

MODULE II

COPYRIGHT AND RELATED RIGHTS

A Introduction

1 General

Part II of the TRIPS Agreement sets out the substantive standards for the protection of IP that WTO members should follow. This module outlines the provisions of Section 1 of Part II (running from Article 9 to Article 14), which sets out the protection that members must make available in the area of copyright and related rights – specifically, for literary and artistic works, performances, phonograms (or sound recordings) and broadcasts.

This Section has to be read, like all other sections in Part II, together with the relevant provisions of certain pre-existing treaties in the area of international IP law that are incorporated by reference into the TRIPS Agreement. In the case of copyright, the relevant treaty is the Berne Convention; and on related rights, there are certain references to the Rome Convention. The relationship between the TRIPS Agreement and these Conventions is explained in section A3 below.

As in the other areas of IP covered by the TRIPS Agreement, the provisions of Section 1 stipulate the minimum level of protection that members have to provide to nationals of other members. In other words, they determine the obligations that such members have towards each other. Given the long history of international cooperation on copyright matters, the national laws in this area are often fairly similar. However, to answer any question the reader may have on how the law applies in any practical situation, the applicable domestic law will have to be consulted.

2 *What are copyright and related rights?*

The term ‘copyright’ in its narrow sense usually refers to the rights of authors in their literary and artistic works. In civil law jurisdictions, the term ‘authors’ rights’ is sometimes used.

In the wider sense, copyright also includes ‘related rights’. The TRIPS Agreement covers in Article 14 three categories of related rights: rights of performers, producers of phonograms and broadcasting organizations (discussed in section C below).

In common law jurisdictions, the term ‘copyright’ is sometimes used in a broad sense, extending also to related rights. In civil law jurisdictions, the term ‘neighbouring rights’ is sometimes used for these rights.

The main social purpose of protection of copyright is to encourage and reward creative work. The income generated by copyright may allow authors to dedicate themselves to creative work and can help to justify the considerable upfront investment often entailed in the creation of certain types of works, such as films. Authors often exploit their works by licensing them to publishers and producers. Copyright is thus the economic backbone of cultural industries. Another rationale for copyright, as in other IPRs, is equity – a sense that it is fair that an author would draw some benefit from others using the fruits of his or her creative efforts.

Performers are also protected for their creative work. Protection of phonogram producers and broadcasting organizations safeguards the investments required to produce sound recordings or the financial and organizational resources needed to bring a broadcast to the public.

Historically, the original domain of copyright was literature, art and other cultural activities. More recently, it has provided protection to new areas, such as computer programs and databases, and the economic importance of copyright has greatly increased in knowledge-based economies.

3 What is the relationship of TRIPS with the Berne and Rome Conventions?

During the Uruguay Round negotiations, it was recognized that the pre-existing Berne Convention standards for copyright protection were adequate for the most part. Thus it was agreed that the point of departure for TRIPS negotiations should be the existing level of protection under that Convention as it was last revised in Paris in 1971, namely under the Paris Act of 1971 of the Convention. In the area of copyright, therefore, the TRIPS Agreement confines itself to clarifying or adding obligations on a number of specific points. The Agreement accordingly has a so-called ‘Berne-plus’ structure. Hence TRIPS Article 9.1 obliges members to comply with the substantive provisions of the Berne Convention, namely Articles 1 through 21 and its Appendix. There is one exception: TRIPS does not create rights or obligations in respect of moral rights conferred under Article 6*bis* of that Convention (discussed at section B2(f) below).

The relevant provisions of the Berne Convention deal with questions such as subject matter to be protected, rights to be conferred and permissible limitations to those rights, minimum term of protection, and protection of pre-existing works. The Appendix to the Berne Convention allows developing countries, under certain conditions, to provide some limitations to the right of translation and the right of reproduction.

As the WTO dispute settlement Panel in *US – Section 110(5) Copyright Act* (DS160) stated, through their incorporation, these substantive rules of the Berne Convention have become part of the TRIPS Agreement and, as provisions of that Agreement, have to be read as applying directly to members as part of their WTO obligations. The Panel also used the negotiating history of these provisions, as reflected in the records of the various diplomatic conferences adopting and revising the Berne Convention, as a relevant source for their interpretation even in the TRIPS context.

The relationship of the TRIPS Agreement with the pre-existing Rome Convention differs from that with the Berne Convention with respect to related rights. The TRIPS Agreement creates no general obligation to comply with the provisions of the Rome Convention. The level of protection it requires is in some respects higher and in other respects lower than that under the Rome Convention. However, despite these differences, the provisions of TRIPS Article 14 on related rights are clearly inspired by the Rome Convention, and the TRIPS Agreement directly refers to certain provisions of that Convention. For example, TRIPS Article 1.3 incorporates the relevant provisions of the Rome Convention dealing with the criteria for eligibility of performers, producers of phonograms and broadcasting organizations for protection of their related rights. TRIPS Article 14.6 provides that members may provide for conditions, limitations, exceptions and reservations in respect of related rights to the extent permitted by the Rome Convention. For these reasons it is important to be aware of the relevant Rome provisions, and how those provisions are understood in the context of that Convention.

As of this writing, four multilateral treaties on copyright and related rights have been adopted since the TRIPS Agreement was concluded. They are not incorporated into the TRIPS Agreement but build on it; in some respects, they require a higher level of protection than TRIPS standards on copyright. Two of these treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), are sometimes referred to as the WIPO 'Internet treaties' because they address a number of questions that have arisen in the context of the use of protected materials on the Internet. A third treaty, the Beijing Treaty on Audiovisual Performances, grants performers economic and moral rights in their fixed and live audiovisual performances, while a fourth, the Marrakesh Treaty,²⁷ establishes limitations and exceptions to copyright to facilitate access to published works by persons who are blind, visually impaired, or otherwise print disabled. Since their provisions do not form part of the TRIPS Agreement, they are not discussed here.²⁸

B TRIPS provisions on copyright

The obligations of members with respect to standards concerning the availability, scope and use of copyright are given in Articles 9 to 13 of Section 1 of Part II of the TRIPS Agreement, including in the substantive provisions of the Berne Convention incorporated into the Agreement by the reference in Article 9.1.

²⁷ The full title of the treaty is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

²⁸ More information on these and other WIPO-administered treaties is available on the WIPO website at www.wipo.int/treaties/en/.

1 What is the subject matter to be protected?

(a) 'Literary and artistic works'

Article 2.1 of the Berne Convention, as incorporated into the TRIPS Agreement, obliges members to protect 'literary and artistic works'. This expression includes 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'. Article 2.1 contains a non-exhaustive list of such works. Examples of works covered by copyright include books, newspapers, other writings, musical compositions, films, photographs, paintings and architecture.

Article 10 of the TRIPS Agreement clarifies two types of subject matter that should be protected, namely computer programs and databases.

(i) Computer programs Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention. This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall also be applied to them. This means that only those limitations that are applicable to literary works may be applied to computer programs. It also confirms that the general term of protection for literary works applies to computer programs, which means that the shorter terms that may apply to photographic works and works of applied art cannot be used for this subject matter.

Article 10.1 further confirms that the form in which a computer program is, whether in source or object code, does not affect the protection. This means that a program is protected irrespective of whether it is in a form designed for a person to understand and work upon ('source code') or in its machine-readable form, for example, as it is stored on a computer hard-disk and actually executed by a computer ('object code' or 'machine code').

(ii) Databases Article 2(5) of the Berne Convention, as incorporated into the TRIPS Agreement, provides that collections of literary and artistic works such as encyclopaedias and anthologies that, by reason of the selection and arrangement of their contents, constitute intellectual creations are to be protected as such. This does not affect the protection of individual works included in the compilation. For example, a personal selection of poems in an anthology may demonstrate originality and thus deserve protection; however, each poem contained in the collection remains separately protected.

Article 10.2 of the TRIPS Agreement clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include individual pieces of data that are not protected under copyright. Databases are eligible for copyright protection provided that they, by reason of the selection or arrangement of their contents, constitute intellectual creations. The provision also confirms that databases have to be protected regardless of what form

they are in, i.e. whether in machine-readable or other form. Furthermore, the provision clarifies that the protection of databases shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

(b) Derivative works

Stemming from Article 2(3) of the Berne Convention, as incorporated into the TRIPS Agreement, members' obligations extend to the protection of so-called 'derivative works', such as a translation of a book into a different language, an arrangement of a song for an orchestra, and a film adaptation of a play. Both the original work and the derivative work are protected. For example, a publisher who wishes to publish a translation of a novel into a different language would need to seek authorization from both the author of the novel and the translator.

(c) Certain other categories of works

Pursuant to Article 2(4) of the Berne Convention, as incorporated into the TRIPS Agreement, members are free to determine whether or not to protect official texts of a legislative, administrative and legal nature, and official translations of such texts. It is widespread practice not to have restrictions on reproducing such official texts.²⁹

Works of applied art and industrial designs can span the borderline between copyright and industrial property. Pursuant to Article 2(7) of the Berne Convention, as incorporated into the TRIPS Agreement, members are free to determine the extent of the application of their copyright laws to works of applied art and industrial designs, as well as the conditions under which such works and designs are protected. However, such productions should always be protected, either as copyright works or industrial designs, or both. For example, textile designs can be protected by copyright or by industrial designs, or by both means.

(d) Certain principles governing eligibility for copyright protection

(i) Idea/expression dichotomy Article 9.2 of the TRIPS Agreement provides that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. In other words, copyright protection does not cover any information or ideas contained in a work; it only protects the original way in which such information or ideas have been expressed. Thus everyone is free to use the information contained in a work, including for the purpose of creating new works. For example, the idea behind a detective novel is not protected as such, but an unauthorized reproduction of that novel that is an expression of the idea is prohibited.

This principle, commonly referred to as the 'idea/expression dichotomy', has always been present in copyright doctrine, although it had not been explicitly set out in the

²⁹ In some common law jurisdictions, governments claim crown copyright or government copyright in legal texts, but may choose to permit widespread reproduction in any case.

provisions of the Berne Convention. Article 9.2 of the TRIPS Agreement is therefore the first explicit confirmation of the principle in multilateral IP law.

(ii) Originality Another principle present in copyright doctrine is the requirement for originality: an expression is protected only to the extent that it reaches the necessary level of originality (which varies between jurisdictions). Although this principle is not specifically addressed by the provisions of the TRIPS Agreement or the Berne Convention, the legislative history of the Berne Convention indicates that the term 'works' has been understood to refer to original, intellectual creations. In other words, they are original creations of the human mind such as literary works, songs and films.

The meaning of the term 'works' is made clear also in Article 2(5) of the Berne Convention in respect of collections such as encyclopaedias and anthologies, where it is stated that the condition of protection is that such collections should be 'intellectual creations'. Similarly, Article 10.2 of the TRIPS Agreement refers to 'intellectual creations' in respect of compilations of data or other material.

Article 2(8) of the Berne Convention clarifies that the Convention does not apply to news of the day or to miscellaneous facts having the character of mere items of press information. To illustrate this, take as an example a bulletin of a sports club that has a news item on the results of a recent tennis tournament. If the item merely contains the results without any original expression, the bare recounting of the facts may not be considered an original work and could be copied in its entirety. (However, note that the level of the originality requirement is very low in some jurisdictions, and need not display literary or artistic creativity.) If the item can be considered as an original intellectual creation, for example if it analysed the results of the tournament or described significant passages of the games, then copying it would require an authorization from its author. However, anyone would still be free to use the information contained in that item, such as the scores, the sequence of games, and the identities of players, without prior permission.

(iii) Automatic protection A key feature of the Berne Convention, and thus also of the TRIPS Agreement, is that copyright protection – unlike most other forms of IPRs – may not be subject to any formality of registration, deposit, or the like. This principle is contained in Article 5(2) of the Berne Convention, that has been incorporated into the TRIPS Agreement.

This principle is also reflected in Article 62.1 of the TRIPS Agreement. It allows members to require, as a condition of the acquisition or maintenance of IPRs provided for under Sections 2 through 6 of Part II of the Agreement, compliance with reasonable procedures and formalities. These Sections concern the protection of trademarks, GIs, industrial designs, patents and layout-designs of integrated circuits. However, Article 62.1 does not refer to Section 1 on copyright and related rights.

(iv) Independence of protection Article 5(2) of the Berne Convention, as incorporated into the TRIPS Agreement, further provides that the enjoyment and exercise of the

rights in the country where protection is claimed are independent of the existence of protection in the country of origin.

2 *What rights are to be conferred?*

(a) General

This section describes the rights that members have to confer on authors; the following section discusses permissible limitations and exceptions to these. In order to have a full picture of copyright protection in any jurisdiction, both the rights and limitations available under the applicable law will need to be considered. Since the TRIPS Agreement is a minimum standards agreement and provides various flexibilities, the actual level of protection may vary among members.

The rights under copyright are divided into two main categories:

- economic rights, which allow authors to extract economic value from the utilization of their works; and
- moral rights, which allow authors to claim authorship and protect their integrity; as explained below, members do not have any rights or obligations under the TRIPS Agreement in respect of moral rights.

Highlighted below are the main aspects of economic rights, although this is not an exhaustive review of all economic rights provided under the TRIPS Agreement. They can be categorized into four groups of exclusive rights:

- reproduction right;
- rental right;
- right of public performance, broadcasting and communication to the public; and
- translation and adaptation right.

The basic TRIPS rules on the economic rights are those stemming from the provisions of the Berne Convention, as incorporated into the TRIPS Agreement. In addition, the Agreement requires members to provide rental rights as explained below.

(b) Reproduction right

This most basic right is reflected in the term copyright. Authors have an exclusive right of authorizing the reproduction (or copying) of their works ‘in any manner or form’ (Article 9.1 of the Berne Convention). This includes, for example, reproducing a novel in the form of a book or reproducing a song on a sound recording. The reproduction right covers any forms of technology, including photocopying of a book or copying the contents of a CD onto a computer hard-disk (although, as outlined later, exceptions

are permitted for reproduction in certain cases, for instance for some forms of personal use).

Authors normally license the reproduction right to publishers and producers, and it thus becomes the legal basis of many commercial forms of exploitation of works.

(c) Rental right

TRIPS Article 11 provides that authors shall have in respect of at least computer programs and cinematographic works (or films) the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. Such rental rights are not covered by the provisions of the Berne Convention.

This Article provides two exceptions. First, with respect to cinematographic works, the exclusive rental right is subject to the so-called 'impairment test': a member is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that member on authors and their successors in title. Second, in respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental. This might be the case, for example, when one rents a television that includes some software to control it. However, if such software is rented separately from such a device, the exclusive rental right would apply.

The TRIPS Agreement, including the Berne provisions incorporated into it, does not require authors to be provided a general right of distribution. However, in many jurisdictions, the rental right is regulated as a part of a general distribution right.

(d) Rights of public performance, broadcasting and communication to the public

Authors enjoy an exclusive right of authorizing the public performance of their works (Article 11 of the Berne Convention). For example, on the basis of this right, the author of a play may authorize or prohibit the performance of his or her play at a theatre. Or songwriters can authorize live performances of their music in restaurants, or recorded performances of their music in discothèques or retail outlets. The right covers only public performances and no authorization is required for a private performance.

Exclusive rights also cover the right of broadcasting of works or communication thereof to the public by other wireless means, and the right of communication to the public by wire (e.g. by cable) or by rebroadcasting of broadcast works as well as the right of public communication by loudspeaker and similar means of broadcast (Article 11*bis*(1) of the Berne Convention).

The application of some of these provisions was reviewed in the panel report in *US – Section 110(5) Copyright Act* (DS160), which is discussed below.

In practice, when music is being played in public, the number of right holders involved is so great that it is impracticable for users to seek permission from each of them. That is why in many countries right holders in musical works have authorized so-called 'collective management organizations' (CMOs) to license restaurants, retail outlets, broadcasting organizations and other users to perform their music on their behalf. There is normally one CMO for each country managing a certain type of use of works. Through reciprocal agreements, each of them can licence the entire world repertoire for users in their country. They distribute the collected revenues, after the deduction of administration costs, to individual right holders.

So if a performance is to be organized at a restaurant, does one need to contact all the relevant composers and lyricists? No. The restaurant normally pays for a blanket licence with the local CMO that allows it to perform music for an agreed payment. On the basis of the information that the CMO receives from the restaurant and other users on what pieces have been performed, it distributes royalties to the concerned right holders.

(e) Rights of translation and adaptation

Authors have the exclusive right to authorize the translation of their works into another language (Article 8 of the Berne Convention). They also enjoy the exclusive right to authorize adaptations, arrangements and other alterations of their works, such as turning a novel into a film script (Article 12 of the Berne Convention). As noted before, translations and adaptations are protected under copyright. Therefore, the use of a translation or an adaptation requires permissions both from the original author and the author of the translation or adaptation.

(f) Moral rights

Under Article 6*bis* of the Berne Convention, the author shall have the right, independently of his economic rights, to claim the authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

TRIPS Article 9.1 provides that members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of that Convention. Moral rights were explicitly excluded from the TRIPS Agreement on the grounds that these rights that protect the personal link between the author and his or her work are not trade-related.

However, this does not affect the obligations of those members that are also parties to the Berne Convention to protect moral rights. This is made even clearer in Article 2.2 of the TRIPS Agreement, which contains a safeguard clause, according to which the

provisions of the Agreement cannot be understood to derogate from the existing obligations that members may have to each other under the Berne Convention.³⁰

3 *What limitations and exceptions are permitted?*

The provisions of the Berne Convention incorporated into the TRIPS Agreement allow members to provide limitations and exceptions to the exclusive rights of authors in respect of particular acts of exploitation. In addition, Article 13 of the TRIPS Agreement contains a general clause on exceptions and limitations.

The limitations that members may provide pursuant to the provisions of the Berne Convention that have been incorporated into the TRIPS Agreement are of two types:

- free use (that is, use of protected works without the obligation to ask for authorization and to pay any remuneration); and
- non-voluntary licences (allowing use of protected works without authorization but with the obligation to pay equitable remuneration to right holders).

Free use of copyrighted works is allowed for some specified purposes, subject to certain conditions. Examples of such uses include quotations, illustrations for teaching purposes, and reporting of current events (Articles 10 and 10*bis* of the Berne Convention).

Under Article 9(2) of the Berne Convention, countries may provide limitations to the reproduction right 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.

In addition to the limitations explicitly mentioned in the text of the Berne Convention, there was express agreement at various conferences to revise the Convention to allow countries to provide 'minor exceptions' to the right of public performance. As clarified in the panel report in *US – Section 110(5) Copyright Act* (DS160) discussed below, such 'minor exceptions' are also permitted under the TRIPS Agreement. Examples of minor exceptions given in the revision conferences include performances of music in religious ceremonies, by military bands, or in the context of education.

Many national laws have detailed provisions on permitted exceptions, for example allowing free private or personal use of works. Several countries, however, have introduced a compensation system to counterbalance the prejudice to copyright owners created by the widespread private reproduction of audiovisual works and phonograms in the form of a levy on blank recording material and/or recording equipment. Schemes for exercising the right of reproduction in respect of photocopying, or at least for granting compensation for such copying, have also been

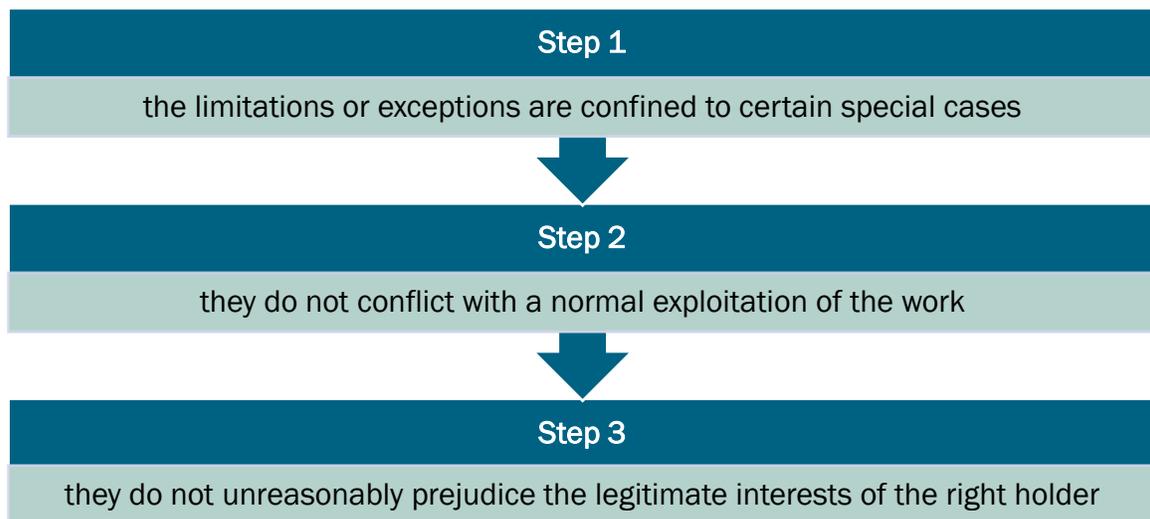
³⁰ Moral rights are also provided under the WCT, and their application has been extended to performers under the WPPT and the Beijing Treaty.

introduced in several countries on a legislative or a contractual basis. In addition to specific free uses, the laws in common law jurisdictions often recognize the notion of ‘fair use’ or ‘fair dealing’, which covers various free uses allowed under international law.

The Berne provisions allow the use of non-voluntary licences in certain situations. These are licences granted by the authorities in a member and not voluntarily by the right holder. Such licences can be applied in respect of broadcasting of works and the communication to the public of broadcast works (Article 11*bis* of the Berne Convention). The same is true in respect of recording of musical works and any words pertaining thereto, but only if the right holder has already authorized an earlier recording (Article 13 of the Berne Convention). The Appendix to the Berne Convention allows developing countries, subject to certain conditions, to make use of compulsory licensing in respect of the rights of translation and reproduction for educational purposes. Given that the provisions of the Appendix have been incorporated into the TRIPS Agreement, these possibilities are also available under the Agreement.

Article 13 of the TRIPS Agreement, entitled ‘Limitations and Exceptions’, is a clause governing limitations and exceptions generally. It sets out the so-called ‘three-step test’ (Figure II.1). It permits limitations or exceptions to exclusive rights only 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.

Figure II.1 Three-step test



The language used in Article 13 has its origins in the similar language used in Article 9(2) of the Berne Convention, although the latter only applies in the case of the

reproduction right. Article 13 was applied in the dispute settlement case *US – Section 110(5) Copyright Act* (DS160) (Box II.1).

BOX II.1: US – SECTION 110(5) COPYRIGHT ACT ³¹ (DS160)				
PARTIES		TRIPS PROVISIONS	KEY DATES	
Complainants European Communities		Arts. 9.1 (incorporating Berne Arts. 11 <i>bis</i> (1)(iii) and 11(1)(ii)) and 13	Establishment of Panel	1 February 1999
Respondent United States			Adoption of Panel report	27 July 2000
<i>Measures at issue and intellectual property at issue</i>				
<ul style="list-style-type: none"> • Measures at issue: Section 110(5) of the US Copyright Act permitted, under certain conditions, the playing of radio and television music in public places such as bars, restaurants and shops, without the payment of a royalty: <ol style="list-style-type: none"> 1. Section 110(5)(A) contained the so-called ‘homestyle exemption’ which allowed small restaurants and retail outlets to amplify music broadcasts without authorization by the owner of copyright in the musical works and without the payment of a fee, provided that they used only homestyle equipment (i.e. equipment of a kind commonly used in private homes). 2. Section 110(5)(B) contained the so-called ‘business exemption’ which allowed the amplification of music broadcasts, without authorization by the owner of copyright and without the payment of a fee, by food service and drinking establishments and by retail establishments, provided that their size did not exceed a certain square footage limit. It also allowed such amplification of music broadcasts by establishments above this square footage limit, provided that certain equipment limitations were met. • IP at issue: Copyright related rights 				

³¹ *United States – Section 110(5) of the US Copyright Act.*

BOX II.1: US – SECTION 110(5) COPYRIGHT ACT³¹ (DS160)

Summary of key Panel findings

The findings of the Panel provide an important discussion of the scope and application of exceptions and limitations under the TRIPS Agreement:

- The Panel considered that the exceptions in the US law implicated two exclusive rights in artistic works provided under the provisions of the Berne Convention as incorporated into the TRIPS Agreement: principally, the right to authorize the public communication of a broadcast by loudspeaker or analogous instrument in Art. 11*bis*(1)(iii), but also the right to authorize the communication to the public of the performance of works in Art. 11(1)(ii).
- The Panel concluded that the incorporation of these two articles into the TRIPS Agreement included the entire *acquis* of these provisions under the Berne Convention, in other words their full legal background and not merely the bare text: this background included the possibility of providing so-called ‘minor exceptions’ to the respective exclusive rights. The Panel then applied the TRIPS Art. 13 three-step test to clarify and articulate the standards applicable to permissible minor exceptions.
- The Panel considered that the three conditions in Art. 13 apply cumulatively. The first test, ‘certain special cases’, requires that a limitation or exception should be clearly defined and narrow in its scope and reach. As regards the second test, panel decided that ‘exploitation’ of musical works 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; ‘normal’ exploitation clearly means something less than full use of an exclusive right. Under the third test, the Panel considered that 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.
- The Panel found that the ‘business exemption’, *inter alia*, covered a substantial majority of eating and drinking establishments and close to half of retail establishments and affected a major potential source of royalties. It did not meet the requirements of Art. 13.
- On the contrary, the ‘homestyle exemption’, given that it covered a comparably small percentage of users and could not acquire economic or practical importance of any considerable dimension, satisfied the requirements of Art. 13.

4 What is the minimum term of protection?

According to the general rule contained in Article 7(1) of the Berne Convention, as incorporated into the TRIPS Agreement, the minimum term of protection shall be the remainder of the life of the author and fifty years after his or her death, or more simply 'life plus fifty years'.

There are two categories of works, namely photographic works and works of applied art, for which the minimum term is shorter, namely twenty-five years from the making of such works.³²

These Berne provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than fifty years from the end of the calendar year of authorized publication or, failing such authorized publication within fifty years from the making of the work, fifty years from the end of the calendar year of making. This could be relevant, for example, in cases where the copyright is vested from the outset in a legal entity rather than a natural person. For example, if a team working for a software firm develops a computer program, the domestic law might directly vest ownership of the copyright in the program with the company itself. In that case, the rights should not end before fifty years from the end of the calendar year in which the computer program was published.

C TRIPS provisions on related rights

The obligations of members with respect to related rights are given in Article 14 of Section 1 of Part II of the TRIPS Agreement. As discussed in section A3 of this module, the provisions of the Rome Convention have not been incorporated into the Agreement. However, there are certain references to that Convention. For example, the limitations and exceptions applicable to related rights have been regulated by such a reference.

Article 14 deals with three categories of holders of related rights, namely performers (such as musicians, actors and dancers), producers of phonograms (or sound recordings such as CDs) and broadcasting organizations. What is common to all of them is that they bring their own contribution in making literary and artistic works available to the public. For example, a performer brings his or her skill and creativity into a performance of a musical composition. Technical skill and investment is needed from a phonogram producer to put the performance on a sound recording. And a broadcasting organization brings its financial resources and organizational capacity to transmit the performance of the song to the public. They all need protection against

³² A number of countries provide a longer general term of protection for literary and artistic works than required under the TRIPS Agreement, for example the life of the author plus seventy years after his or her death.

acts such as bootlegging, piracy and signal misappropriation so as to be able to dedicate their resources to this process.

Article 14 is drafted in a way that recognizes the differences between the civil law and common law systems in their approach to the protection of related rights (civil law systems have traditionally laid more emphasis on the recognition of distinct, personal rights over protected subject matter, whereas the common law approach has typically included a wider range of remedies for unauthorized uses). The Agreement leaves members free to implement their obligations under Article 14 within their own legal traditions and to employ a range of legal means for that purpose.

1 What rights are available?

(a) Performers

According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a sound recording, for example a CD, and the reproduction of such a fixation. The fixation right required under the TRIPS Agreement covers only audio, not audiovisual recordings or fixations. This means that musicians must have the possibility of preventing an unauthorized sound recording of their concerts (e.g. bootlegging), but actors need not be given a similar possibility of preventing the unauthorized filming of their theatre performances.

Performers must also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance.

(b) Producers of phonograms

In accordance with Article 14.2, members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in a member's domestic law. This right has the same scope as the rental right in respect of computer programs. Therefore, it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called 'grandfather clause', according to which a member, which on 15 April 1994 (the date of the signature of the Marrakesh Agreement) had in force a system of equitable remuneration of right holders in respect of the rental of phonograms may maintain such a system provided that the commercial rental of phonograms does not lead to the material impairment of the exclusive rights of reproduction of right holders.

(c) Broadcasting organizations

Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit unauthorized fixation, the reproduction of fixations, and the rebroadcasting by

wireless means of broadcasts, as well as the communication to the public of their television broadcasts.

However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention. For example, in some common law jurisdictions those who hold the copyright in respect of the content of a broadcast hold such rights and therefore broadcasting organizations do not have a separate right in the signal.

2 What limitations and exceptions are permitted?

Article 14.6 provides that any member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

Such limitations provided under the Rome Convention, and thus applicable also under the TRIPS Agreement include, for example, private use; use of short excerpts in connection with the reporting of current events; and use solely for the purposes of teaching or scientific research. In general, the Rome Convention also permits a country to provide for the same kinds of limitations as it provides for in its domestic law in respect of literary and artistic works.

3 What is the minimum term of protection?

The term of protection available to performers and producers of phonograms shall last at least until the end of a period of fifty years computed from the end of the calendar year in which the fixation was made or the performance took place.

The term of protection granted to broadcasting organizations shall last for at least twenty years from the end of the calendar year in which the broadcast took place (Article 14.5).