apply. Article 25.2 itself provides that resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed "except as otherwise provided in this Understanding". Article 25 itself does not specify that recourse to Article 25 arbitration should be excluded when determining the level of nullification or impairment suffered by a Member. On the contrary, the terms of Article 25.1 referring to "the solution of certain disputes that concern issues that are clearly defined by the parties" may support the view that Article 25 should be understood as an arbitration mechanism to which Members may have recourse whenever necessary within the WTO framework. We also note that Article 22.2 refers to "negotiations […] with a view to developing mutually acceptable compensation." There is no language in that provision which would make it impossible to consider arbitration as a means of reaching a mutually acceptable compensation.

2.5 Moreover, recourse to Article 25 arbitration in the present situation is fully consistent with the object and purpose of the DSU. Arbitration is likely to contribute to the prompt settlement of a

---

[24] This is evidenced by Article 21 of the Optional Rules of the Permanent Court of Arbitration for

frBes auf the Permanent Court of Arbitration f,here Haed ,here Neerwingu."

ThWT/DS160/15
1m Emphaste add w

is of the view that the economic value of the copyrights at issue in the present dispute corresponds to the licensing revenue *potentially* foregone by EC right holders as a result of Section 110(5)(B).

3.5 The **United States** considers that the level of nullification or impairment of benefits caused to the European Communities is equal to the annual benefits lost by EC right holders as a result of Section 110(5)(B). Like the European Communities, the United States believes that the level of nullification or impairment should be measured by reference to the licensing royalties lost by EC right holders. However, the United States disagrees with the European Communities' contention that it has lost benefits equal to the total licensing royalties that hypothetically could be collected. In the view of the United States, the most accurate and factually grounded way to quantify the lost benefits is to determine the benefits that EC right holders were receiving prior to the enactment of Section 110(5)(B).

3.6 According to the United States, the European Communities' proposed methodology should be rejected because it calculates foregone licensing royalties as though copyright holders would receive royalties from *every* user of radio or television music that is affected by Section 110(5)(B). The United States maintains that prior to the enactment of Section 110(5)(B) many bars, restaurants and retail establishments in the United States that could have played radio or television music were not licensed to do so. The United States submits that this absence of 100% licensing is to be expected, as the US CMOs which administer the rights of the copyright holders face substantial costs in licensing bars, restaurants and retail establishments. The United States argues that, given the geographically dispersed user base in the United States, it is not economically rational for US CMOs to locate and attempt to obtain and administer licenses for every establishment that plays radio or television music. The United States is therefore of the view that, because it disregards the cost of collecting and distributing royalties, the European Communities' proposed methodology produces a windfall for itself, which would be contrary to WTO rules and would unfairly penalize the United States.

3.7 The **European Communities** rejects the United States' argument that it would be "too costly" to license certain categories of businesses or businesses in certain areas of the United States. The European Communities submits that this is tantamount to suggesting that a WTO Member in which piracy rates are very high or where the enforcement of intellectual property is particularly difficult or costly is, for all practical purposes, released from its substantive obligations under the TRIPS Agreement.

3.8 The **Arbitrators** note that they are called on, in this case, to determine the level of nullification or impairment of benefits accruing to the European Communities as a result of the continued application of Section 110(5)(B). In respect of Section 110(5)(B), the Panel reached the conclusion that it was "[…] 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."[31] Neither party to this dispute contests that Section 110(5)(B), as currently in force, continues to be inconsistent with the provisions of the aforementioned articles.

3.9 It is clear, therefore, that the benefits which Section 110(5)(B) is impairing or nullifying are those which should accrue to the European Communities and other Members under the provisions of Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971)[32] as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

3.10 It is apparent from the submissions of the parties that they do not so much differ regarding the *nature* of the benefits which should accrue to the European Communities under the provisions of Articles 11*bis*(1)(iii) and 11(1)(ii), but rather regarding the *level* of benefits which the

[31] Panel Report on *US - Section 110(5) Copyright Act*, *supra*, para. 7.1(b).

[32] Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) will hereafter be referred to as "Articles 11*bis*(1)(iii) and 11(1)(ii)".

European Communities could expect to accrue to it under those provisions. The Arbitrators will address these issues in turn.[33]

3.11 As concerns, first, the *nature* of the benefits which would accrue to the European Communities if Section 110(5)(B) were brought into conformity with Articles 11*bis*(1)(iii) and 11(1)(ii), it is well to recall at the outset what those Articles actually provide.

3.12 Article 11*bis*(1)(iii) reads:

> Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
>
> […]
>
> (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

3.13 Article 11(1)(ii) states:

> Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
>
> […]
>
> (ii) any communication to the public of the performance of their works.

3.14 By virtue of Article 9.1 of the TRIPS Agreement[34], the provisions of 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."[35]

3.15 For purposes of the present dispute, this means that the United States is under an obligation to make available to EC right holders the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii).[36] It is important to bear in mind, however, that, while it is for the *United States* to *provide* EC right holders with the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii), it is for *EC right holders* to determine whether and how to *exercise* or *exploit* those rights.

3.16 Although there may be a variety of ways in which EC right holders could exercise or exploit the exclusive rights which the United States must make available to them, the parties are in agreement

---

(1)2iwhifromi3

[36] The Arbitrators note that, in those cases where users of copyright works are covered by Section 110(5)(B), the European Communities does not currently derive *any*5)Em lsieiwhifromi3

that, in practice, such exclusive rights are and would be exploited through licensing. The Arbitrators see no reason to differ from the parties in this regard.[37]

3.17 If it is assumed, then, that copyright holders exploit their exclusive rights by granting licences for the use of their works, one of the benefits which arises from those rights consists of the licensing royalties which right holders would receive. Thus, exclusive rights such as those set forth in Articles 11*bis*(1)(iii) and 11(1)(ii) will normally translate into economic benefits for copyright holders.

3.18 In their submissions to the Arbitrators, the parties have focused on this type of benefit accruing to copyright holders. The Arbitrators concur with the parties that, for purposes of these arbitration proceedings, the relevant benefits are those which are economic in nature.[38] This is consistent with previous decisions of arbitrators acting under Article 22.6 of the DSU.[39] Moreover, like the parties to this dispute, the Arbitrators will proceed on the assumption that the licensing royalties realizable by copyright holders constitute an adequate measure of the economic benefits arising from Articles 11*bis*(1)(iii) and 11(1)(ii).

3.19 Accordingly, the Arbitrators will, in this case, assess the level of EC benefits which Section 110(5)(B) is nullifying or impairing in terms of the royalty income foregone by EC right holders. In making this observation, the Arbitrators are aware that their task in this case is to determine the benefits which are denied to the *European Communities* rather than determining the benefits which are denied to *EC right holders*. However, there can be no question that the benefits which are denied to the European Communities include the benefits which are denied to EC right

[37] The assumption that the exclusive rights at issue in this dispute are exploited through licensing is, of course, without prejudice to any assumptions that may appropriately be made in other cases involving other

holders.[40] What is more, the European Communities has not made out a claim to the effect that Section 110(5)(B) is nullifying or impairing benefits additional to those which EC right holders could otherwise derive from Articles 11*bis*(1)(iii) and 11(1)(ii). As a result, it is appropriate, for the purposes of these proceedings, to determine the level of EC benefits which Section 110(5)(B) is nullifying or impairing in terms of the benefits foregone by EC right holders.

3.20 Having addressed the nature of the benefits which should accrue to the European Communities under Articles 11*bis*(1)(iii) and 11(1)(ii), the Arbitrators next turn to the issue of the *level* of benefits which the European Communities could expect to accrue to it under those Articles. Put in another way, the next issue confronting the Arbitrators relates to the level of royalty income which EC right holders could expect to receive if the United States were to comply with its obligations under Articles 11*bis*(1)(iii) and 11(1)(ii).[41]

3.21 The European Communities considers that, because this dispute involves exclusive rights, the level of benefits which EC right holders could expect to obtain should be assessed by reference to the economic value of the exclusive rights conferred on them by Articles 11*bis*(1)(iii) and 11(1)(ii). The European Communities argues that the economic value of those rights corresponds to the royalty income *potentially* realizable by EC right holders. The European Communities recalls, in this regard, that all US bars, restaurants and retail establishments which play radio or television music would have to pay licensing fees and that any unauthorized use of copyrighted musical works by such establishments would be illegal.

3.22 The Arbitrators are cognizant of the fact that the rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii) are in the nature of exclusive rights. If granted by the United States, those rights would provide EC right holders with the assurance that any unauthorized use of those works would be illegal as a matter of US law. It is also true, as the European Communities suggests, that any unauthorized use of copyright works, quite apart from being illegal, would deprive EC right holders of royalty income. However, the question is whether the level of royalty income which EC right holders could expect to receive *includes* the royalty income of which they would be deprived by all unauthorized users of their works.

3.23 The European Communities answers this question in the affirmative. In essence, it argues that because EC right holders *should* receive licensing royalties from *all* users of their copyright works - i.e., legal and illegal users - the benefits which the European Communities can expect to accrue to it are equal to the royalty income which EC right holders *should* receive.[42]

3.24 The Arbitrators consider that the benefits which they should take into account in this case are

Articles 11*bis*(1)(iii) and 11(1)(ii).[43] In this regard, the Arbitrators certainly appreciate the European Communities' point that, as a matter of US law, all users of copyright works by EC right holders *should* be licensed and *should* pay licensing fees. But is it reasonable, in the circumstances of the present dispute, for the European Communities to expect that all users of the works of EC right holders *would* be licensed and *would* pay licensing fees?

3.25 In considering this issue, it is important to recall that the rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii) do not exercise or enforce themselves. In this connection, the Arbitrators note that neither party to this dispute has suggested that, in the event those rights were available under US law, the United States would have any role to play in how those rights would be exercised. Nor has it been asserted that it would be the duty of the United States to enforce those rights on behalf of EC right holders. In the view of the Arbitrators, it is clear that the exercise and enforcement of the rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) would not be the responsibility of the United States but of EC right holders.[44]

3.26 Indeed, it is common ground that, in practice, copyright holders entrust CMOs with the exercise and enforcement of the exclusive rights at issue in this dispute.[45] Such CMOs are authorized by copyright holders to identify users of their rights, grant licences for the use of those rights and take legal action to enforce licences or pursue users who fail to seek licences.

3.27 The United States submits that, in performing the aforementioned tasks, US CMOs incur substantial costs. The United States recalls in this respect that, in the United States, the potential base of users of copyrighted musical works - i.e., bars, restaurants and retail establishments - is wide, geographically dispersed and in almost constant change, as users continually leave and enter the market. From these considerations, the United States infers that it is not economically rational for US CMOs - which the United States says generally seek to maximize profits for the right holders they represent[46] - to attempt to identify and obtain licences from *every* user of copyright works.[47]

---

[43] It should be recalled, in this context, that the inquiry into the level of benefits which the European Communities could expect to accrue to it *if* Section 110(5)(B) were brought into conformity with the TRIPS Agreement is hypothetical in nature. The Arbitrators consider that, in such a situation, it is necessary to proceed with caution, such that only those benefits which the European Communities could, in good faith and taking account of all relevant circumstances, expect to derive from Articles 11

According to the United States, estimates relating to the time before Section 110(5)(B) was enacted in fact bear out its view that right holders do not license *all*

3.46 With this definition in mind, the Arbitrators now turn to consider what benefits EC right

United States notes that the distributions from US CMOs to EC right holders are reflected on the US current account of international payments. The United States submits, therefore, that the level of EC benefits nullified or impaired should be measured as foregone earnings in the European Communities' current account transactions with the United States.

3.53 The Arbitrators are not persuaded that it is necessary, or even appropriate, in this case to link the issue of the level of EC benefits which are being nullified or impaired to the US current account of international payments. To begin with, the Arbitrators do not see any legal reason why the calculation of the level of payments from US CMOs to EC right holders should necessarily be based on figures stemming from the US current account. The fact that the current account may, in some cases, be usefully relied on to measure the impact of WTO-inconsistent measures does not lead to the conclusion that the current account should be determining in all cases or that it should be used to the exclusion of other sources of relevant data.[60] Indeed, the United States itself has not based its argumentation before the Arbitrators on current account figures, nor has it provided such figures to the Arbitrators.

3.54 Another reason for approaching current account figures with caution in this case lies in the fact that they may not give sufficiently accurate indications regarding the amount of payments which US CMOs would make to EC right holders. It is the understanding of the Arbitrators that the international transactions which are reflected on the US current account are transactions between residents of the United States and foreign residents. In other words, it is the residency of the parties involved in a particular cross-border transaction rather than their nationality which determines whether and, if so, where that transaction is reflected on the current account. However, what the Arbitrators are concerned with in the present proceedings are payments made by US CMOs to EC nationals, i.e., EC right holders.[61]

3.55 Thus, payments made by US CMOs to EC right holders residing in the United States or to EC right holders residing in, say, Switzerland should, in the view of the Arbitrators, be taken into account in their determination of the level of EC benefits which are being nullified or impaired. Yet those transactions would not be reflected on the US current account as transactions between the United States and the European Communities because the EC nationals concerned would not be EC residents.

3.56 A similar problem would arise in the event of indirect distributions from US CMOs to EC right holders. For instance, EC right holders might rely on US publisher affiliates to represent them in the United States. In such cases, the relevant payments would be those from US CMOs to US publisher affiliates representing EC right holders. These types of payments from US CMOs to US publisher affiliates would not be reflected on the US current account. Yet this does not alter the fact that such payments would be payments to EC right holders.[62] As such, the Arbitrators must take them into account.[63]

---

[60] In the view of the Arbitrators, the mere fact that this case is a "trade case" involving international licensing payments which appear on the US current account does not, in itself, provide a sufficient rationale for why current account figures have to be utilised.

[61] Article 1.3 of the TRIPS Agreement requires Members to accord the treatment provided for in that Agreement to the "nationals of other Members".

[62] In the view of the Arbitrators, such royalty payments would be payments to EC right holders even if EC right holders decided to use or reinvest their revenue in the United States rather than to have it transferred to a member State of the European Communities.

[63] The Arbitrators note that the data they have been provided with concerning distributions by the US CMOs to EC right holders through their US publisher affiliates is somewhat incomplete in that it does not specify the criteria which were applied in compiling it. In the view of the Arbitrators, the data supplied might include distributions to persons that could be considered to be US right holders. The Arbitrators explain at para. 4.46 how they have taken account of this problem in determining the level of such indirect distributions.

3.57 As is evident from the aforementioned examples, were the Arbitrators to employ current account figures, there would be a risk of underestimating the payments which US CMOs would make to EC right holders.[64] In view of that risk, the Arbitrators prefer not to base their determination of the level of benefits lost by the European Communities on data taken from the US current account.[65]

3.58 In the light of the above considerations, the Arbitrators conclude that the level of EC benefits which are being nullified or impaired as a result of Section 110(5)(B) should be assessed on the basis of the amount of royalty payments ("distributions") which would be made by US CMOs to EC right holders or their representatives.

IV. CALCULATION

A. OUTLINE OF THE METHODOLOGY FOLLOWED BY THE ARBITRATOR

1. "Bottom-up" *versus* "top-down" approach

4.1 The **Arbitrators Ay paymenOeo0s452top-downag44 Tc 0 0.2144 Tlnefit, durS reathn6limp0sseluldr1s0 -0**

believe that recourse to a counterfactual would only be justified if it was established that the situation predating the 1998 Amendment was itself TRIPS-incompatible.

4.9 The Arbitrators recall that, before the entry into force of the 1998 Amendment, some categories of establishments were already exempted from copyright payments under Section 110(5) of the 1976 Copyright Act. To be exempted, these establishments had to use a single receiving apparatus of a kind commonly used in private homes, hence the term "homestyle exemption" used to describe it.[72] Some size requirements also applied to the establishments, based on decisions of courts.[73] With the 1998 Amendment, a subparagraph (B) was added which extended the scope of exemptions under Section 110(5).[74]

4.10 The Arbitrators note that their task is to determine the level of EC benefits nullified or impaired, not to assess the TRIPS-compatibility of any piece of US legislation. Within that framework, they also consider that the most appropriate way to assess the level of EC benefits nullified or impaired is to determine what EC right holders received before the enforcement of the 1998 Amendment – because historical figures are available with respect to that period - and adjust it as appropriate to take into account the evolution of the US market in the sector concerned.

4.11 The Arbitrators are mindful that they should base their calculation on a TRIPS-consistent situation. They recall that the European Communities has claimed that the situation pre-dating the 1998 Amendment (i.e. the exemption of certain establishments under the original homestyle exemption) was not TRIPS-compatible. The European Communities bases its conclusion on the fact that, in its view, the incompatibility of Section 110(5)(B) implies that the original homestyle exemption itself was TRIPS-incompatible.

4.12 The Panel did not make any finding on the original homestyle exemption which, in any event, was no longer in force by the time it issued its report. However, in its analysis of the current Section 110(5)(A) and (B), the Panel did make a number of statements relating to the original homestyle exemption. The Arbitrators recall that the Panel noted the limited percentage of establishments covered by the original homestyle exemption, the restrictions imposed by Section 110(5) and, more specifically, the fact 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."[75] We note in this respect that the European Communities did not, either before the Panel or during these proceedings, sufficiently establish its claim that the economi3indw (aying mus

4.115e remption of certamesty wTc ited percentage of

4.14 For these reasons, we considered it appropriate not to attempt to include into the total fees paid in relation to EC works the potential revenue from establishments covered by the original homestyle exemption.

4.15 Finally, we note that determining the level of nullification or impairment suffered by a Member requires detailed calculations.[76]

must determine the level of nullification or impairment of EC benefits over a one-year period ending as closely as possible to 23 July 2001.[78]

4.20 The Arbitrators recall that the European Communities suggested that they follow the approach in the *EC - Hormones* Article 22.6 arbitrations, which would consist of assessing the level of nullification or impairment of benefits in this case on the date when the United States should have brought its legislation into conformity with its WTO obligations. We recall that, in *EC - Hormones*, the arbitrators used a counterfactual and considered that they should assess the level of nullification or impairment of benefits as if the European Communities had brought its legislation into conformity at the end of the reasonable period of time.[79] In the present case, the reasonable period of time was supposed to lapse on 27 July 2001.[80] However, on 24 July 2001, the DSB agreed to an extension until 31 December 2001 or the date on which the current session of the US Congress adjourns, whichever is earlier.[81] In those circumstances, the Arbitrators believe that using the date of the end of the reasonable period of time as cut-off date is not feasible, lest they will add uncertainty to their estimate

and 2001, in order to reflect the evolution in the value of EC rights until the date of referral of the matter to arbitration. We consider that this approach does not contradict our original intent to base our estimate as much as possible on historical figures for two reasons:

(a) adjusting relevant figures regarding the period pre-dating the 1998 Amendment to take into account the evolution of the US market is a necessity since that period has been one of sustained economic growth for the United States. In addition, we have been given no valid reason why we should not make that adjustment; and

(b) using the annual rate of growth of the US gross domestic product between 1998 and 2001 is, in our opinion, a very conservative approach if one compares those figures with those supplied by ASCAP for the same period.

4.24 For these reasons, the Arbitrators deem it appropriate to calculate the level of EC benefits nullified or impaired by the continuing operation of Section 110(5)(B) on a date as close as possible to the date on which the matter was referred to them. In this case, because of the statistical information available, their estimate will be based on the situation on 30 June 2001. For the first six months of the year 2001, we have used the growth rate of 1.7%, which we have calculated from quarterly GDP at current dollar value, seasonally adjusted at annual rates as published by the US bureau of census.[82]

3. Elements not considered in the calculation

(a) Approach of the Arbitrators

4.25 In its submissions, the **European Communities** suggested that a number of factors which, in its view, could contribute to nullification or impairment of benefits, be disregarded by the Arbitrators because precise data are lacking. This is the case of the detrimental effects of the denial of protection of specific rights in a given work for the exploitation of other rights in this work. Moreover, the European Communities only took into account in its calculations those establishments that use broadcast music (i.e. radio or television music). Despite the fact that, in its opinion, Section 110(5)(B) is also applicable to music transmitted via the Internet, the European Communities did not include this aspect in its calculations.

4.26 In the opinion of the **Arbitrators**, this raises the question of how to reconcile these suggestions with their attempt to reach an estimate which reflects as closely as possible the level of EC benefits nullified or impaired. The Arbitrators recall that in document WT/DS160/15, the parties stated that "they shall accept [the award of the Arbitrators] as the level of nullification or impairment for purposes of any future proceedings under Article 22 of the DSU in this dispute". This seems to imply that our award may not only condition the amount of compensation which the United States may offer to the European Communities under Article 22.2 of the DSU, but also the work of potential arbitrators under Article 22.6, since the latter are required under the DSU to determine whether the level of suspension of concessions or other obligations is hatma. -etermnbmiss3w To mus2mt onD /

other obligations under Article 22.7 would be in fact "punitive", because the level of EC benefits nullified or impaired by the operation of Section 110(5)(B) would have been overestimated.[84]

4.28 More generally, as mentioned in paragraphs 4.15 *supra* and 4.36 *infra*, the Arbitrators in this case did not have sufficiently specific information and either had to adjust figures or draw inferences. They believe that by trying to incorporate in their calculations elements for which information was insufficient, they run the risk of erring on the side of pure speculation. Therefore, the Arbitrators considered appropriate to accept most of the "simplifications" suggested by the European Communities, such as the exclusion of indirect harm to EC copyright holders or the exclusion of music broadcast through the Internet, provided they were accepted by the United States and to the extent that, in the opinion of the Arbitrators, they did not lead to a higher level of nullification or impairment of benefits. Likewise, when they proceeded to necessary adjustments or deductions, in the absence of figures grounded on facts, the Arbitrators tried to use estimates which were accepted by the parties or otherwise seemed reasonable on the basis of the information available.

(b) Elements not considered in the calculation

(i) "Indirect" or "potential" harm to other rights of EC right holders

4.29 The **European Communities** recalls that the Panel pointed out that the denial of protection of specific rights in a given work can also have detrimental effects for the exploitation of other rights in this work such as substitution between different uses of the work by a given establishment or a possible erosion of licensing fees for other users. However, the European Communities, given the lack of quantitative data and the uncertainty of causality relations, suggested that the Arbitrators' assessment may not include this "potential" or "indirect" harm to other copyright sources.

4.30 The **United States** did not comment.

4.31 The **Arbitrators** are mindful of the remarks of the Panel that the denial of protection of specific rights in a given work could also have an impact on the exercise of other rights.[85] However, having regard to the arguments of the European Communities and in the light of their own preliminary comments above, the Arbitrators agreed not to incorporate into their calculation the "indirect" or "potential" harm caused to right holders through the substitution of broadcast music by other forms of music, such as recorded music. We consider that we have no reason not to accommodate the request of the European Communities. In particular, we believe that trying to assess the level of benefits nullified or impaired as a result of "indirect" or "potential" harm would most probably entail more assumptions, deductions or inferences, thus increasing the risk of reaching an unreasonable estimate.

4.32 The Arbitrators would like to stress, however, that their position is based on the factual circumstances of this case and the particular purpose of these proceedings, i.e., determining the level of nullification or impairment of EC benefits, not identifying violation. It is without prejudice to whether this type of damage would be considered to nullify or impair benefits accruing directly or indirectly to any Member in another case.

(ii) Activities of SESAC

4.33 The **Arbitrators** recall that, in the United States, three collective management organizations collect fees for copyright holders: ASCAP, BMI, and SESAC. They note that, in their submissions, the parties did not include any data relating to the activities of SESAC. The parties explained in the course of the proceedings that this was essentially because SESAC does not represent any significant number of EC collecting society members and does not distribute significant amounts of royalties to EC right holders.

4.34 We see no reason to put in doubt the information given by both parties about SESAC's representation of EC right holders. Furthermore, considering the difficulties which we would have encountered in assessing the contribution of SESAC, we have decided not to seek to factor SESAC's activities in our calculation. In that case, the reason was nevertheless more related to the limited impact that the exclusion of SESAC would, in the opinion of both parties, have on our calculation.

(iii) Music broadcast through Internet

4.35 The **Arbitrators** recall that the European Communities, while hinting at the impact of music transmission via Internet in the nullification or impairment of EC benefits, did not include such transmission in its calculation. The Arbitrators are aware of the development of music transmission

4.37 We have discussed *supra* the differences between the methodologies suggested by the European Communities and the United States, and the implications that these differences have. We recall that the outcomes of the parties' calculations based on their respective methodologies are quite far apart from each other. The European Communities arrives at the figure of US$ 25,486,974 per year, while the United States suggests that the level of nullification or impairment of benefits to the EC is in the range of US$ 446,000 to US$ 733,000 per year. This discrepancy can, to a large extent, be explained by the conceptual differences between the two approaches.[89]

4.38 As regards the order of magnitude of the annual losses to EC right holders resulting from Section 110(5)(B), we note as an illustration that, according to the information provided by the United

homestyle exemption at the entry into force of the 1998 Amendment. For the reasons stated above[93], we did not find it necessary to include such establishments in our calculation.

4.42 The **European Communities** provided us with a compilation of quantitative data by ASCAP which includes, for the years 1996-1998, first the amounts of the total domestic distribution to EC CMOs and second distribution to US publisher affiliates for performance of EC works.[94] The European Communities refers to these two categories as, respectively, "direct" and "indirect" distributions to EC right holders. The European Communities notes that the first category does not include the total royalties paid for EC works in the repertoire of ASCAP, because music publishers' share of royalties is overwhelmingly paid directly by ASCAP to EC publishers' US affiliates, rather than through the affiliated EC collecting societies to those EC publishers that are members of those societies. These payments to EC publishers' US affiliates are included in the second category.

4.43 The **United States** has used the three-year averages of these figures provided by ASCAP as the starting-points for its calculations, the "direct" distributions representing the lower range of royalties paid to EC right holders and the sum of "direct" and "indirect" distributions representing the upper range.

4.44 In calculating the amount of revenue that EC right holders received from ASCAP prior to the 1998 Amendment, the **Arbitrators** have taken as their starting-point the sums of "direct" and "indirect" distribution to EC right holders over the period 1996-1998.

4.45 The Arbitrators note that the 1998 Amendment entered into force on 26 January 1999. Therefore, the Amendment did not affect ASCAP's revenues collected before the year 1999. We note that the European Communities and the United States have provided us with relevant data on ASCAP's distributions to EC right holders over the three-year period of 1996-1998, and that the United States has used the average of the distributions in these three years as the starting-points for its calculation. As we are calculating the level of EC benefits nullified or impaired by the Amendment on the basis of historical data, we need to determine an appropriate previous representative period as the starting-point for our own calculation. In this regard, we note that under GATT practice the most recent three-year period not distorted by restrictions has been used in assessing the consistency of a measure.[95] In our case, the most recent representative period would be the three-year period not affected by the 1998 Amendment, namely the years 1996-1998. We believe that using the data made available to us for this three-year period is consistent with the prudent approach which we have decided to follow by using the "top-down" methodology based on historical figures. In determining a single starting-point for our further calculation, we have used the average of the figures concerning these three years. On the one hand, we do note that in this case ASCAP's distributions to EC right holders grew regularly over this period. On the other hand, we have no evidence that this growth is applicable also to the sector at issue in this case and, in any event, three years are generally considered to be insufficient to establish a particular trend in a market. In this sense, using an average for this three-year period would tend to reflect the average revenue at the level of the year 1997 rather than in 1998. We have taken this into account at the final step of our calculation when we have adjusted the outcome of our calculation to reflect the situation at the time of the referral of the issue to the Arbitrators.

---

[93] See *supra*, section IV.A.

[94] Exhibit EC-15 (exhibit US ARB-5), which contains information that was provided to the European Communities in confidence with the request that it not be communicated to private parties.

[95] See the Panel Report on *EEC - Restrictions on Imports of Apples from Chile*, BISD 27S/98, adopted 10 November 1980, para. 4.8. See also the Decision of the Arbitrators on *EC - Bananas III (22.6) (US)*, *supra*, paras. 5.24 *et seq*.

4.46 The three-year average of ASCAP's distributions to EC right holders amounts to approximately US$ xxxxxxxx per year. We note that this figure may not be entirely accurate, given that the information made available to us by the parties, on which we based our calculation, may not be complete for the reasons discussed below. Earlier we have noted that direct payments by the US CMOs to EC right holders (i.e., payments that ASCAP and BMI make directly to EC right holders that are their members rather than payments they make to EC CMOs) are relevant for our calculation even if the EC right holders in question were to collect these fees through their US affiliates.[96] However, as regards the confidential data on ASCAP's distributions to EC right holders' US publisher affiliates, we note that we do not have the exact criteria that ASCAP has used in producing its figures. Therefore, there may be a risk that a small part of this figure may represent payments to persons that could not be considered as EC right holders or their representatives. On the other hand, we note that neither the first nor the second category appears to include those payments that ASCAP may make to those individual EC authors that are members of ASCAP and thus receive their royalties directly from it, rather than through EC CMOs. Consequently, the figures provided may be somewhat too high in some respects and too low in others, but we have not attempted to factor in these aspects into our calculations, given that they compensate for each other and that any difference between the two revenues is not likely to be substantial, and that, at any rate, their impact on the overall calculation would be quite limited.

4.47 The **United States** provided us with an estimation of the amount that BMI distributed to EC CMOs in 1996. The United States did not provide any data for the years 1997 and 1998. The **European Communities** does not contest the figure suggested by the United States. The **Arbitrators** have taken this figure as their starting-point in calculating the revenue that EC right holders received from BMI. However, they have made two adjustments to it.

4.48 The **European Communities** argues that if data on BMI's distributions to EC right holders through the EC CMOs were to be used, BMI's distributions to EC right holders' US publisher affiliates should also be taken into account in a similar manner as in the case of ASCAP.

4.49 The **Arbitrators** agree with the European Communities on this point. Lacking any data concerning BMI's distributions to EC right holders' US publisher affiliates, we have made an assumption that the share between BMI's "direct" and "indirect" distributions would be the same as the share between ASCAP's corresponding categories of distributions. We have accordingly made the appropriate adjustment to the estimate on BMI's distribution to EC right holders provided by the United States.

4.50 For the reasons explained above[97], in calculating EC right holders' revenue from ASCAP, we have used the average of such revenues for the period 1996-1998. Although we have data from BMI only for the year 1996, we are of the view that in order to be consistent we need also to base BMI figures on similar average from the period 1996-1998. To be able to do so, we have determined BMI's distributions to EC right holders in 1997 and 1998 on the basis of the 1996 estimate, assuming that BMI's distributions grew over that period at the same rate as those of ASCAP. Subsequently, we have calculated the three-year average of these BMI distributions in 1996-1998. For the purposes of our calculation, this figure represents the annual average amount of revenues that EC right holders received from BMI prior to the 1998 Amendment.

4.51 Accordingly, for the purposes of our further calculations, we estimate that BMI's distribution to EC right holders prior to the 1998 Amendment was approximately US$ xxxxxxxx per year.

---

[96] See *supra*, para. 3.56.
[97] See *supra*, para. 4.45.

4.52 Adding up our estimations on ASCAP's and BMI's distributions to EC right holders, we estimate that, prior to the 1998 Amendment, EC right holders received approximately US$ xxxxxxxx per year.

3. Royalties from eating, drinking and retail establishments

4.53 Having established the annual average of the total amount of royalties EC right holders received prior to the 1998 Amendment, the Arbitrators will now attempt to estimate what share of that revenue came from eating, drinking and retail establishments. We will do this by deducting in two steps the royalties that were received from other types of users.

4.54 First we will estimate what share of the total licensing revenue paid to EC right holders was attributable to the so-called general licensing category. This category includes various types of licensees such as drinking and eating establishments and retail establishments, but it excludes licensing revenue from radio and television broadcasting and concerts. From ASCAP's annual reports for 1996-1998 it can be calculated that an average of 18.45% of the total domestic receipts was attributable to the general licensing category during this period. We have not been provided data that would have allowed us to calculate the corresponding share of BMI's receipts. In the absence of relevant data, we considered it reasonable to apply the same percentage to BMI's receipts. Using this percentage, we calculate that, of the total amount of revenue EC right holders received per year prior to the 1998 Amendment, approximately US$ xxxxxxxx per year were attributable to the general licensing category.

4.55 The general licensing category includes, in addition to eating, drinking and retail establishments, miscellaneous users of background music such as airlines, sports stadiums, motion picture theatres, amusement parks, conventions, telephone music services, colleges and universities, health clubs and background music services. Therefore, we will need to estimate what share of the general licensing revenue is attributable to eating, drinking and retail establishments as defined in Section 110(5)(B). The problem we face is that we have not obtained any specific data on this question. Given that the general licensing category embraces many types of licensed uses, the United States claims that "a more than reasonable estimate is that 50% is attributable to restaurants, bars and retail establishments". We note that the European Communities has not contested this percentage suggested by the United States. Nor has it provided an alternative estimate.

4.56 We consider the US estimate of the percentage to be reasonable in the light of the arguments of the parties. Therefore, we use it in our calculation. Accordingly, we estimate that the amount of revenue received by EC right holders prior to the 1998 Amendment that was attributable to eating, drinking and retail establishments was approximately US$ xxxxxxxx per year.

4. Royalties attributable to the playing of radio and television music

4.57 The next step is to determine what amount of the revenue collected from eating, drinking and retail establishments was attributable to playing radio and television music as defined in Section 110(5)(B). This requires us to deduct the amount of royalty payments that was attributable to the use of other sources of music that were not exempted under that Section. For this purpose, both parties use in their respective calculations a figure of xx% as representing the share of this revenue that is attributable to the use of radio and television music. This figure is based on data from the National Restaurant Association and the National Licensed Beverage Association.

4.58 In using this figure, the **European Communities** notes that it does not include establishments that play music only from the television, but is not asking the Arbitrators to consider this factor. The **United States** notes that it has used this, in its view, high number to account for the fact that it has been unable to factor television use into the picture.

4.59 The **Arbitrators** note that this figure of xx% is based on actual data and that both parties use

4.65 As a result, we estimate that 58.5% of eating, drinking and retail establishments are within the scope of Section 110(5)(B), either by falling within the statutory size limits (53.9%) or, in case their size exceeds those limits, by complying with the statutory equipment limitations (4.6%), and thus benefit from the exemption contained in that Section.

4.66 We note that, at the corresponding point in its calculation, also the United States has deducted from the remaining EC right holders' royalties the percentage that represents the share of establishments that fall within the statutory size limits, namely 53.9% (but not the 4.6% share that represents the share of larger establishments that comply with the statutory equipment limitations). It appears that this methodology of making the 53.9% deduction is not entirely accurate in two respects, although neither of these inaccuracies would appear to have a significant impact on the result of the calculation.

4.67 First, applying this methodology may not be entirely accurate as the exempted smaller establishments were likely to pay lower fees than the larger establishments that were not exempted.

have to be adjusted to take into account the evolution of the market between the entry into force of the 1998 Amendment and the date of referral of the matter to the Arbitrators, namely 23 July 2001.[101]

4.71 We recall that our above calculation is based on an average figure calculated on the basis of ASCAP's and BMI's distributions to EC right holders in 1996-1998 (in case of BMI, we had access to data only from 1996, but we assumed an annual growth corresponding to that of ASCAP's distributions). The figure of US$ 0.91 million represents an estimate of the hypothetical level of nullification or impairment in the year 1997, i.e., about one year before the entry into force of the 1998 Amendment. Therefore, in adjusting this figure to reflect the level of EC benefits nullified or impaired at the date of referral of the matter to the Arbitrators, we will need to make an adjustment starting from the end of the year 1997.

4.72 In our view, the most appropriate way to adjust the aforementioned figure is to take into account the growth of the US economy in the same period. For this purpose, we have used the annual rate of growth of the US gross domestic product in current dollars in the relevant period. During this

ANNEX I

TEXT OF THE LETTERS SENT TO ASCAP AND BMI REQUESTING INFORMATION

Dear Ms. Preston/Dear Ms. Bergman,

4. To the extent feasible, please provide your estimation of the share of each category of establishment referred to in Section 110(5) that play broadcast music you are currently licensing.

5. Please provide the rates applicable to the various categories of establishments referred to in Section 110(5).

Needless to say, any information described as confidential in your reply will be treated as such. If you so request, the arbitrators will ensure that only the parties to this case will have access to this information. Moreover, the public version of the arbitrator's report will be edited so as to ensure that it does not contain any confidential data.

I should like to stress that, while there is no obligation for you to reply to the questions above or to submit any of the information requested, your full cooperation would be greatly appreciated.

Since the arbitrators' proceedings are subject to very short deadlines, I would appreciate it very much if you could provide us with any reply by Friday, 14 September 2001.

Yours faithfully,

Ian F. Sheppard
Chairman
Arbitration Panel on *United States – Section 110(5) of the US Copyright Act*

ANNEX II

SPREADSHEET OF CALCULATIONS

OMITTED AS CONFIDENTIAL

_____