

US – SECTION 110(5) COPYRIGHT ACT¹ (DS160)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>TRIPS Arts. 9 and 13 Berne Convention and Art. 11bis and 11</i>	Establishment of Panel	<i>26 May 1999</i>
			Circulation of Panel Report	<i>15 June 2000</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>27 July 2000</i>

1. MEASURE AT ISSUE

- Measure at issue:** Section 110 of the US Copyright Act that provides for limitations on exclusive rights granted to copyright holders for their copyrighted work, in the form of exemptions for broadcast by non-right holders of certain performances and displays, namely, “homestyle exemption” (for “dramatic” musical works) and “business exemption” (works other than “dramatic” musical works).

2. SUMMARY OF KEY PANEL FINDINGS²

- “Minor exceptions” doctrine:** Regarding the US argument that limitations on exclusive rights in the US Copyright Act are justified under TRIPS Art. 13, as Art 13 “clarifies and articulates the ‘minor exceptions’ doctrine”, the Panel concluded as an initial matter: (i) that there is a “minor exceptions” doctrine that applies to Berne Convention Art. 11*bis* and 11³; and (ii) that the doctrine has been incorporated into the TRIPS Agreement.
- TRIPS Art. 13 (limitations on exclusive copyrights):** The Panel clarified three criteria that parties have to cumulatively meet to make limitations or exceptions to exclusive rights under Art. 13: the limitations or exceptions (i) are confined to certain special cases; (ii) do not conflict with a normal exploitation of the work; and (iii) do not unreasonably prejudice the legitimate interests of the right holder. Based on these criteria, the Panel found as follows:

“Homestyle exemption”: The Panel found that the homestyle exemption met the requirements of Art. 13, and, thus, was consistent with Berne Convention Art. 11*bis*(1)(iii) and 11(1)(ii) as incorporated into the TRIPS Agreement (Art. 9.1): (i) the exemption was confined to “certain special cases” as it was well-defined and limited in its scope and reach (13-18 per cent of establishments covered); (ii) the exemption did not conflict with a normal exploitation of the work, as there was little or no direct licensing by individual right holders for “dramatic” musical works (i.e. the only type of material covered by the homestyle exemption); and (iii) the exemption did not cause unreasonable prejudice to the legitimate interests of the right holders in light of its narrow scope and there was no evidence showing that the right holders, if given opportunities, would exercise their licensing rights.

“Business exemption”: The Panel found that the “business exemption” did not meet the requirements of Art. 13: (i) the exemption did not qualify as a “certain special case” under Art. 13, as its scope in respect of potential users covered “restaurants” (70 per cent of eating and drinking establishments and 45 per cent of retail establishments), which is one of the main types of establishments intended to be covered by Art. 11*bis*(1)(iii); (ii) second, the exemption “conflicts with a normal exploitation of the work” as the exemption deprived the right holders of musical works of compensation, as appropriate, for the use of their work from broadcasts of radio and television; and (iii) in light of statistics demonstrating that 45 to 73 per cent of the relevant establishments fell within the business exemption, the United States failed to show that the business exemption did not unreasonably prejudice the legitimate interests of the right holder. Thus, the business exemption was found inconsistent with Berne Convention Art. 11*bis*(1)(iii) and 11(1)(ii).

¹ *United States – Section 110(5) of the US Copyright Act*

² Other issues addressed: panel’s request for information from the WIPO; *amicus curiae*.

³ The Berne Convention (1971), including Art. 11*bis* and 11 on exclusive rights granted to copyright holders, are incorporated into the TRIPS Agreement (Arts. 9-13 on copyright protection) by Art. 9 of that Agreement.