

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

*Report of the Panel*

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Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.



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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.<sup>1</sup>

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.<sup>2</sup>

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."<sup>3</sup>

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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<sup>1</sup> See document WT/DS160/1 (4 February 1999).

<sup>2</sup> See document WT/DS160/5 (16 April 1999) reproduced in Annex 1 to this report.

<sup>3</sup> 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<sup>4</sup>, as amended by the Fairness in Music Licensing Act of 1998 ("the 1998 Amendment"),<sup>5</sup> 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

...<sup>6,7</sup>

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<sup>4</sup> United States Copyright Act of 1976, Act of 19 October 1976, Pub.L. 94-553, 90 Stat. 2541 (as amended).

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

<sup>6</sup> As contained in Exhibit US-15(b).

<sup>7</sup> 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:<sup>8</sup>

"§ 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—

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<sup>8</sup> 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 display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

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

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

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

..."<sup>9</sup>

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

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

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

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

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

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

extensive amplification equipment) into the equivalent of a commercial sound system."<sup>10</sup> 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".<sup>11</sup>

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*,<sup>12</sup> 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<sup>2</sup>), of which 620 square feet (56 m<sup>2</sup>) 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".<sup>13</sup>

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

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

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

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

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

<sup>12</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

<sup>13</sup> See the second written submissions by the United States (paragraph 3) and the European Communities (paragraph 7).

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

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<sup>2</sup>) for retail establishments and 3,750 gross square feet (348 m<sup>2</sup>) for restaurants.

2.11 In its study of November 1995<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18,19</sup>

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.<sup>20</sup> The provisions do not distinguish between analog and digital transmissions.

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

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<sup>15</sup> As reproduced in Exhibit EC-16.

<sup>16</sup> The *Aiken* case is explained in paragraph 2.6 above.

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

<sup>18</sup> See the response from the US to question 9 from the Panel and confidential exhibit US-18.

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

<sup>20</sup> See the response of the US to question 5 from the Panel.

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

### **III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES**

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

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

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

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

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

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

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<sup>21</sup> Exhibits attached to the submissions and annexes to the letter from the Director General of WIPO are not reproduced in this report.

## V. INTERIM REVIEW

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

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

- (a) The European Communities deemed section III on "findings and recommendations requested by the parties" and subsection VI.A on "claims" overlapping. We considered that it was useful to reflect the parties' main claims in both sections.
- (b) In subsection VI.B on "preliminary issue", the European Communities suggested shortening the Panel's reasoning on its treatment of a letter from a law firm representing ASCAP to the United States Trade Representative that was copied to it. We made an editorial adjustment to the wording of paragraph 6.8.
- (c) As proposed by the European Communities, we deleted the last sentence of paragraph 6.27 of the interim report.
- (d) With regard to an EC comment on the last sentence of paragraph 6.41, we considered it useful to note that Article 30 of the Vienna Convention on the relation between successive treaties on the same subject-matter was not relevant to the case at hand.
- (e) We were of the view that it was not necessary to rephrase our statement in paragraph 6.93 that the minor exceptions doctrine is *primarily* concerned with *de minimis* use.
- (f) As suggested by the European Communities, we agreed to refer to the Dun & Bradstreet study prepared in 1999 based on data from 1998 as the 1999 D&B study.
- (g) As regards the second sentence of paragraph 6.140, the European Communities stressed that it had consistently referred to the *Claire's Boutique* and *Edison Bros.* cases as evidence that the homestyle exemption is not narrowly confined but had been applied to huge nationally operating corporations. We clarified the sentence by indicating that it expresses *our* understanding of the EC argumentation.
- (h) The European Communities requested us to clarify our reasoning in paragraph 6.214. We deemed the reasoning to be sufficiently clear.
- (i) We did not agree to change our finding in paragraph 7.1(a), as suggested by the European Communities, by adding, after the words "subparagraph (A) of Section 110(5) of the US Copyright Act", the words "which covers exclusively dramatic musical works".

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

- (a) We accepted certain editorial suggestions and made minor clerical changes in paragraphs 6.97, 6.205 and 6.260 of the findings.
- (b) We agreed, as requested by the United States, to refer to exhibits US-17 and US-18 as "confidential exhibits", given that the United States had obtained them in confidence.

- (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,<sup>22</sup> 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.<sup>23</sup> 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*,<sup>24</sup> 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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<sup>22</sup> Exhibit US-19(a). The USTR sent a similar letter to the BMI, Exhibit US-19(b).

<sup>23</sup> These questions and the responses thereto by the United States are contained in Attachment 2.3 to the report.

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

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. ...".<sup>25</sup>

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.<sup>26</sup>

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

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

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<sup>25</sup> Appellate Body Report on *United States – Shrimps*, op.cit., paragraph 108.

<sup>26</sup> Response to question 2 from the Panel to the United States at the first substantive meeting.

<sup>27</sup> First written submission by the European Communities, paragraph 74; the second written submission by the European Communities, paragraph 34.

<sup>28</sup> In *United States – Shirts and Blouses*, the Appellate Body stated:

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



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,<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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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<sup>29</sup> 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.

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

<sup>31</sup> 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).<sup>32</sup> 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.<sup>33</sup> For the purposes of this dispute, the claims raised by the European Communities under Article 11*bis*(1) are limited to subparagraph (iii).<sup>34</sup>

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<sup>32</sup> 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.

<sup>33</sup> 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 may not be for commercial ends. ... The Convention's answer is 'no'. Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (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 Berne Convention (1971). Article 11(1) provides:

"Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

- (i) the public performance of their works, including such public performance by any means or process;
- (ii) any communication to the public of the performance of their works."

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

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

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

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

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

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

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

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

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.<sup>37</sup>

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.<sup>38</sup>

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

(b) Limitations and exceptions

(i) *Introduction*

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

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

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

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

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

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

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

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

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

(ii) *Summary of the arguments raised by the parties*

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

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

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

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

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

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<sup>39</sup> See explanation in paragraphs 6.45ff below.

<sup>40</sup> Brussels Diplomatic Conference for the Revision of the Berne Convention, 5 to 26 June 1948.

<sup>41</sup> Intellectual Property Conference of Stockholm, 11 June to 14 July 1967.

<sup>42</sup> See, *inter alia*, the second written submission by the European Communities, paragraphs 16, 17, 22, 23, 27 and 28.

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.<sup>43</sup>

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<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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<sup>47</sup> 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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<sup>43</sup> See the second written submission by the United States, paragraphs 16-22.

<sup>44</sup> 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.

<sup>45</sup> The written submission of Australia, paragraphs 2.8-2.14, 3.7-3.14, 4.3 and 4.8.

<sup>46</sup> Paragraphs 23 and 24 of the US second written submission; see also US response to question 6 from the Panel to both parties.

<sup>47</sup> 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 As frequently referred to by WTO panels and the Appellate Body, the fundamental rules of treaty interpretation are Article 31<sup>48</sup> "General rule of interpretation" and Article 32 "Supplementary means of interpretation" of the Vienna Convention. We note that, pursuant to Article 31(1) of the Vienna Convention, we have to interpret in good faith the provisions within our terms of reference in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. We have already addressed the terms of these Articles. But our task does not end with that. The ordinary meaning has to be given to the terms of a treaty in their context and in the light of its object and purpose.<sup>49</sup>

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

"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; ..."<sup>50</sup>

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

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

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

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

<sup>51</sup> Sinclair, *op.cit.* p. 129.

Whether they are an actual part of the treaty depends on the intention of the parties in each case.<sup>52</sup> 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.<sup>53</sup> It must equally be drawn up on the occasion of the conclusion of the treaty.<sup>54</sup> Any agreement or instrument fulfilling these criteria will form part of the "context" of the treaty and will thus not be treated as part of the preparatory works but rather as an element in the general rule of interpretation.<sup>55</sup>

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

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

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

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

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<sup>52</sup> Yearbook of the International Law Commission (1966-II), p. 221.

<sup>53</sup> Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*, op.cit., p. 37; cited by Sinclair, op.cit., p.129.

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

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

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



exclusive rights.<sup>57</sup> 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).<sup>58</sup>

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

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

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

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

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<sup>57</sup> The other main category of implied exceptions are understood to apply to the use of translations of literary works.

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

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

<sup>60</sup> Article XVI:5 of the Agreement Establishing the WTO reaffirms Article 72 of the TRIPS Agreement.

concerning the possibility to provide minor exceptions in national law would be included into the General Report.<sup>61</sup>

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

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

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<sup>61</sup> The relevant part of the General Report of the Brussels Diplomatic Conference reads as follows:

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

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

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

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

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

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

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

that minor exceptions are permitted, *inter alia*, in respect of Articles 11 and 11bis of the Berne Convention.<sup>65</sup>

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,<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

#### *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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<sup>65</sup> 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 11bis(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.

<sup>66</sup> 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.

<sup>67</sup> 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.)

<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> When these references are read in their proper context, it is evident that the given examples are of an illustrative character.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup>

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*.<sup>74</sup>

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.<sup>75</sup> In our view, the use of the term "*maintain*" in the Stockholm records<sup>76</sup> is not sufficient evidence to substantiate the interpretation

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<sup>69</sup> Response to question 11 from the Panel to the European Communities.

<sup>70</sup> See the citations in footnote 64 above.

<sup>71</sup> 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.

<sup>72</sup> See footnote 67 above.

<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> 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<sup>77</sup>, 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).<sup>78</sup>

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.<sup>79</sup>

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.<sup>80</sup> A TRIPS Negotiating Group document<sup>81</sup> reproduces a document that was prepared by the International Bureau of the WIPO following a decision taken by the Negotiating Group, on 3 March 1988, inviting the Bureau "to prepare a factual document to facilitate an understanding of the

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

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

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

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

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

<sup>81</sup> MTN.GNG/NG11/W/24/Rev.1 of 15 September 1988.

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

"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<sup>84</sup> mentions the minor exceptions doctrine as forming part of existing international standards. We are not aware of any record in the Uruguay Round documentation of any country participating in the negotiations challenging or questioning the minor exceptions doctrine being part of the Berne *acquis* on which the TRIPS Agreement was to be built.<sup>85</sup>

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

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<sup>82</sup> See GATT document MTN.GNG/NG11/6, paragraphs 39 and 40 and Annex.

<sup>83</sup> *Ibid.* p. 22.

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

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

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

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

*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).<sup>87</sup> In the view of the United States, it becomes clear from the Agreed Statement concerning Article 10 of the WCT that the signatories of the WCT, which include the European Communities and its member States and the United States, commonly recognized the minor exceptions doctrine.<sup>88</sup> In support of its view, the United States also points out that Article 10 of the WCT is based on Article 12 of the Basic Proposal for the 1996 Diplomatic Conference.<sup>89</sup> The commentary in the Basic Proposal explains that the TRIPS Agreement already enunciates the standard of that Article for limitations and exceptions in Article 13 of the TRIPS Agreement, and further states that "[n]o limitation, not even those that belong in the category of minor reservations, may exceed the limits set by the three-steps test".

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

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

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

<sup>87</sup> Article 10 of the WCT provides:

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

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

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

<sup>89</sup> Response to question 14 from the Panel to the United States.

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

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

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

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

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

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

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

<sup>92</sup> See the chapter "The three criteria test under Article 13 of the TRIPS Agreement", beginning with paragraph 6.97 of this report.

<sup>93</sup> Article 13 of the TRIPS Agreement provides:

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

<sup>94</sup> Article 9(2) of the Berne Convention (1971) provides:

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

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



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

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

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

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

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

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

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

<sup>98</sup> See EC response to question 10 from the Panel to the European Communities.

<sup>99</sup> The complete text of Article 20 of the Berne Convention (1971) reads:

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

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").<sup>100</sup> 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".<sup>101</sup> The United States adds that the application of Article 13 of the TRIPS Agreement to the rights provided under Article 11(1) and 11*bis*(1) of the Berne Convention (1971) does not derogate from the obligations under the Berne Convention in violation of Article 2.2 of the TRIPS Agreement or Article 20 of the Berne Convention, because Article 13 of the TRIPS Agreement articulates the standard applicable to minor exceptions under the Berne Convention (1971) as far as these Articles are concerned.

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

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

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

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<sup>100</sup> Paragraph 27 of the second written submission by the European Communities.

<sup>101</sup> Paragraph 4 of the oral statement of the United States at the second meeting with the Panel.

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

6.83 Article 11bis(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement relates to the exclusive rights conferred under Article 11bis(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 11bis(1), including the rights under Article 11bis(1)(iii). Article 11bis(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,<sup>102</sup> or determine other conditions provided that they are not prejudicial to the right holder's right to obtain an equitable remuneration.<sup>103</sup>

6.85 The European Communities argues that any exception to the rights contained in Article 11bis(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.<sup>104</sup>

6.86 The United States contends that Article 11bis(2) has no bearing on Section 110(5); Article 11bis(2) merely authorizes a country to substitute a compulsory licence, or its equivalent, for an exclusive right under Article 11bis. The United States adds that Article 11bis(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 11bis.

6.87 We believe that Article 11bis(2) of the Berne Convention (1971) and Article 13 cover different situations. On the one hand, Article 11bis(2) authorizes Members to determine conditions under which the rights conferred by Article 11bis(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 11bis(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 11bis(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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<sup>102</sup> See e.g. the Guide to the Berne Convention, op.cit., paragraph 11bis.15, p. 70.

<sup>103</sup> 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 11bis 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.

<sup>104</sup> The written submission of Australia, paragraphs 2.8-2.14, 3.7-3.14, 4.3 and 4.8.

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

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

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

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

(vi) *Summary of limitations and exceptions*

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

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

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

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

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

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

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

### **(a) General introduction**

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

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

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

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

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

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

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

(b) "Certain special cases"

(i) *General interpretative analysis*

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

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

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

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

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<sup>107</sup> US second oral statement, paragraph 18.

<sup>108</sup> US first written submission, paragraph 24.

<sup>109</sup> US second written submission, paragraph 29.

<sup>110</sup> EC first oral statement, paragraph 66ff and second written submission, paragraph 31.

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

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

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

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

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

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

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<sup>111</sup> The New Shorter Oxford English Dictionary ("Oxford English Dictionary"), Oxford (1993), p. 364.

<sup>112</sup> Oxford English Dictionary, p. 2971.

<sup>113</sup> Oxford English Dictionary, p. 345.

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

interpretative tests which were based on the subjective aim or objective pursued by national legislation.<sup>115</sup>

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

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

(ii) *The business exemption of subparagraph (B)*

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

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

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

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

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

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

<sup>117</sup> US second written submission, paragraph 29.

<sup>118</sup> *Ibid.*



used by establishments above the applicable limits.<sup>119</sup> 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.<sup>120</sup>

6.119 The United States confirms these figures as far as eating and drinking establishments are concerned.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> The European Communities

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<sup>119</sup> 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.

<sup>120</sup> *See* also paragraph 2.11 above.

<sup>121</sup> Exhibit US-16.

<sup>122</sup> US reply to question 9 by the Panel to the United States and confidential exhibit US-18.

<sup>123</sup> *See* also paragraph 2.13 above.

<sup>124</sup> *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<sup>125</sup> 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.<sup>126</sup>

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.<sup>127</sup>

6.124 In view of the vagueness of the explanation available to us of the methodology used for the 1999 D&B study,<sup>128</sup> 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.<sup>129</sup>

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

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<sup>125</sup> 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.

<sup>126</sup> 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.

<sup>127</sup> US second submission, paragraphs 33-48.

<sup>128</sup> Exhibit EC-7.

<sup>129</sup> 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.<sup>130</sup>

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.<sup>131</sup> 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).<sup>132</sup> 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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<sup>130</sup> 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.

<sup>131</sup> 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.

<sup>132</sup> See Section II on Factual Aspects, paragraph 2.14.

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

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

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

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

(iii) *The homestyle exemption of subparagraph (A)*

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

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

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

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

*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*,<sup>134</sup> 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<sup>2</sup>), of which 620 square feet (56m<sup>2</sup>) 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.<sup>135</sup> 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.<sup>136</sup> 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.*<sup>137</sup>) 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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<sup>134</sup> See paragraph 2.6 of the section on factual aspects above.

<sup>135</sup> 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.

<sup>136</sup> *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.

<sup>137</sup> *Broadcast Music, Inc. v. Edison Bros. Stores Inc.*, US Court of Appeals for the Eighth Circuit, N° 91-2115, 13 January 1992. See Exhibit EC-5.

- (b) 13.5 per cent of all US drinking establishments; and
- (c) 18 per cent of all US retail establishments

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

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

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

#### *Homestyle equipment*

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

#### *Musical works covered by subparagraph (A)*

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

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

<sup>139</sup> See paragraph 2.7.

<sup>140</sup> See the second written submission by the United States (paragraph 3) and the second written submission by the European Communities and their member States (paragraph 7).

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

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

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

#### *Internet transmissions*

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

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

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

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

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<sup>141</sup> Second written submission by the European Communities and their Member States, paragraph 8.

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

<sup>143</sup> US reply to question 6(a) by the Panel to the United States.

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

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

#### *Other considerations*

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

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

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

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

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

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

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



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

(iv) *Need to examine the other two conditions*

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

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

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

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<sup>146</sup> See Article 7 of the DSU.

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

<sup>148</sup> In *United States – Shirts and Blouses*, the Appellate Body stated:

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

<sup>149</sup> In *Australia – Salmon*, the Appellate Body stated:

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

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".<sup>150</sup> 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 ...".<sup>151</sup> 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.<sup>152</sup>

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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.

<sup>150</sup> Oxford English Dictionary, p. 888.

<sup>151</sup> Oxford English Dictionary, p. 1940.

<sup>152</sup> 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

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

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

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

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

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

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

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

<sup>153</sup> See also the written submission of Australia, paragraph 3.8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>159</sup> Ricketson, *The Berne Convention*, op.cit., p. 483.

<sup>160</sup> US reply to question 17 by the Panel to both parties.

<sup>161</sup> Document S/1: *Berne Convention; Proposals for Revising the Substantive Copyright Provisions* (Articles 1-20). Prepared by the Government of Sweden with the assistance of BIPRI, p. 42.

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

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

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

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

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

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

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

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<sup>162</sup> *Ibid.*, p. 41.

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

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

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

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

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

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

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

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

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

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

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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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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<sup>165</sup> 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.

<sup>166</sup> EC and US responses to question 14 by the Panel to both parties.

<sup>167</sup> 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,<sup>168</sup> in the US view, the residual limitation on some secondary uses of broadcast works does not rise to the level of a conflict with normal exploitation.

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

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

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

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

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<sup>168</sup> Exhibit US-14.

<sup>169</sup> US response to question 7 from the Panel to the United States.

<sup>170</sup> US response to question 10 from the Panel to the United States.

<sup>171</sup> House Report (1976), Exhibit US-1.

<sup>172</sup> Letter, dated 18 November 1999, from the NRA to the USTR. Confidential exhibit US-18.

<sup>173</sup> Based on the Census Bureau data, the NRA estimates that there were 183,253 table service restaurants and 185,891 quick-service restaurants in the United States. Based on this data and a number of its own surveys, it estimates that 16% (28,000-31,000) table service restaurants and 5% (8,000-10,000) quick service restaurants were licensed in the same period by CMOs. See US response to question 10(b) from the Panel to the United States.

<sup>174</sup> Written statement by the President of ASCAP, Ms. Marilyn Bergman, dated 31 July 1997, to the Subcommittee on Courts and Intellectual Property, House Judiciary Committee. Exhibit US-20.

<sup>175</sup> In her testimony before Congress in 1997, the President of ASCAP stated that "the total number of ASCAP restaurant licensees does not exceed 70,000". Exhibit US-20, p. 177. In her testimony, she also complained that "[t]here exists a massive non-compliance problem by tens of thousands of restaurants". Exhibit US 20, p. 175.

<sup>176</sup> The NRA estimated on the basis of the Census Bureau data that there were a total of 369 144 table and quick-service restaurants in the United States. Confidential exhibit US-18.

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,<sup>177</sup> 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,<sup>178</sup> and, on the other hand, 19 per cent of restaurants were licensed by ASCAP.<sup>179</sup> The United States also estimates that 74 per cent of all restaurants play some kind of music.<sup>180</sup>

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

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

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

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<sup>177</sup> See paragraph 2.11.

<sup>178</sup> US response to question 10(b) by the Panel to the United States, paragraph 1.

<sup>179</sup> US response to question 10(b) by the Panel to the United States, paragraph 2.

<sup>180</sup> US response to question 11(b) by the Panel to the United States.

6.199 The United States draws attention to a proposal by the US CMOs to amend Section 110(5).<sup>181</sup> In 1995, the CMOs set forth a substitute text for the bill<sup>182</sup> 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.<sup>183</sup> The CMO proposal represented a modest expansion of the original homestyle exemption.<sup>184</sup>

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

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

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

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

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<sup>181</sup> US first written submission, paragraph 11.

<sup>182</sup> H.R. 789, Exhibit US-4.

<sup>183</sup> Letter of 24 July 1995 to the Honourable Carlos Moorhead from ASCAP, BMI, Inc. and SESAC, Inc., Exhibit US-5.

<sup>184</sup> US first written submission, paragraph 11.

<sup>185</sup> For details, *see* US first written submission, paragraphs 12 and 13.

information.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup>

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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<sup>186</sup> See US response to the question 1(c) from the Panel to the United States.

<sup>187</sup> 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.

<sup>188</sup> 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.

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

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,<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> From this data, the United States assumes that no more than 44 per cent of licensing fees can be attributed to radio music.<sup>193</sup>

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.<sup>194</sup> 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

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<sup>190</sup> US response to question 11(b) by the panel to the United States.

<sup>191</sup> Letter from NLBA of 18 November 1999, confidential exhibit US-17.

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

<sup>193</sup> US response to question 11(b) by the panel to the United States.

<sup>194</sup> US Congress Conference Report (1976), Exhibit US-2, referred to in paragraph 2.5 above.

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

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

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

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

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

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

<sup>196</sup> See the House Report (1976), Exhibit US-1, referred to in paragraph 2.5 above.

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

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.<sup>198</sup>

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"<sup>199</sup> 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

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<sup>198</sup> Guide to the Berne Convention, *op.cit.*, pp. 55-56, paragraph 9.8.

<sup>199</sup> 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.<sup>200</sup> "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".<sup>201</sup>

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

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

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

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

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

<sup>201</sup> Oxford English Dictionary, p. 2496.

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

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



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

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

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

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

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particular exclusive rights conferred by the subparagraphs of Articles 11 and 11*bis* in relation to one and the same work may be held by different persons. See EC and US replies to question 4 from the Panel to both parties.

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

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

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

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

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

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

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

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*.<sup>208</sup> An assessment of the impact of a WTO-inconsistent measure on an individual Member in terms of nullification or impairment is relevant under Article 22.6 of the DSU when compensation or suspension of concessions or other obligations has to be estimated in equivalence to the nullification or impairment suffered from a WTO-inconsistent measure which has not been brought into WTO-compliance within a reasonable period of time.

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

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

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

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

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

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.<sup>212</sup>

(ii) *The business exemption of subparagraph (B)*

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

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

- (i) do not play music at all;
- (ii) rely on music from some source other than radio or TV (such as tapes, CDs, commercial background music services, jukeboxes, or live music);
- (iii) were not licensed prior to the passage of the 1998 amendment and which the CMOs would not be able to license anyway;

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

<sup>211</sup> US response to question 12 from the Panel to the United States.

<sup>212</sup> See paragraph 6.185 and footnotes 163-165 above.

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

(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.<sup>214</sup> In addition, the United States estimates that 74 per cent of all restaurants play some kind of music.<sup>215</sup>

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

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

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

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

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

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

<sup>216</sup> US reply to question 11(d) by the Panel to the United States.

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

<sup>218</sup> See EC first oral statement, paragraph 37.

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.<sup>219</sup>

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

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

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

*Summary of the relevance of the above factors*

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

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

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

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

<sup>220</sup> See paragraphs 6.204-6.205 above.

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.<sup>221</sup>

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<sup>222</sup> and BMI.<sup>223</sup> 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.<sup>224</sup>

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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<sup>221</sup> 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.

<sup>222</sup> See excerpt in Exhibit EC-26.

<sup>223</sup> See excerpt in Exhibit EC-27.

<sup>224</sup> 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.<sup>225</sup>

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.<sup>226</sup> 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,<sup>227</sup> a considerable number of US establishments were covered by the exemption. According to the European Communities,<sup>228</sup> the *Aiken* surface limitations were doubled by US Courts before the 1998 Amendment.<sup>229</sup>

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<sup>225</sup> "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.

<sup>226</sup> 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.

<sup>227</sup> 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.

<sup>228</sup> 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".<sup>230</sup> We also recall the estimations on the percentages of establishments covered by the exemption.<sup>231</sup> 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."<sup>232</sup> 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<sup>233</sup> 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.

<sup>229</sup> 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.

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

<sup>231</sup> See paragraphs 2.11 and 6.142 above.

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

<sup>233</sup> 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.