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Section 110(5) and The Fairness in Music Licensing Act: Will the WTO Decide the UNITED STATES Must Pay to Play?

LAURA A. McCLUGGAGE *

* Laura A. McCluggage received her B.A. from the University of Colorado, Boulder; M.B.A. from Pepperdine University; J.D. from Pepperdine University School of Law; and LL.M. in International and Comparative Law from Georgetown University Law Center. She is an active member of the State Bar of California.

I. Introduction

While dining in your favorite restaurant, have you ever thought about the music playing in the background? You likely chose the restaurant for the food and the service, but perhaps atmosphere was a factor in your selection. That ambiance includes the tablecloth, the china, the flowers, and yes, the music. But is the restaurant paying for the radio playing softly while you dine? Should it?

On April 21, 1997, the European Commission ("EC") received a complaint from the Irish Music Rights Organization ("IMRO"). In its complaint, the IMRO asked for an inquiry regarding § 110(5) of the U.S. Copyright Act, n1 claiming that several provisions were inconsistent with U.S. obligations n2 under the Agreement Establishing the World Trade Organization ("WTO"). n3 The IMRO is a collecting society that administers, licenses and enforces the rights of its members, whose ranks include composers, arrangers, lyricists and publishers. n4 The IMRO complaint is supported by GESAC, n5 which has a membership of nearly 480,000 rightholders. n6 The complaint alleges that § 110(5) of the U.S. Copyright Act violates the Berne Convention, n7 which is incorporated by reference into the TRIPS Agreement, which is a side agreement of the WTO Agreement. n8

This paper will attempt to answer three questions. First, does the U.S. exemption under § 110(5) of the U.S. Copyright Act of 1976 comply with international obligations of the United States under the TRIPS Agreement? Second, if it does not comply, would the United States be forced to change its law? Third, if a change is required, how should U.S. law be changed?

This paper follows a five-part structure. After this introduction the next section of this paper examines the history of § 110(5) under the U.S. Copyright Act of 1976. n9 Under the Act, songwriters have a right of public performance. When a radio station plays a song, the writer is entitled to a fee from both the radio station and anyone else who publicly rebroadcasts the song, such as a restaurant. An exemption from the author's right of public performance was created in § 110(5) to allow certain establishments to broadcast songs without obtaining prior permission from the copyright owner or paying royalties. The language in the exemption is vague as to who is exempt. This vagueness has led to a great deal of case law, which often inconsistently interprets the exemption. It is important to understand the § 110(5) exemption from the U.S. Copyright Act of 1976 before determining whether or not it complies with the TRIPS agreement.

The third section discusses the Fairness in Music Licensing Act, n10 passed in October of 1998, as an attempt to clarify § 110(5). Again, it is important to understand exactly what the amendment provides before analyzing it for compliance. Even if the original exemption meets international standards, since the amendment greatly expands the exemption, there is a smaller chance that it complies with TRIPS obligations.

The fourth section of this paper focuses on U.S. obligations under the TRIPS Agreement. Once the provisions of the § 110(5) exemption are understood, one must determine what the U.S. obligations are under the TRIPS Agreement in order to decide whether the § 110(5) exemption complies with those obligations. Since the TRIPS Agreement incorporates by reference nearly all of the Berne Convention, analysis of U.S. obligations begin there. This section also explores an exception available under Article 13 of TRIPS, and whether the U.S. exemption meets the three-pronged exception criteria. Since the Article 13 exception has never been tested by a court or panel, its interpretation lies at the heart of the case between the United States and the EC. The exception language in the Berne Convention, the TRIPS Agreement, and the new digital treaties of the World Intellectual Property Organization ("WIPO"), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, n11 are nearly identical. n12 Since so many treaties involve the same language, which has never been officially interpreted, n13 this will truly be a landmark case.

Finally the last section discusses whether the United States must change its law if it loses the case, and if so, what the new provision, if any, would encompass. This discussion includes an analysis of the U.S. amendment process and proposes a new amendment based on the legislative history of the Fairness in Music Licensing Act.

II. History of Section 110(5)

A. Copyright Law Under the 1909 Copyright Act

For the first time in the United States, the 1909 Copyright Act n14 provided protection against unauthorized public performance of a musical work. The 1909 Act stated that performing the work in public, for profit, violated the copyright in the work. n15 This provision was first interpreted by the U.S. Supreme Court in Herbert v. Shanley Co., n16 where the plaintiff sued a restaurant for unauthorized use of his musical work. n17 The restaurant argued there was no violation because it did not directly charge the customer for the performance. Speaking for the Court, Justice Oliver Wendell Holmes stated that a direct charge to the customer is not required to show that the performance

was "for profit"; evidence that the music was merely a factor in the establishment's profitability was sufficient. n18 The opinion broadly defined "for profit" and the definition remains unchanged to this day.

In Buck v. Jewell-La Salle Realty Co., n19 the Supreme Court next attempted to define the element of "public performance." n20 Here, a hotel broadcasted the radio over loudspeakers into its rooms, and the Court held that such use constituted a public performance under the 1909 Act. n21

In 1968, the Court revisited the public performance issue in Fortnightly Corp. v. United Artists, Inc., n22 which involved a retransmission of copyrighted works through cable systems. n23 In contrast to the Jewell-LaSalle case the Court held in Fortnightly that there was no public performance, even though the facts of the two cases were similar. It reasoned that cable systems were viewers, not broadcasters, and there could be no performance by a viewer. n24

The landmark decision of Twentieth Century Music Corp. v. Aiken n25 essentially overturned Jewell-LaSalle. n26 George Aiken played the radio without a license via a receiver and four speakers in his fast food restaurant. The copyright owners of the broadcasted songs claimed that the broadcast constituted a "performance" and that their rights to publicly perform their works had been violated. n27 The Supreme Court held that there was no "performance" as defined by the 1909 Act, basing its decision upon the small size of Aiken's establishment and the floodgates that would open should all similar businesses be subject to payment. n28 This exemption gained enough recognition to become an issue under the newly-drafted Copyright Act of 1976.

B. Legislative History: § 110(5) of the Copyright Act of 1976

An early draft of the § 110(5) exemption appeared in a 1974 Senate Bill, which permitted the use of ordinary radios and televisions at small business establishments. n29 The Aiken decision caused Congress to rethink the exemption. A 1976 Senate Bill proposed that the exemption would not apply if the broadcast was by loudspeakers or similar devices in establishments such as bus terminals, factories, department stores, hotels, and quick service food establishments. n30 A 1976 House Report however, proposed that the exemption be applied to small commercial establishments, with some limitations. n31 The House Report stated:

Under the particular fact situation in the Aiken case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performance would be exempt under [§ 110](5). However, the Committee considers this fact situation to represent the outer limit of the exemption and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it 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. n32

The House Report went on to list exemption factors to be considered, including size, physical arrangement, 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 for individual members of the public using those areas. n33

Congress resolved the House and Senate differences greatly in favor of the House Report. The House Conference Report stated:

It is the intent of the conferees that a small commercial establishment of the type involved in Twentieth Century Music Corp. v. Aiken, . . . which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply. n34

When courts began to interpret the still vaguely worded exemption provision of the newly enacted Copyright Act of 1976, they had only the foregoing legislative history to look to for guidance.

C. Section 110(5) of the Copyright Act of 1976

The Copyright Act of 1976 revised many provisions of the 1909 Act. The right of public performance, provided in § 106(4), was modified in the 1976 Act to state that the owner of copyright has the exclusive right "to perform the copyrighted work publicly." n35 Section 101 defines "to perform" as "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." n36 Section 101 also states:

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 in 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. n37

Exceptions, carved out of the rights granted under § 106, include the limitation on the right of public performance contained in § 110(5). Despite growing discrepancies in case law, § 110(5) does not embody clear legislative intent. While § 110(5) reveals that the following is not an infringement of copyright,

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; n38

the plain meaning of the language in § 110(5) is not clear. Phrases such as "communication of a transmission," "single receiving apparatus," "of a kind commonly used in private homes," and "further transmission to the public," are ambiguous. Since a WTO panel may also have difficulty interpreting the statutory language based strictly on its plain meaning, the panel will likely turn to the large body of applicable U.S. case law that has developed since the enactment of the 1976 Act for interpretive guidance.

D. Case Law Interpretation of § 110(5)

In attempting to apply the § 110(5) exemption, courts have examined both the statutory language and the legislative history. This section will discuss several factors that the courts have used to interpret the exemption: 1) type of stereo equipment; 2) whether the broadcast was "further transmitted to the public"; 3) whether the establishment is "small," either physically or financially; and 4) whether patrons are charged for the performance.

1. Type of Stereo Equipment

The statutory language of § 110(5) indicates that it only applies to a "single receiving apparatus of a kind commonly used in private homes." n39 Section 110(5) has become known as the "homestyle exception" because the equipment used must be of the type used in private homes. Courts differ over what this encompasses. The House Report provided factors, but did not designate the weight each factor should receive, n40 which explains why courts have reached different conclusions.

a) Modification of Equipment

The only factor courts have agreed upon is that modification of "homestyle" equipment disqualifies the user from the § 110(5) exemption. In Merrill v. Country Stores, Inc., n41 a hardware-store owner connected the radio to a fourteen-speaker sound system. n42 The court held the exemption inapplicable because the store failed to use "a single receiving apparatus of a kind commonly used in private homes." n43

b) Hidden Speakers or Concealed Wiring

Courts disagree over the importance of hiding speakers or wiring behind walls, rather than openly exposing them to the public. In Hickory Grove Music v. Andrews, n44 a restaurant with ceiling speakers and hidden wiring claimed the exemption, stating that these features are commonly found in homes. n45 The court refused to adopt the exemption, stating,

Although the sound system . . . was installed by an amateur and does not provide optimal sound, this Court and the case law both disagree with efendant's contention that this is a 'home-type' system. Numerous courts have found that recessed ceiling speakers attached to a receiving apparatus by a substantial length of hidden wiring do not constitute 'home-type' systems. n46

In contrast, the court in Broadcast Music, Inc. v. Claire's Boutiques, Inc., n47 affirmed by the Seventh Circuit in 1991, n48 arrived at a very different conclusion. n49 The Claire's Boutiques court rejected the factors of ceiling speakers and concealed wiring in determining whether a sound system was "homestyle," reasoning that the concealment of wires is an aesthetic decision and irrelevant to the sophistication of the equipment itself. n50 The court determined that the equipment simplicity should be the determining factor and allowed the exemption despite the concealed wires. n51

c) Number of Speakers

Courts generally agree that the greater the number of speakers used, the less likely the exemption will apply. However, decisions of the courts are split over the allowable number of speakers. Legislative history cites Aiken as the "outer limit of the exemption," n52 allowing a maximum of four speakers, but courts have disregarded the legislative history on many occasions. In Rodgers v. Eighty Four Lumber Co., n53 a lumber company was denied the exemption because its radio was connected to a system that used between three and eight speakers. n54 A North Carolina court however, in Springsteen v. Plaza Roller Dome, Inc., n55 granted the exemption to a miniature golf course that used six speakers. n56 The Plaza Roller Dome court held the legislative history to be non-dispositive, stating that the "number of speakers are not, . . . standing alone, the sole or even predominant factors to consider . . . ." n57

In May 1995, the Seventh Circuit reanalyzed the factor of type of stereo equipment in Cass Country Music Co. v. Muedini. n58 In Cass, the restaurant owner had purchased a Radio Shack receiver designed "to drive only four speakers over moderate lengths of speaker cable," but attached seventy-volt transformers to nine speakers, with no depreciation in the quality of the sound. n59 The court noted that the additional transformers could allow thirty-six speakers to be used under the four-speaker receiver design without much deterioration in sound quality. n60 The court held that the number of speakers should not be the sole determining factor, but the sound system as a whole should be considered on "a case by case basis." n61 The court denied the exemption, declaring that the augmented system could not "be characterized fairly as composed of only home-type components, nor could it be said to be configured in a manner commonly found in a home." n62

d) Quality of the Speakers

In Hickory Grove Music, the court gave little weight to the factor of sound system quality. n63 Instead, the Hickory court denied the application of the § 110(5) exemption reasoning that "even though the sound projection from the speakers is not optimal, it is audible to the public, and the music played is recognizable." n64

In Plaza Roller Dome, the court reached the opposite conclusion, giving heavy weight to the poor quality of the sound system. n65 The court focused on the congressionally enunciated factor of noise level and audibility when it applied the exemption because the speakers, "mounted on light poles interspersed over the 7,500 square foot area of the course

. . . did not project well, and could be heard without distortion only at a close proximity." n66

2. Direct Charge to See or Hear the Transmission

Section 110(5) specifically denies exemption eligibility if patrons are charged to hear or see the transmission. n67 For example, if a bar were showing the Superbowl on its big-screen television and charging customers admission to see the game, the bar would not meet the requirements of the exemption. This requirement has not encountered much litigation, however, as most establishments do not charge a separate admission fee.

3. Further Transmission to the Public

Section 101 of the U.S. Copyright Act of 1976 defines "transmit" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." n68 Some courts have looked to the legislative history for guidance, which states that "the exemption is inapplicable to cases where there is a further transmission 'beyond the place where the receiving apparatus is located.'" n69 This language appears to deny the exemption to an establishment where the receiver and the speakers were located in separate rooms.

Some courts have followed this rationale, holding that when speakers are in a different room from the receiver, there is a transmission in violation of § 110(5). In Merrill v. Bill Miller's Bar-B-Q Enterprises, n70 the restaurants used receivers located in closets to broadcast the radio over speakers located in the dining area. n71 The court denied the use of the exemption, reasoning that "the radio broadcasts . . . were 'further transmitted' to the public because the broadcasts were initially received in a room or area without speakers and were sent to a separate room with speakers via some 40 feet of wiring." n72

8008larily, in Hickory Grove Music, the Montana district court found per se inapplicability of the exemption based on a separation of the receiver and speakers. n73 The defendants admitted listening to the radio broadcast in the dining room even though the receiver was in the lobby. n74 Thus, the court determined that the defendants "further transmitted" the broadcast to the public and denied the exemption. n75 Also, in International Korwin Corp. v. Kowalczyk, n76 an Illinois district court denied the exemption under similar circumstances. n77 A receiver located in a private office, broadcasting the radio transmission to speakers in a dining room, constituted a "further transmission." n78

Nevertheless, the Claire's Boutiques court analyzed the meaning of "further transmission" and diverged from the logic used in previous cases. n79 The court suggested that a further transmission "can only mean something more substantial, such as a re-broadcast of a transmission or the use of cable to service multiple receivers." n80 The district court did not find a further transmission, and the Seventh Circuit agreed upon

appeal, stating that further transmission "must entail the use of some device or process that expands the normal limits of the receiver's capabilities." n81

4. Small Commercial Establishment

Some courts have interjected a requirement for the § 110(5) exemption that mandates the establishment must qualify as a small business, either physically or financially. One of the first cases to propose such a factor, Sailor Music v. Gap Stores, Inc., n82 involved an infringement suit against the retail chain for broadcasting the radio via a receiver connected to several ceiling speakers. n83 The district court granted summary judgment in favor of the copyright owners, citing the House Report, which lists establishment size as a factor to consider. n84

The court stated, "The Gap stores, with an average size of 3,500 square feet, are substantially larger than the public area of 620 square feet in the fast-food store at issue in Aiken." n85 The Second Circuit affirmed, explaining, "The Gap store in the instant case exceeds this 'outer limit [set forth in Aiken] . . . . Furthermore, the store is 'of sufficient size to justify . . . a subscription to a commercial background music service,' . . . a factor which further suggests Congress did not intend that the Gap store would be exempt." n86

In International Korwin v. Kowalczyk, n87 the court found the sheer size of the restaurant independently sufficient to preclude exemption under § 110(5). n88 The court noted that "with 2,640 square feet of space, the restaurant is more than four times the size of the small fast food store in Aiken and hence too large an establishment to qualify under § 110(5)." n89 Furthermore, the court found that with annual net profits of $ 35,000 to $ 136,000 the restaurant has "sufficient space and generates enough revenue to justify the use of a commercial background music service." n90 The Seventh Circuit later affirmed the trial court's decision. n91

The Hickory Grove Music court also concluded that § 110(5) applies only to small commercial establishments. n92 Copyright owners brought a suit against a restaurant that seated 120 people and had a dining area of 1,192 square feet. n93 The Montana district court considered three factors: square footage, capacity, and business revenues. n94 It held that although the disputed sound system only covered 880 square feet, that amount exceeded the limits set forth under Aiken, n95 thus implying that Aiken is the standard regarding square footage.

The court in Plaza Roller Dome analyzed physical and financial size as well. Despite the physical size of the miniature golf course, the court recognized its small financial size, with seasonal business and revenues rarely exceeding $ 1000 per month and held that the miniature golf course was entitled to the exemption. n96 The court reasoned that "the size of the . . . facility and the number of speakers are not . . . the sole or even predominant factors to consider in determining the applicability of the exemption." n97

The Claire's Boutique court, however, explicitly rejected the "small business establishment" factor. n98 The establishment owned and operated 721 stores ranging in size from 458 to 2,000 square feet, with an average size of 861 square feet. n99 Net sales in 1990 exceeded $ 160 million. n100 The Illinois district court refused to consider either the square footage or net profits in determining that Claire's qualified for the exemption stating,

Although the legislative history may . . . help a court discover the statute's meaning, it may not be used to change it . . . . The text of . . .

§ 110(5) includes nothing at all about the size of a business, the area that it covers, or the revenue that it generates. Certainly the legislative history may be useful in terms of interpreting factors as 'further transmission' and 'single receiving apparatus of a kind commonly used in private homes.' It may not, however, be used to supply additional elements beyond those specified in the statute. n101

This issue surfaced again recently in Edison Brothers Stores v. Broadcast Music, Inc. n102 Edison Brothers was a chain of approximately 2500 shoe stores ranging from 850 to 1200 square feet in size. n103 Edison restricted its stores to playing the radio, and it provided a receiver and two speakers for each store to do so. n104 At trial, Broadcasting Music, Inc. ("BMI") argued the factors of size and financial strength to dispose of the § 110(5) exemption, but the court granted a declaratory judgment in favor of Edison Brothers, stating,

The criteria BMI stresses are nowhere to be found in the statute, and [the court] doubts the necessity to look beyond the clear terms of the statute to find hidden requirements in the legislative history. . . . It is clear from the statutory language of [§ 110(5)] that Congress chose to focus on the type of equipment and the manner in which it is used, and not on the size or financial strength of the business. n105

With Claire's Boutiques and Edison Brothers, courts seemed to be taking a new direction in interpreting § 110(5), indicating a need for further clarification from Congress as to the scope and applicability of the exemption.

E. Panel Application of U.S. Case Law Interpreting § 110(5)

Since a WTO panel will likely be unable to determine the meaning and scope of the exemption under § 110(5) strictly from its plain meaning, U.S. case law will be persuasive in the panel's interpretation of the section. However, in the U.S. courts no consensus exists as to what the exemption provides. Therefore, the panel will likely consider the factors that various courts have used to resolve these cases, such as: type of stereo equipment, whether there is a direct charge to see or hear the transmission, whether there is a further transmission to the public, and financial and physical size of the establishment. The WTO panel may look to the Fairness in Music Licensing Act of 1998 for additional clarification of the § 110(5) exemption.

III. The Fairness in Music Licensing Act

By the 1990's, both copyright owners and owners of commercial establishments were eager for Congress to clarify the exemption under § 110(5) of the Copyright Act. The lobbying efforts of the restaurant and beverage associations paved the way for a new amendment, entitled, the "Fairness in Music Licensing Act." n106 It was originally proposed in the 103rd Congress but passed through several stages of revision before enactment in October of 1998 by the 105th Congress. Although Congress enacted the

Fairness in Music Licensing Act to further define the exemption of § 110(5), many believe it took the exemption too far.

The Amendment exempts all businesses that have "less than 2000 gross square feet (excluding space used for customer parking and for no other purpose)." n107 Non-food service and non-drinking establishments sized over 2000 gross square feet are exempted, but only if they perform copyrighted works exclusively by audio means, and the performance "is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 are located in any 1 room or adjoining outdoor space . . . ." n108 Food service and drinking establishments less than 3750 gross square feet in size are also exempted; those exceeding 3750 gross square feet qualify for the exemption only if no more than six loudspeakers or four "audiovisual devices" (such as televisions) with diagonal screens no greater than 55 inches communicate the audio or audiovisual performance. n109 In any case the exemption does not apply if the establishment charges the public a fee for listening to or viewing the transmission. n110

During the drafting process, many copyright and international trade experts testified that the Amendment was likely to violate U.S. obligations under the TRIPS Agreement. These experts were heard on July 17, 1997, before the Subcommittee on Courts and Intellectual Property Committee of the House Committee on the Judiciary. n111

Marybeth Peters, Register of Copyrights, provided insight into how the proposed amendment would affect domestic law and international obligations. She explained to the Committee that the current exemption had three components: 1) use of a single receiving apparatus of a kind commonly used in private homes; 2) no direct charge for seeing or hearing the transmission; and 3) no further transmission of the performance to the public. n112 She testified that the proposed amendment would eliminate components one and three, greatly expanding the scope of the exemption. n113

Peters testified that the proposed amendment would also conflict with U.S. international obligations under the Berne Convention and the TRIPS Agreement, stating,

An exception this broad appears to be outside the scope of the permissible 'small exceptions' to the Berne rights of public performance and communication. Allowing virtually every business to play music to its customers through loudspeakers or audiovisual devices would invite a difficult case against the United States for violating our TRIPs obligations. n114

She also testified that the IMRO had filed a complaint with the EC, which had opened an investigation regarding the exemption. During the investigation the TRIPS Council of the WTO discovered that several countries had questioned the United States about the permissibility of these bills. n115

Bruce A. Lehman, Assistant Commissioner of Commerce and Commissioner of Patents and Trademarks, also testified before the same Committee. n116 He explained that the United States had joined the Berne Convention with the understanding that the § 110(5) exemption was de minimis. n117 He argued that

our trading partners are likely to allege that several of the changes to the copyright law proposed . . . may be inconsistent with our obligations under the Berne Convention and TRIPS . . . . If H.R. 789 is

enacted, and we undermine the rights of copyright owners of

musical works to perform their works in public, . . . we are seriously concerned that they will claim that we are in violation of our international commitments under both the Berne Convention and the TRIPs Agreement n118

In addition Representative Henry Hyde testified that the amendment was too broad. In reference to TRIPS and the Berne Convention, he stated:

I believe, along with the United States Trade Representative and the Secretary of Commerce, that the Sensenbrenner amendment may violate these treaties which are the law of our land. We cannot allow ourselves to be unsuccessful defendants under the dispute mechanism of the World Trade Organization on this issue which may lead to retaliation in areas other than intellectual property such as agriculture or resources. . . . I believe the McCollum/Conyers Amendment carries out that purpose while meeting our international obligations and protecting small businesses who cannot afford licensing fees n119

Further, the Deputy U.S. Trade Representative, Richard W. Fisher, wrote a letter to Representative Mary Bono, which was included in the Senate Congressional Record. The letter stated:

One of our most important trading partners, the European Union (EU), has already expressed significant concern about the pending legislation, and we know that EU officials are following its progress in Congress very closely. The EU is currently threatening to bring dispute settlement proceedings in the WTO challenging the existing "home style" exception in U.S. copyright law as overly broad. The pending legislation, as you know, would expand that exception, and thus would likely elicit a strong reaction. n120

Recall that in the introduction of this paper, the first question posed was whether the U.S. provision under § 110(5) complies with international obligations. According to the testimony given before Congress, many American intellectual property experts assert that the exemption does not comply. Yet, Congress, well aware that the proposed amendment conflicted with international obligations, passed the amendment. The EC will surely cite to this expert testimony in its brief, and the WTO panel will likely give the testimony weight in its analysis of § 110(5) compliance. In the next section, specific provisions of the amendment will be discussed in relation to U.S. obligations under the TRIPS Agreement.

IV. U.S. Obligations Under the TRIPS Agreement

The TRIPS Agreement incorporates nearly all of the provisions of the Berne Convention. Therefore, an analysis of U.S. obligations under TRIPS first requires an analysis of the relevant provisions of the Berne Convention.

A. The Berne Convention

1. Article 11bis

Article 11bis(1) of the Berne Convention grants an author the exclusive right to authorize the public performance of his work. n121 The 1928 Rome Revision of the Berne Convention first recognized the right of "authorizing the communication of . . . works to the public by radio and television." n122 The 1948 Brussels Revision broke down the authorization right into three parts to account for various ways in which the right might be exploited. n123 Neither the Stockholm nor the Paris Acts revised this section, so the Article remains today in the format of the Brussels revision. Article 11bis states:

(1) 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 rebroadcasting 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. n124

This Article affords authors a right to broadcast and communicate a copyrighted work by any "means of wireless diffusion of signs, sounds or images." n125 The emission of the signal, not the reception by the listener, triggers the right. n126

To determine whether the § 110(5) exemption encroaches upon the author's right of public performance granted under Article 11bis of the Berne Convention, one must compare the language of the right to the language of the exemption. There are two components to Article 11bis(1): 1) communication to the public; and 2) manner of communication. n127

In order to determine whether the § 110(5) exemption meets the "communication to the public" element, one need not look further than the plain meaning of the § 110(5) exemption language. The original language of § 110(5) from the Copyright Act of 1976 uses the words, "public reception of the transmission" n128 and the Amendment uses the language "work intended to be received by the general public . . . ." n129 Berne Article 11bis(1) grants a right of "communication to the public" and § 110(5) provides an exemption to it. The next step is to determine whether the language regarding the means of communication under the public performance right of Article 11bis(1) matches the language of the exemption to that right under § 110(5).

The second criteria in Article 11bis(1) involves the means of communicating to the public. n130 Article 11bis(1) specifically uses the word "loudspeaker" to describe the means of communication of the right of public performance. n131 Section 110(5), as amended, specifically grants an exemption for a work that is "communicated by means of a total of not more than six loudspeakers. . . ." n132 The Amendment to § 110(5) uses the word "loudspeaker," as does Article 11bis.

The plain language of § 110(5) directly conflicts with Article 11bis(1) of the Berne Convention. However, delving beyond the plain meaning, one could argue that Article 11bis(1) only requires that radio stations pay licensing fees, since they are the ones broadcasting the copyrighted works. During the enactment of the amendment of § 110(5), restaurateurs took this position. n133 They argued that since radio stations had already paid licensing fees, restaurants should not have to pay additional fees for the same broadcast of the songs. n134 This issue was presented to WIPO, the administrators of the Berne Convention, which responded:

The question is whether the license 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 . . . . Once this reception is done 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 the work. n135

Since only the International Court of Justice can enforce the terms of the Berne Convention, and no cases have ever been brought regarding a violation of the Berne Convention, the WIPO Guide to the Berne Convention serves as an important source of information regarding interpretation of the Convention. n136

Prior to the U.S. ratification of the Berne Convention, Congress established the Ad Hoc Working Group to determine whether the Copyright Act of 1976 complied with obligations under the Berne Convention. The Group specifically discussed whether § 110(5) was compatible with the requirements of the Berne Convention, and concluded that

the programme of the Brussels Conference suggests that the principal concern of the drafters - and the Conference itself - was with the loudspeaker, as opposed to the simpler home receiver. It may be that the provisions of the Berne Convention assuring to the author the exclusive right to communicate to the public broadcasts of his or her work via loudspeakers implies the use of a technology qualitatively different from the ordinary home receiver. In such a light, section 110(5) would be compatible with the requirements of Article 11bis. The exemption does not extend to the use of "loudspeakers" or any sort of speaker arrangement, which has the characteristics of a commercial sound system. n137

The Ad Hoc Working Group has essentially testified against current U.S. compliance by stating that the exemption does not extend to loudspeakers. This is highly detrimental

to U.S. interests because the Amendment to § 110(5) specifically uses the word "loudspeaker" when delineating the number of speakers an establishment may use and still qualify for the exemption. Logically, the Ad Hoc Working Group would not likely find the amended § 110(5) to comply with Article 11bis today.

Article 11bis(2) discloses the only exemption of Article 11bis(1). Article 11bis(2) states that countries may determine the conditions under which the rights in Article 11bis(1) may be exercised. n138 The exception is not without limitation; it states that conditions placed on the right may not be prejudicial to the moral rights of the author nor to his right to be paid. n139 In essence, this means that a country can impose a compulsory licensing system upon this right, but that the author is still entitled to collect royalties. n140

Herein lies the problem with § 110(5) as it provides that under certain circumstances, no payment is required. The right to remuneration is extinguished for authors whose works are performed in establishments that qualify for the exemption. Therefore, the U.S. provision must fall under an exception of the Berne Convention to conform with international obligations.

B. The TRIPS Agreement

The TRIPS Agreement set an international minimum standard of protection for intellectual property when it was incorporated into the WTO Agreement at the Uruguay Round. Previously, the highest level of international protection was the Berne Convention; however, countries joined at various stages of the Convention, creating differing levels of protection. Upon joining the WTO, countries agreed to abide by the standards set forth in the 1971 Paris Act of the Berne Convention. n141

1. Article 9(1)

Article 9(1) of TRIPS states, "Members shall comply with Articles 1 through 21 of the Berne Convention and the appendix thereto." n142 Thus, if a WTO panel determines that a nation (such as, in this case, the United States) has violated Article 11bis of the Berne Convention, then that nation has violated Article 9(1) of TRIPS as well.

2. Article 13

Article 13 is the only provision in the TRIPS Agreement limiting a Member's obligations. 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." n143 Scholars have commented on the three-part test of Article 9(2) of the Berne Convention, and much of that analysis can be applied to the exemption in Article 13 of TRIPS. The exception in Article 13 appeared almost verbatim in the Berne Convention under Article 9(2). However, Article 9(2) limits the right of reproduction, whereas the exception in Article 13 applies to all exclusive rights. There are three parts to this exception:

1) limitations to exclusive rights are confined to "certain special cases"; 2) the exception must not "conflict with a normal exploitation of the work"; and 3) the exception must not "unreasonably prejudice the legitimate interests of the right holder." n144 Before exploring this three-part test, it is important to understand the primary

difference between the exceptions under Article 9(2) and Article 13 -- deference to national legislation.

a) Deference to National Legislation

The major difference between the exceptions under Article 9(2) of the Berne Convention and Article 13 of TRIPS is that Article 9(2) states, "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." n145 Although the elements of the three part test are the same under both Article 9(2) and Article 13, Article 9(2) provides that application of the exception depends on the discretion of national legislation of Member countries. No such language appears in the TRIPS exception, which could indicate that the drafters intended that Members not be allowed to define their own exemptions. Perhaps the TRIPS drafters intended to force Members to honor their commitments under the TRIPS Agreement.

Under the Berne Article 9(2) exception, national legislatures and courts historically enjoy broad discretion in interpreting the words "special," "normal," and "unreasonable." n146 This has allowed each country to establish its own balance between authors' rights and competing political, legal, and cultural values. n147 It is unclear whether a WTO panel would interpret an exemption under Article 13 of TRIPS consistently with national legislation under Berne Article 9(2). n148 The defending Member bears the burden of proving exceptions to WTO treaty obligations, and such exceptions must be narrowly construed. n149 The WTO Appellate Body has also stressed that the relationship between the "affirmative commitments" set forth in the treaties and the "policies and interests" embodied in the exceptions and limitations clauses "can be given meaning . . . only on a case-by-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members to express their intent and purpose." n150

The drafters of the WTO provided an extremely deferential standard of review for anti-dumping and counterveiling duty measures. n151 Yet because the WTO declined to state such a standard for other WTO obligations, and merely required panels to make an "objective assessment" of the facts and relevant treaty articles, n152 one could argue that the drafters did not intend for panels to give deference to national decision makers. Commentators have noted, however, that some deference is appropriate in disputes under WTO Agreements, stating that there is "an important policy value in recognizing the need for some deference to national government decisions . . . for virtually all types of cases and not just those in antidumping or other specified categories." n153 Commentators have also noted that the rationale behind creating the GATT/WTO is to establish an international standard. This standard would be undermined by excessive deference to national legislation. n154

Merely identifying important sovereignty values does not by itself provide a persuasive argument justifying deferential panel review. Standing alone, the argument that deferential review is necessary to protect authorities' national sovereignty fails to acknowledge that some balance between authorities' interest in protecting their sovereignty, on the one side, and the broader interest in realizing the gains of

international coordination, on the other, must be struck. The argument proves too much, in other words, as it unwittingly challenges the very rationale of the GATT/WTO itself. n155

With regard to the IMRO complaint, the WTO panel determining § 110(5) compliance must decide how much deference to give U.S. national legislation. Now that the § 110(5) exemption has been amended by the Fairness in Music Licensing Act, Congress has specifically addressed how the right of public performance should be limited, and which establishments qualify under the exemption. Since the exemption has been codified as U.S. law, a panel may be inclined to give some deference to how the United States chooses to balance the rights of the authors against the rights of society (namely, the establishments). However, if the panel believes that the exemption undermines the international obligations the United States has made under TRIPS, it may afford little deference, if any, to U.S. legislation. Should the panel decide against deference, it will have to analyze the actual language and meaning of the Article 13 TRIPS exemption.

b) Vienna Convention on the Law of Treaties

Under the Dispute Settlement Understanding, a panel may not "add to or diminish the rights and obligations" set forth in TRIPS and must construe TRIPS in accordance with "customary rules of interpreta tion of public international law." n156 Commentators contend that this language was meant to invoke the treaty interpretation provisions of the Vienna Convention on the Law of Treaties, but since the United States was not a party to the Vienna Convention treaty, the language of "customary rules" was inserted in TRIPS. n157 GATT and WTO panels repeatedly refer to the Vienna provisions, n158 and predictably may look to those provisions in this case as well.

Article 31(1) of the Vienna Convention states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." n159 This means that a panel must first try to interpret Article 13 of TRIPS by directly exa mining statutory language. If the panel cannot determine the application of Article 13 from its plain meaning, then it will resort to methods suggested in Article 32 of the Vienna Convention, which states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable. n160

When analyzing the Article 13 exemption, the panel will first turn to the plain meaning of the words of the three-part exemption eligibility test. However, if the plain meaning fails to provide a satisfactory understanding of the exception, then the panel will likely turn to the legislative history of the provision. Since the Article 13 exemp tion of

the TRIPS Agreement mirrors the language of the Article 9(2) exemp tion under the Berne Convention, the panel may also examine the legislative history under the Berne Convention.

Three specific components of Article 13 must be analyzed for their plain meaning. First, only "certain special cases" warrant limitation of authors' exclusive rights. n161 Black's Law Dictionary defines special as ". . . designed for a particular purpose; confined to a particular purpose, object, person or class. Unusual or extraordinary." n162 The Merriam-Webster Dictionary defines special as "distinguished by some unusual quality; designed for a particular purpose or occasion." n163 These definitions indicate that a particular purpose must exist for something to be special, but they really do not clarify what qualifies as a "certain special case."

Second, the exception must not "conflict with a normal exploitation of the work." n164 Black's Law Dictionary defines normal as, "according to, constituting, or not deviating from an established norm, rule, or principle; conformed to a type, standard, or regular form; performing the proper functions; regular; average; natural." n165 The Merriam-Webster Dictionary defines normal in nearly the same terms as Black's: "According with, constituting or not deviating from a norm, rule, or principle; conforming to a type, standard, or regular pattern." n166 These definitions imply that "normal exploitation" encompasses the rights provided under the "established principles" of TRIPS and the Berne Convention. Again, these dictionary definitions give little additional insight into what would qualify for an exemption under Article 13.

Third, the exception must not "unreasonably prejudice the legitimate interests of the right holder." n167 Here, the ambiguous word is unreasonable. Black's Law Dictionary defines unreasonable as, "not reasonable; immoderate; exorbitant; capricious; arbitrary; confiscatory." n168 The Merriam-Webster Dictionary defines unreasonable as, "exceeding the bounds of reason or moderation." n169 These definitions are necessarily vague, as the measure of reason is subjective. Since the plain meaning of the words in Article 13 does not advance the determination of what exemptions are acceptable under TRIPS, the WTO panel will likely resort to the legislative histories of both TRIPS and the Berne Convention.

c) Legislative History of Article 13 of TRIPS and Article 9(2) of the Berne Convention

The United States advocated a strict market test for limitations and exceptions in the draft agreement for TRIPS. n170 Article 6 of the draft provided, "Contracting parties shall confine any limitations or exceptions to exclusive rights . . . to clearly and carefully defined special cases, which do not impair an actual or potential market for or the value of a protected work." n171 This exemption would have enabled a panel to focus on the market value of the works that were affected by § 110(5) and were not receiving royalty payments. However, since this language was not included in the final TRIPS Agreement, the panel may need to look beyond the market value of the works in question to define "certain special cases."

Since very little has been written directly about TRIPS Article 13, one must look to the interpretation of the same three requirements established for the exception under Article 9(2) of the Berne Convention. Article 9(2) was drafted during the Stockholm Act

of the Berne Convention, and the drafters debated over the precise language that should be used for the exception. A Study Group, established to draft various possible versions of the proposed exemption, suggested:

However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention,to limit their cognition and the exercise of that right, for the specified purposes, and on the condition that these purposes should not enter into economic competition with these works. n172

The Study Group emphasized that "exceptions should only to be made for clearly specified purposes, e.g. such as private use, etc." n173 and that generalized exceptions were not permitted. It also stated that the exception should not compete with the work economically. n174 The Study Group considered listing all of the possible exceptions, but rejected this proposal because the list would be lengthy and non-comprehensive. n175

The 1965 Committee of Governmental Experts reasoned that some exceptions should be specifically noted, and proposed the following:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works

(a) for private use;

(b) for judicial or administrative purposes;

(c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work. n176

France advocated the words "for individual or family use" instead of "for private use." n177 A German proposal added a requirement that the reproduction should not conflict with the author's right to obtain equitable remuneration. n178 In contrast, other nations sought to narrow the scope of the exception. India proposed an additional paragraph that stated, "(d) in cases not covered by (a), (b), or (c) above, on payment of such remuneration, which, in the absence of agreement, shall be fixed by competent authority." n179 The United Kingdom suggested a compromise of these variations, which would phrase the exception as simply paragraph (c), a suggestion accepted by "Main Committee I," which delegated the drafting to a Working Group under the direction of Italy. n180 The Working Group drafted the language of the current version of Article 9(2).

d) The "Three-Part Test" of Article 13

Commentators conducting detailed analysis of the legislative history reason that the three parts of Article 9(2) are cumulative. n181 First, limitations to exclusive rights are confined to "certain special cases." Second, the exception must not "conflict with a normal exploitation of the work." Third, the exception must not "unreasonably prejudice the legitimate interests of the right holder." All three requirements of the test must be met

for the exception to apply, so analysis should begin with the first prong of the exemption, the "certain special cases" limitation.

(1) "Certain Special Cases"

One commentator contends that the Stockholm Act did not intend to exclude existing exceptions in national legislation. n182 While this interpretation pertains to the right of reproduction, its analysis can be applied to TRIPS Article 13. If the drafters of TRIPS did not mean to exclude exceptions already existing in national legislation, then the case law surrounding § 110(5) becomes significant. That is, if the exception existed at the time of the drafting of TRIPS, and the case law has further defined what qualifies for the exemption, then the EC may not be able to prove that § 110(5) violates TRIPS because it predates the drafting of TRIPS. However, this reasoning seems illogical, because all nations could selectively not comply with certain TRIPS provisions if they had been violating such provisions at the time of the drafting of the treaty. The purpose of TRIPS is to raise intellectual property standards to a unified international level. If any country who failed to meet that standard could escape liability by arguing it had followed an illegal practice at the time of ratification, then the entire WTO system would be undermined.

Commentators have dissected the phrase "certain special cases" into two components. First, the unauthorized use must be for a specific purpose. n183 This logic follows the basic definitions found under the plain meaning interpretation. Second, "there must be something 'special' about this purpose, 'special' here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance." n184 Examples given are reproductions for educational and research purposes. n185 One commentator even asserts that a strict reading of Article 13 would not permit certain applications of the U.S. fair use doctrine. n186

Turning to whether the § 110(5) exemption would be considered a "certain special case," one might look to see if there is a public policy reason behind the measure. Traditional public policy reasons include education and research, but other societal goals may qualify as a special case. If the United States can show that the § 110(5) exemption was designed to promote the arts, the exemption could be justified as a public policy concern. However, since the dispute here involves music rebroadcast over the radio to establishments in business to sell their goods and services, and not to promote the arts, this argument will likely fail.

To further analyze the exemption, a panel may investigate the reasons why the exemption was created. Was there a special purpose in creating the § 110(5) exemption? One rationale is that requiring every establishment to obtain prior authorization and payment for playing the radio on their "boom box" would be too burdensome, and fee collection would be unmanageable. This theoretically seems to be a "special purpose," but when the Amendment to § 110(5) was passed, the exemption nearly swallowed the rule, in light of the number of establishments that qualified for it. During the enactment of the Amendment, Representative Dreier cited in his testimony to statistics from the Congressional Research Service which indicated that the Amendment would increase the number of exemptions four fold, enabling sixty-five percent of all restaurants to qualify for the exemption. n187 Since non-exempt establishments pay a flat fee for a blanket

license, the type of work that is rebroadcast is not a factor in determining a "special case." The language "certain special cases" therefore addresses which types of establishments qualify. Herein lies the importance of U.S. case law. Courts have tried to determine which types of establishments qualify, and their decisions would be persuasive evidence for a panel determining which types of establishments qualified prior to the Amendment and whether they fall under the category of "certain special cases." From a purely quantitative perspective, if one tries to reconcile the sixty-five percent figure with the "special case" language, one would be forcing a square peg into a round hole.

Another possible purpose for creating the exemption is financial. The restaurant and beverage associations had enough influence with Congress to obtain the passage of the Fairness in Music Licensing Act, and perhaps the law was passed simply because those who could afford to pay were tired of doing so.

Yet another "special purpose" might be to exempt a particular type of equipment. The language "of a kind commonly used in private homes" in the original version of § 110(5) may have been considered a "special purpose" when the Copyright Act of 1976 was enacted, but with the advent of new technology, homes systems are often sophisticated enough to be professional sound systems. Accounting for the diminishing distinction between home and professional equipment, a panel would likely determine that "type of equipment" is not narrow enough of a limitation to be considered a "special case." The Fairness in Music Licensing Act greatly expanded the equipment to be used, which supports the argument that the equipment type cannot properly trigger an exemption application, because it would make eligible for exemption nearly all of the places where an author would be entitled to exercise his right of rebroadcast.

(2) "Conflicts With Normal Exploitation of the Work"

The second factor to consider is whether the exemption "conflicts with normal exploitation of the work." n188 This may be understood best in light of the common aim of both the Berne Convention and TRIPS to protect rights in as uniform a manner as possible. n189 Although the Berne Convention allows for some non-commercial exceptions as "fair uses," some commentators argue that U.S. fair use exceptions would not meet the standards of Article 13. n190 According to the WIPO Guide to the Berne Convention:

If the contemplated reproduction would be such as to conflict with a normal exploitation of the work it is not permitted at all. Novels, schoolbooks, etc. are normally exploited by being printed and sold to the public. This Article [9(2)] does not permit member countries to allow this e.g., under compulsory licenses, even if payment is made to the copyright owner. n191

The right to publicly perform a work is specifically enumerated in both the Berne Convention and TRIPS, and it is a right that an author should have an expectation of exploiting. The legislative history of the Stockholm Act provides an example of a use that would conflict with a normal exploitation of a work, namely, the photocopying of a "very large number of copies" for a particular purpose. n192 Analogizing the word "photocopying" with "rebroadcasting," and "copies" with "songs," demonstrates that the

rebroadcasting of a very large number of songs would conflict with a normal exploitation of a work.

One commentator proposes that authors would not expect to receive a fee for certain uses, even though the uses fall within the scope of their rights. n193 For example, songwriters would expect payment if Macy's department stores rebroadcast their songs, but might not expect payment from the hot dog street vendor's rebroadcast of the same works. It appears that an exemption should exist under this expectation, but the problem is that many of the establishments, from which a songwriter would expect a fee, now qualify for the exemption under the Amendment to § 110(5). Although a panel might find that the original § 110(5) exemption under the Copyright Act of 1976 did not conflict with a "normal exploitation of a work," the Amendment has broadened the exemption and does not meet the standard set forth by Article 13.

(3) "Unreasonably Prejudice the Legitimate Interests of the Rightholder"

The third factor under TRIPS Article 13 is that the exemption may not "unreasonably prejudice the legitimate interests of the rightholder." n194 In the Stockholm Act, the Working Group stated, "Since any exception to the right of reproduction must inevitably prejudice the author's interests, the Working Group had attempted to limit that prejudice by introducing the term . . . 'unreasonable.'" n195 It also appears that "Main Committee I" determined that "unreasonable prejudice to the legitimate interests of the author" may be avoided by the remuneration under a compulsory license. n196 The report continues:

A rather large number of copies for use in industrial undertakings . . . 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. n197

This statement may be applied to § 110(5) in two ways. First, one could argue that even though a large number of copies (rebroadcasts) are being made, it does not unreasonably prejudice the author so long as he is paid. The problem here is that the author is not being paid. Second, one could argue that if only a small number of copies (rebroadcasts) are made, no payment is required. This argument fails if one recalls the statistics regarding the number of establishments (sixty-five percent) that qualify for the exemption. Since the drafters specifically named individual and scientific use as acceptable under this test, one would be hard-pressed to successfully classify the rebroadcast of any music by a profit-making establishment as an exemption.

In the present case, the United States will need to prove to the WTO panel that the amount of uncollected royalties on behalf of the IMRO due to the § 110(5) exemption is not "unreasonable." The Berne Convention and TRIPS specifically grant authors the right of remuneration and to deny royalties undermines this right. However, if the amount that would have been collected is small, the panel may determine that the exemption is not "unreasonable."

One could argue that any amount of uncollected revenue based on the § 110(5) exemption is "unreasonable," but since unreasonableness is an inexact standard, a panel

might seek guidance from other provisions within the WTO that measure injury. In light of other WTO provisions, such as anti-dumping, n198 it is this author's opinion that a de minimis test would be more appropriate. Commentators have suggested that under Berne Article 9(2), copying for private use would be the basis for a de minimis exception. n199 If both private copying and anti-dumping provisions are subject to a de minimis standard, then rebroadcasting could be subject to the same standard. Under the anti-dumping provisions of the WTO, de minimis dumping exists where the margin of dumping is less than two percent of the export price. n200 Thus, if the percentage of establishments that qualify for the § 110(5) exception exceeded two percent, or if the amount of royalties that would have been collected as a percentage of the total royalties owed to the author exceeded two percent, then the de minimis standard would be exceeded, and the violation would be actionable under Article 13. Consequently, the issue becomes how to calculate the lost revenue.

To determine the amount of revenue that would have been collected without an exemption, one first needs to determine the number of establishments affected by the exemption. As referenced in the preceding section, sixty-five percent of all establishments qualify for a § 110(5) exemption. The United States faces difficulty in challenging this sixty-five percent figure since its own federal government calculated the figure. n201 The number of all establishments could also be provided from an annual U.S. Small Business Administration report. n202

The next step would be to determine which songs were being played on the radio in those establishments. In the present case, the broadcast frequency of songs represented by the IMRO would need to be established. The U.S. music industry reports the ranking of songs played on the radio through charts in Radio & Records ("R&R") magazine. From the charts, one could determine the percentage of IMRO artists that were being played on American radio stations. Through assistance from the American Society of Composers, Authors and Publishers ("ASCAP") and BMI, n203 one could determine the fee collected for American songwriters similarly positioned on the R&R charts from establishments that are not exempted, and the fee could be applied to those establishments that are exempted. This would be the equivalent amount that an IMRO artist would receive, had the exemption not been applied. n204

The problem with using a de minimis standard is that the drafters of the TRIPS Agreement did not include one in the Agreement. Arguably, if the drafters had intended the TRIPS Agreement to have a de minimis standard, they would have provided one. However, since the drafters adopted most of the language of the Berne Convention in drafting TRIPS, perhaps they overlooked the ambiguity of the Article 13 exemption and failed to realize the necessity of a de minimis standard. It will be up to the WTO panel to determine whether such a standard is appropriate.

The EC argues that the § 110(5) exemption interferes with an author's "legitimate interest" because it leads to a poor attitude regarding enforcement of music licensing rights, and other countries will follow suit. n205 What qualifies as a "legitimate interest" in one country is dependent on "the particular vision of copyright a country employs." n206 A developing country may find it is in its interest to allow compulsory licensing, which may conflict with the "normal exploitation" by an author in a developed country. n207 The National Restaurant Association and similar lobbying groups have downplayed

the necessity of music licensing, but during the enactment of the Fairness in Music Licensing Act, several members of the entertainment industry, copyright profession, and federal government testified to the necessity of protecting copyrights. Case law proves that music publishers and collecting societies will continue to advocate for licensing and enforcement of performing rights. Therefore, the risk that the § 110(5) exemption will lead to a deterioration of attitudes seems quite low.

Furthermore, one could argue that an author has a "legitimate interest" in exercising his rights in foreign countries, but that the § 110(5) exemption interferes with this interest because it suggests to other countries that non-payment of royalties under the conditions of § 110(5) is acceptable, assuming other countries follow the example set by the United States. Authors will collect fewer royalties from countries that follow the pattern set by the United States, so the risk of proliferation of such an exemption interferes with their "legitimate interests." The cumulative effect of multiple international exemptions could greatly impact licensing revenues. n208 This, in turn, causes "unreasonable prejudice" to the rights of songwriters. There is a great deal of merit to this argument, because the United States has positioned itself as a prototype of copyright law, and other countries will look to the United States in drafting their own copyright legislation. Some countries do have exemptions to the public performance right, including Canada and Australia, which in addition to Japan and Austria, have formally joined, in consultation in the WTO case.

(a) Canada

Canada has a provision in its copyright law regarding radio performances in places other than theatres. n209 Article 69(2) of the Canadian Copyright Law provides:

In respect of public performances by means of any radio receiving set in any place other than a theatre that is ordinarily and regularly used for entertainment to which an admission charge is made, no royalties shall be collectable from the owner or user of the radio receiving set, but the Board shall, in so far as possible, provide for the collection in advance from radio broadcasting stations of royalties appropriate to the conditions produced by the provisions of this subsection and shall fix the amount of the same. n210

Thus in Canada, no royalties can be collected for the public performance of the song played on the radio within an establishment other than a theater. This exemption is even broader than the U.S. provision because it applies to all establishments. The difference is that the Canadian exemption allows for collection of royalties from radio stations that include an additional amount in proportion to the distribution of the broadcast. For example, if a Canadian station broadcast over a large area and has high ratings (more listeners), it would pay a higher licensing fee. The intent here seems to be that the station pays a greater proportion to compensate for the fact that revenue is not collected in the establishments that secondarily play the radio.

The Canadian exemption appears to be incompatible with the spirit, if not the letter, of Article 11bis(1)(iii) of the Berne Convention, and therefore, with Article 13 of the TRIPS Agreement. As mentioned previously, when a radio or television is turned on, the proprietor creates an additional audience, and a separate right of public performance

springs to life. Just because the Canadian radio station pays a larger fee does not eliminate the author's right to collect a payment from a new audience of listeners or viewers. Canada has intervened in the EC-U.S. dispute as a third party because it recognizes that its law may be in jeopardy in light of the controversy over the American exemption.

(b) Australia

Currently, there are no Australian exemptions to the right of public performance that are similar to § 110(5). However, Australian law is in revision, and the issue of an exemption is subject to Parliamentary Enquiry. In fact, the U.S. exemption has been suggested as a model. n211

(c) Japan

Japan also has an exemption for public performance rights. Article 38(3) of the Japanese Copyright Act states:

It shall be permissible to communicate publicly, by means of a receiving apparatus, a work already broadcast or diffused by wire, for nonprofit-making purposes and without charging any fees to audiences or spectators. The same shall apply to such public communication made by means of a receiving apparatus of a kind commonly used in private homes. n212

The language in this provision is nearly identical to that of § 110(5) in the 1976 Act, and it would not be a surprise if Japan had looked to the United States for guidance in drafting its exemption.

Article 14 of the Supplemental Provisions to the Japanese Copyright Act permits the public playing of sound recordings in limited circumstances. n213 It does not allow the exemption for broadcasting or cable transmission or for establishments who use the performance to obtain a profit, and Japanese courts have specifically ruled that karaoke clubs, which earn their profit based upon the music, do not qualify for the exemption. n214 Article 3 of the Supplemental Provisions to the Japanese Copyright Act specifies that the exemption is not allowed if: 1) the establishment serves food or drinks but advertises entertainment by music or has special facilities for such services; 2) if it permits customers to dance on the floor; or 3) if it shows other performances that accompany the music. n215 In light of the language used in the exemption, Japan should formally join the dispute as a third party, since its provision may soon be called into question as well.

(d) Austria

Austria has in its copyright law a unique exemption for public accommodations that broadcast cinematographic works. Article 56d(1) of the Austrian Copyright Law states that hotels may publicly perform cinematographic works for their guests if: 1) at least two years have passed since the first performance of the cinematographic work in Austria or in a Germanic language; 2) the performance is communicated and distributed by lawful means (e.g. through a lawfully purchased videocassette copy or via an authorized cable

broadcaster); and 3) the audience is not charged. n216 In order for the provision to apply, the author must also be compensated for the performance. n217

While both the U.S. and Austrian statutes provide an exemption for the public performance of a copyrighted work, there is a major difference between the two. Under Austrian law, the author enjoys two rights -- the right to authorize use of the copyrighted work and the right to be paid for that use. The Austrians treat the exemption like a compulsory license, i.e., they do not require hotels to procure authors' permission to show movies to its guests; however, the Austrian law does require the hotel to compensate the author for that use. The American law exempts the establishment from obtaining permission and from paying royalties. The risk of other countries adopting provisions similar to the § 110(5) exemption seems great, and this may "unreasonably prejudice" the "legitimate interests" of the songwriter.

(4) Summary of the "Three-Part Test"

The United States will likely argue that there is a "special purpose" for the § 110(5) exemption; therefore, the first prong of "certain special cases" should be met. Its best argument is that the original exemption was designed for "homestyle" stereo systems, and the exemption was limited to a "special" type of equipment. This argument may be effective for the original exemption, provided the United States can produce statistics on how many businesses have the "homestyle" system versus a commercial system. If the "homestyle" equipment becomes defined as more like a "boom box" and only affects a small number of establishments, the argument may succeed. However, the extent of the exemption under the Fairness in Music Licensing Act is quite broad, and it will be difficult for the United States to fit the sixty-five percent exemption eligibility figure into a "certain special case" limitation.

The second prong of the exemption, to not "conflict with a normal exploitation of the work," will be more difficult for the United States to overcome. Since the songwriter receives royalties from establishments who do not qualify for the exemption, there is a clear expectation of payment for that "type" of exploitation of a copyrighted work in presently exempted establishments. Again, it will be easier for the United States to meet this test under the original 1976 Act exemption because fewer establishments qualified.

The third prong of the exemption, to not cause "unreasonable prejudice to the legitimate interests of the rightholder," will be the prong the United States has the strongest chance of satisfying. The United States will likely focus on the word "unreasonable," but it will have to cite to some statistics to prove its case.

The United States faces a big challenge in meeting the requirements of Article 13. Since all three prongs of the test must be met, the panel will have a variety of justifications for ruling in favor of the EC The United States has its best shot at arguing that deference should be given to national legislation of the Member country. However, if too much deference is given, the exemption will eventually swallow the right.

V. Would the United States be Required to Amend Its Law?

This dispute is of extreme importance to both the EC and the United States. The EC wants the United States to change its copyright law, and the United States will not easily submit to that demand. The EC has already requested the formation of a WTO panel,

n218 and if the panel rules against the United States, the United States will surely appeal. If the United States fails to prevail, the issue then becomes whether the United States would be required to repeal the Amendment and change its copyright law, or whether the EC could merely suspend concessions indefinitely. Additional controversy would erupt over the level of suspension of concessions, and an arbitrator would need to look at the amount of nullification or impairment that EC songwriters suffer as a result of the U.S. § 110(5) exemption.

Under the Dispute Settlement Understanding ("DSU"), would the United States have the option to compensate the EC with other trade measures, or would it be required to fulfill its obligations in the WTO and withdraw the offending measure, e.g., repeal the law that is in violation of TRIPS obligations? One commentator has proposed that "the 'compensation' (or retaliation) approach is only a fallback in the event of noncompliance." n219 Others believe that the DSU rules are not binding, in the sense that a country can not be incarcerated, and no injunctive relief or damages are available, as they would be in domestic courts. n220 In trying to predict the end result, it is important to look at the language of the DSU itself.

Article 23 of the DSU states that Members "shall have recourse to, and abide by, the rules and procedures of this Understanding." n221 The word "shall" indicates that Members are required to abide by all of the rules, including those issued in a panel report or in an Appellate Body report. Should a Member decide it need not abide by the rules of the DSU, it would undermine the entire dispute settlement system.

Article 3.7 of the DSU states:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort . . . is the possibility of suspending the application of concessions or other obligations under the covered agreements n222

This article implies that an offending measure should be removed, and that compensation is only temporary relief while the measure is remedied. It is unclear, however, whether the option to suspend concessions can legally be a permanent solution.

Article 22 delineates the rules regarding compensation and suspension of concessions. It begins:

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. n223

Implementation of the recommendation is "preferred." One could argue that if the DSU intended to require withdrawal of the measure, drafters would have included language indicating mandatory withdrawal of the measure, but no such language exists.

Article 22 continues:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. n224

The first sentence here indicates that a suspension would be temporary, implying that at some future date the inconsistent measure would be removed. However, the second sentence indicates that a "mutually satisfactory solution" could resolve the conflict. This could be interpreted to mean that if the United States and EC mutually agree on a level of compensation, the case would be settled without amending U.S. law.

Two types of offenses can occur that may be forwarded to the Dispute Settlement Body ("DSB"). The first, which is likely to be applicable to the case involving the United States and EC, is when an actual violation of the WTO Agreement has occurred. The second type is when there has been a non-violation nullification or impairment of a benefit provided under the Agreement. In cases of non-violation, the DSU states that "where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure." n225 Following this reasoning, when a dispute does involve a violation, the offending measure should be removed. If this were not true, then language for both violative and non-violative offenses would be the same. Since this is not the case, the implication is that the U.S. violation must be corrected.

A. Repeal of and Proposed Alternatives to § 110(5)

If the United States loses the case, and the panel recommends that the United States bring its laws into compliance, the United States will need to decide how to change the Copyright Act. First, the United States could just repeal the Amendment, reviving the old language of the Copyright Act of 1976. Whether this option is viable will depend upon the panel's analysis of Article 13 of the TRIPS Agreement. The panel might not distinguish between the U.S. law under the Copyright Act of 1976 and the Amendment. However, if it does, and the original exemption is found to be in compliance, then repeal of the Amendment would be the United States' best choice. The problem of applying the exemption would once again be relegated to the courts, but it would temporarily alleviate the issue of non-compliance with TRIPS. The IMRO brought this case to the EC based upon the language in the original exemption. Thus, the panel may determine that the original exemption is not limited to a "certain special case," "conflicts with a normal exploitation of the work" or "unreasonably prejudices the legitimate interests of the rightholder." n226 If the panel is specific and rules that the exemption under the Copyright Act of 1976 is not in compliance, then the United States should repeal both the Amendment and the original law and redraft the exemption to comply with Article 13.

For a new amendment to comply with TRIPS, it would need to qualify as an exemption under Article 13. It must meet the three parts previously discussed: 1) the exemption should only apply in "certain special cases"; 2) it should not be in "conflict with a normal exploitation of the work"; and 3) it should not "unreasonably prejudice the legitimate interests of the right holder." n227 Several versions of the amendment were proposed in the legislative history of the Fairness in Music Licensing Act, and Congress could revisit some of those proposals in drafting a new amendment to the Copyright Act.

Senate Bill 1628, proposed in the 104th Congress by Senator Hank Brown, provides a good starting point for a new amendment. The bill read:

(5) communication within a commercial establishment of a transmission embodying a performance or display of a work by the reception of a broadcast, cable, satellite, or other transmission, if communicated -

(A) in an area within the establishment where a transmission is intended to be received by the general public that is smaller than 5,000 square feet;

(B) within an establishment whose gross annual income does not exceed 20 percent of the gross annual income of a small business under the applicable Standard Industrial Code as defined by the Small Business Administration;

(C) by means of 10 or fewer loudspeakers, not including speakers in audiovisual devices; or

(D) by means of speakers in audiovisual devices only,

if no direct charge is made to see or hear the transmission, the reception of the transmission is authorized, and the transmission or retransmission is not further transmitted to the public beyond the premises of the retail establishment. n228

More than ninety-two percent of small-business owners, represented by the National Federation of Independent Businesses ("NFIB"), supported the bill. n229 The proposal provides a solid foundation for a new amendment for several reasons. If a panel does apply a de minimis measurement for the test in Article 13, one way to reduce the number of businesses who qualify is to limit the square footage of the establishment. This bill defined the square footage of eligible establishments. n230 If the panel rules that the current Amendment violates U.S. obligations, and the current Amendment has a square footage allotment of 2,000 and 3,750 square feet, then a new Amendment would need to have an area requirement that falls under this amount. Additional statistics would need to be gathered to reduce the square footage amount to a number whereby only a small number of establishments would qualify. Article 13 states that an exception is allowed in "certain special cases," n231 and if only a few establishments qualify for the exemption then the new amendment might just meet the Article 13 standard. Also, if only a few establishments fall under the exemption, then the uncollected revenue under the exemption would not "unreasonably prejudice" the rights of songwriters to remuneration.

Senate Bill 1628 was unique in the legislative history in that it was the only proposal that included a factor regarding gross annual income of the establishment. n232 This is a good idea, because if a business is indeed "small" in earning potential, then it may not be

financially capable of paying for licenses. This provision is in line with other exemptions in the U.S. Copyright Act for non-profit and educational institutions that cannot afford to pay licensing fees. n233 The provision may also qualify under a public policy exception for small businesses that cannot afford to pay the fees as it could fit under the "certain special cases" of Article 13.

Senate Bill 1628 additionally included a factor regarding the number of speakers used in the facility attempting to qualify for the exemption. n234 If the United States can argue that the "certain special cases" test is met through "special" types of equipment, then a qualifier should be inserted into the new amendment limiting the type of equipment. In Senate Bill 1628, the exemption allowed for ten loudspeakers. n235 The Fairness in Music Licensing Act only allowed for six loudspeakers, n236 but this may still be too many to meet Article 13 standards. If the panel returns to the "homestyle" definition of equipment, the United States would want to include a maximum number of speakers that would be consistent with a "homestyle" stereo system. It seems that many home systems have only two speakers. Therefore, the United States would likely be able to define its exemption to allow for two speakers in an establishment and still meet the "homestyle" requirement. With today's technology, sound quality would still be good, but a limited number of speakers would limit the projection range to a small area. For example, if a small shoe store in a shopping mall wanted to play the radio in the background, two speakers could easily supply the music for a small area. A restaurant, however, covers a larger area of square footage, and the limitation to two speakers would mean that most restaurants would be required to pay a licensing fee.

B. Conclusion

Overall, the policy objectives of the WTO are to eliminate trade barriers, establish international rules, and elicit compliance from Members. If a Member is allowed to maintain a practice that is inconsistent with multilateral standards, then the entire trade system is undermined.

The United States has held itself out as a champion of intellectual property rights. Now that its own laws are being called into question, the United States should practice what it preaches. The firm stand it once took regarding TRIPS obligations to ensure international protection may become its own nemesis. An example that has recently raised some tempers, is the dispute over banana importation that also involves the EC and the United States. n237 The EC lost that case, and the Appellate Body recommended that the EC bring its banana-importation regime into compliance. The United States continues to argue that changes made by the EC do not bring their bananas trade into compliance, and some very harsh words have been uttered toward the EC regarding its respect for the DSU and the WTO in general.

U.S. Trade Ambassador Scher stated:

We must conclude that it is time for the EU to bear some of the consequences for its complete disregard for its GATT and WTO obligations . . . . At a time of global uncertainty, we place a premium on building and maintaining confidence in the WTO. The international trading system only works if all countries fulfill their obligations . . . . On each occasion when we have lost, we have met our obligations. n238

Quoting The President of the United States, Ambassador Rita Hayes commented on the dispute in a statement to WTO General Council on Bananas. "We cannot maintain an open trading system, which is essential to global prosperity, unless we also have rules that are abided by." n239 In support, Ambassador Hayes further stated,

Likewise, the time lines in Article 22 are necessary to establish some end point at which the prevailing party will no longer have to continue suffering nullification or impairment without compensation or recourse . . . . The United States has fully implemented three adverse DSB recommendations and is in the process of implementing a fourth. n240

The United States has taken a strong stand against other countries in enforcing WTO obligations and bringing violating laws into compliance. It is ironic that in this case, one of its best arguments rests on deference to national legislation, since the United States has been a proponent of harmonization of the world trading system. It shall be intriguing to see if the United States will be so eager to force measures into compliance when it is the one which must comply.

Turning to the questions posed in the introduction to this paper, it seems that the U.S. exemption under § 110(5) is not in compliance with its international obligations under TRIPS. A panel will likely determine that the Amendment embodied in the Fairness in Music Licensing Act does not fall within the parameters of Article 13 of TRIPS; however, the panel may deem that the original exemption under the Copyright Act of 1976 does meet the Article 13 standard. It is this author's opinion that both the original exemption and the amendment fail the three-part test of Article 13. If the United States loses, it should change its law. The United States has been adamant in its foreign relations that intellectual property protection is a priority. If the United States cannot comply with TRIPS obligations, other countries will argue they also need not comply. Consequently, the WTO system of trade will be severely undermined. When the U.S. law is changed, it could take a variety of forms, depending upon the specificity of the panel's analysis. It is this author's opinion that both the original exemption and the Amendment need to be repealed and a new exemption needs to be enacted. If the United States wants to encourage the dispute settlement process and the progress of intellectual property protection, it needs to be a "good sport" and accept defeat gracefully by amending or repealing § 110(5) of the U.S. Copyright Act.

n1 Copyright Act of 1976, *17 U.S.C. § 110*(5) (1994).

n2 See Commission Decision of 11 December 1998 under the provisions of Council Regulation (EC) No. 3286/94 concerning section 110(5) of the Copyright Act of the United States of America (notified under document C(1998) 4033) 1998 O.J. (L 346) 60, 60-63. [hereinafter Commission Decision of 11 December 1998].

n3 Agreement Establishing the World Trade Organization, Marrakesh, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *33 I.L.M. 1143, 1144 (1994)* [hereinafter WTO Agreement].

n4 Commission Decision of 11 December 1998, supra note 2, at 60.

n5 GESAC is the Groupment Europeen des Societes d'Auteurs et Compositeurs [Euorpean Group of the Societies of Authors and Composers].

n6 Report to the Committee established under Article 7 of Council Regulation (EC) No. 3286/94 (Trade Barriers Regulation), Examination Procedure Regarding the Licensing of Musical Works in the United States of America, Brussels, 23 Feb. 1998, I.E.3/JVE D(98) [hereinafter Licensing of Musical Works].

n7 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised at Paris on July 24, 1971) [hereinafter Berne Convention].

n8 Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *33 I.L.M. 1143* Annex 1C, 1199 (1994) [hereinafter TRIPS].

n9 Copyright Act of 1976, *17 U.S.C. § 110*(5) (1994).

n10 Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830 (to be codified at *17 U.S.C. § § 101*, 110, 504 & 512) [hereinafter the Amendment].

n11 WIPO Copyright Treaty, adopted Dec. 20, 1996, CRNR/DC/94; WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, CRNR/DC/95. The texts of both treaties are available at <http://www.wipo.org>.

n12 This paper discusses the Berne Convention and the TRIPS Agreement, see discussion infra part IV., but the new digital treaties are beyond its scope.

n13 No cases have ever been brought to the International Court of Justice under the Article 9(2) exemption of the Berne Convention. See Allen Z. Hertz, Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and the World Trade Organization, *23 Can.-U.S. L.J. 261, 269 (1997).*

n14 Copyright Act of 1909, ch. 320, 35 Stat. 1075 (codified as amended at *17 U.S.C.A. § § 101*-1101 (West 1996 & Supp. 1999)) [hereinafter 1909 Act].

n15 See id. § 1(e), 35 Stat. at 1075-76 (codified as amended at *17 U.S.C.A. § 110* (West 1996 & Supp. 1999)).

n16 *242 U.S. 591 (1917).*

n17 See *id. at 593.*

n18 *Id. at 594.*

n19 *283 U.S. 191 (1931).*

n20 *Id. at 196.*

n21 See *id. at 202.*

n22 *392 U.S. 390, 158 U.S.P.Q. (BNA) 1 (1968).*

n23 See id.

n24 See *id. at 400, 158 U.S.P.Q. at 5.*

n25 *422 U.S. 151, 186 U.S.P.Q. (BNA) 65 (1975).*

n26 See *id. at 166, 186 U.S.P.Q. at 70.*

n27 *Id. at 153, 186 U.S.P.Q. at 66.*

n28 See *id. at 162, 186 U.S.P.Q. at 69.*

n29 See S. 1361, 93d Cong. (1974).

n30 See S. 22, 94th Cong. (1976).

n31 See H.R. Rep. No. 94-1476, at 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701.

n32 Id.

n33 See id.

n34 H.R. Conf. Rep. No. 94-1733, at 75 (1976).

n35 Copyright Act of 1976, Pub. L. No. 94-553, § 106(4), 90 Stat. 2541 (codified at *17 U.S.C. § 106*(4) (1994)).

n36 *17 U.S.C. § 101* (1994).

n37 Id.

n38 *17 U.S.C. § 110*(5) (1994).

n39 Id.

n40 See H.R. Rep. No. 94-1476, at 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701.

n41 *669 F. Supp. 1164, 5 U.S.P.Q.2d (BNA) 1046 (D.N.H. 1987).*

n42 See id.

n43 *Id. at 1170, 5 U.S.P.Q.2d at 1050.*

n44 *749 F. Supp. 1031 (D. Mont. 1990).*

n45 See *id. at 1038.*

n46 Id.

n47 *754 F. Supp. 1324, 18 U.S.P.Q.2d (BNA) 1851 (N.D. Ill. 1990),* aff'd, *949 F.2d 1482, 21 U.S.P.Q.2d (BNA) 1181 (7th Cir. 1991).*

n48 See *Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 21 U.S.P.Q.2d (BNA) 1181 (7th Cir. 1991),* aff'g *754 F. Supp. 1324, 18 U.S.P.Q.2d 1851 (N.D. Ill. 1990).*

n49 See *Claire's Boutiques, 754 F. Supp at 1324, 18 U.S.P.Q.2d 1851.*

n50 See *id. at 1330, 18 U.S.P.Q.2d at 1857.*

n51 See *id. at 1331, 18 U.S.P.Q.2d at 1857.*

n52 H.R. Rep. No. 94-1476, at 63 (1976).

n53 *617 F. Supp. 1021, 228 U.S.P.Q. (BNA) 942 (W.D. Pa. 1985).*

n54 See *id. at 1023, 228 U.S.P.Q. at 943.*

n55 *602 F. Supp. 1113, 225 U.S.P.Q. (BNA) 1008 (M.D.N.C. 1985).*

n56 See *id. at 1119, 225 U.S.P.Q. at 1113.*

n57 *Id. at 1117, 225 U.S.P.Q. at 1012.*

n58 *55 F.3d 263, 34 U.S.P.Q.2d (BNA) 1773 (7th Cir. 1995).*

n59 *Id. at 268, 34 U.S.P.Q.2d at 1778.*

n60 See *id. at 269, 34 U.S.P.Q.2d at 1778.*

n61 Id.

n62 *Id. at 268, 34 U.S.P.Q.2d at 1777.*

n63 See *Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1038 (D. Mont. 1990).*

n64 Id.

n65 See *Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1118, 225 U.S.P.Q. (BNA) 1008, 1012 (M.D.N.C. 1985).*

n66 *Id. at 1114, 225 U.S.P.Q. at 1009.*

n67 See *17 U.S.C. § 110*(5) (1994).

n68 *17 U.S.C. § 101* (1994).

n69 H.R. Conf. Rep. No. 94-1733, at 75 (1976).

n70 *688 F. Supp. 1172, 8 U.S.P.Q. (BNA) 1077 (W.D. Tex. 1988).*

n71 See *id. at 1174, 8 U.S.P.Q. at 1078.*

n72 *Id. at 1176, 8 U.S.P.Q. at 1079.*

n73 *Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1038 (D. Mont. 1990).*

n74 See id.

n75 Id.

n76 *665 F. Supp. 652, 4 U.S.P.Q.2d (BNA) 1483 (N.D. Ill. 1987),* aff'd, *855 F.2d 375, 8 U.S.P.Q.2d (BNA) 1050 (7th Cir. 1988).*

n77 See *id. at 660, 4 U.S.P.Q.2d at 1483.*

n78 *Id. at 657, 4 U.S.P.Q.2d at 1480.*

n79 *Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324, 1331, 18 U.S.P.Q.2d (BNA) 1851, 1857 (N.D. Ill. 1990),* aff'd, *949 F.2d 1482, 21 U.S.P.Q.2d (BNA) 1181 (7th Cir. 1991).*

n80 *Id. at 1332, 18 U.S.P.Q.2d 1858.*

n81 *Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 1495, 21 U.S.P.Q.2d (BNA) 1181, 1192 (7th Cir. 1991).*

n82 *Sailor Music v. Gap Stores, Inc., 516 F. Supp. 923, 213 U.S.P.Q. (BNA) 1089 (S.D.N.Y. 1981),* aff'd, *668 F.2d 84 (2d Cir. 1981).*

n83 See id.

n84 See *id. at 925, 213 U.S.P.Q. at 1091* (citing H.R. Rep. No. 94-1476, at 63 (1976)).

n85 Id.

n86 *Sailor Music v. Gap Stores, Inc., 668 F.2d 84, 86 (2d Cir. 1981).*

n87 *665 F. Supp. 652, 4 U.S.P.Q.2d (BNA) 1483 (N.D. Ill. 1987),* aff'd, *855 F.2d 375, 8 U.S.P.Q.2d (BNA) 1050 (7th Cir. 1988).*

n88 See *id. at 658, 4 U.S.P.Q.2d at 1486.*

n89 Id.

n90 *Id. at 655, 4 U.S.P.Q.2d at 1484.*

n91 See *International Korwin Corp. v. Kowalczyk, 855 F.2d 375, 8 U.S.P.Q.2d (BNA) 1050 (7th Cir. 1988),* aff'g *665 F. Supp. 652, 4 U.S.P.Q.2d (BNA) 1483 (N.D. Ill. 1987).*

n92 *Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1038 (D. Mont. 1990).*

n93 See *id. at 1034.*

n94 See id.

n95 See *id. at 1039.*

n96 See *Springsteen v. Plaza Roller Dome Inc., 602 F. Supp. 1113, 1119, 225 U.S.P.Q. (BNA) 1008, 1013 (M.D.N.C. 1985).*

n97 *Id. at 1117, 225 U.S.P.Q. at 1012.*

n98 *Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324, 1332, 18 U.S.P.Q.2d 1851, 1860 (N.D. Ill. 1990),* aff'd, *949 F.2d 1482, 21 U.S.P.Q.2d (BNA) 1181 (7th Cir. 1991).*

n99 See *id. at 1325, 18 U.S.P.Q.2d at 1852.*

n100 See id.

n101 *Id. at 1333, 18 U.S.P.Q.2d at 1859.*

n102 *760 F. Supp. 767, 770, 19 U.S.P.Q.2d (BNA) 1453, 1456 (E.D. Mo. 1991),* aff'd, *954 F.2d 1419, 21 U.S.P.Q.2d (BNA) 1440 (8th Cir. 1992).*

n103 See *id. at 768, 19 U.S.P.Q. at 1454.*

n104 See id.

n105 *Id. at 772, 19 U.S.P.Q.2d 1456.*

n106 Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830 (to be codified at *17 U.S.C. § § 101,* 110, 504 & 512). For an example of testimony offered on behalf of the restaurant industry, see Music Licensing in Restaurants and

Retail and Other Establishments, 1997: Hearings on H.R. 789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. [hereinafter H.R. 789 Hearings] (statement of Peter Kigmore, General Counsel, National Restaurant Association and Member, Fairness in Music Licensing Coalition).

n107 Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, § 110(5)(B), 112 Stat. 2830 (to be codified at *17 U.S.C. § 110*(5)(B)).

n108 Id.

n109 Id., 112 Stat. at 2830-31.

n110 See id., 112 Stat. at 2831.

n111 See H.R. 789 Hearings, supra note 106 (testimony of experts).

n112 See id. (statement of Marybeth Peters, Register of Copyrights).

n113 See id.

n114 Id.

n115 See id.

n116 See id. (statement of Bruce A. Lehman, Assistant Comm'r of Commerce and Comm'r of Patents and Trademarks).

n117 See id.

n118 Id. (statement of Rep. Henry Hyde).

n119 Id.

n120 44 Cong. Rec. H9952 (1998), reprinted in 56 Pat. Trademark & Copyright J. (BNA) 740 (Oct. 15, 1998).

n121 Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 66 (WIPO 1978) [hereinafter WIPO Guide to the Berne Convention].

n122 Id. (Berne Convention revised at Rome, June 2, 1928).

n123 See id. (Berne Convention revised at Brussels, June 26, 1948).

n124 Berne Convention, supra note 7, art. 11bis(1), 828 U.N.T.S. at 240-43.

n125 WIPO Guide to the Berne Convention, supra note 121, at 66.

n126 See id.

n127 See Berne Convention, supra note 7, art. 11bis(1), 828 U.N.T.S. at 240-243.

n128 Copyright Act of 1976, Pub. L. No. 94-553, § 110(5), 90 Stat. 2541 (codified at *17 U.S.C. § 110*(5) (1994)).

n129 Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, § 110(5)(B), 112 Stat. 2830 (to be codified at *17 U.S.C. § 110*(5)(B)).

n130 See Berne Convention, supra note 7, art. 11bis(1), 828 U.N.T.S. at 240-243.

n131 Id.

n132 Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, § 110(5)(B), 112 Stat. 2830 (to be codified at *17 U.S.C. § 110*(5)(B)) (emphasis added).

n133 See H.R. 789 Hearings, supra note 106.

n134 See id.

n135 WIPO Guide to the Berne Convention, supra note 121, at 68.

n136 See Hertz, supra note 13, at 269.

n137 Ad Hoc Working Group on U.S. Adherence to the Berne Convention, Preliminary Report 10 (Dec. 1985).

n138 See Berne Convention, supra note 7, art. 11bis(2), 828 U.N.T.S. at 242-43.

n139 See id.

n140 See WIPO Guide to the Berne Convention, supra note 121, at 68.

n141 See TRIPS, supra note 8, art. 9(1), *33 I.L.M. at 1201*.

n142 Id.

n143 Id. art. 13, *33 I.L.M. at 1202*.

n144 Id.; Berne Convention, supra note 7, art. 9(2), 828 U.N.T.S. at 238-39.

n145 TRIPS, supra note 8, art. 9(2), *33 I.L.M. at 1201* (emphasis added).

n146 Berne Convention, supra note 7, art. 9(2), 828 U.N.T.S. at 238-39.

n147 See Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a Human Rights Analogy, *39 Harv. Int'l L.J. 357, 373 (1998)*.

n148 See *id. at 380*.

n149 See id. (citing United States -- Measure Affecting Imports of Woven Wool Shirts and Blouses From India, Apr. 15, 1997, AB-1997-1, WT/DS33/AB/R, § IV) (stating that exceptions to WTO obligations "are in the nature of affirmative defenses" and that "the burden of establishing such a defense should rest on the party asserting it"). It should be noted that the United States disputed this proposition before the WTO Appellate Body, which did not resolve the issue. See id. at § II(B)(1) (contesting India's argument that "all 'exceptions' are required to be construed narrowly").

n150 Id. (citing United States -- Standard for Reformulated and Conventional Gasoline, AB 1996-1, § IV). The existence of this case law, although insufficiently deferential to national decision-makers applying copyright exceptions and limitations, suggests that TRIPS jurists may properly examine the motives of national actors when reviewing national legislation.

n151 See Helfner, supra note 147, at 439.

n152 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, art. 11, *33 I.L.M. 1143* Annex 2, 1233 (1994) [hereinafter Dispute Settlement Understanding or DSU].

n153 Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, *90 A.J.I.L. 193, 193 (1996).*

n154 See *id. at 212.*

n155 Id.

n156 DSU, supra note 152, art. 3.2, *33 I.L.M. at 1227.*

n157 Crowley & Jackson, supra note 153, at 200.

n158 See, e.g., Canada -- Certain Measures Concerning Periodicals, Mar. 14, 1997, WTO Doc. No. WT/DS31/R, PP 5.17, 5.29; Japan -- Customs Duties, Taxes and Labeling Practices on Imported Wine and Alcoholic Beverages, July 11, 1996, GATT B.I.S.D. (34th Supp.) P 6.7, at 83; United States -- Standards of Reformulated and Conventional Gasoline, Jan. 29, 1996, WTO Doc. No. WT/DS2/R, P 6.7; United States -- Restrictions on Imports of Tuna, June 16, 1994, WTO Doc. No. DS29/R,

P 5.18, *33 I.L.M. 839;* Japan -- Taxes on Alcoholic Beverages, Oct. 4, 1996, WTO Doc. No. WT/DS8/AB/R, PP 2-4.

n159 Vienna Convention on the Law of Treaties, opened for signature May 23, 1969,

art. 31(1), *8 I.L.M. 679, 691-92 (1969)* (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

n160 Id. art. 32, *8 I.L.M. at 692.*

n161 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202.*

n162 Black's Law Dictionary 971 (6th ed. 1990).

n163 Merriam-Webster Dictionary (visited April 26, 1998) <http://www.m-w.com>.

n164 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202.*

n165 Black's Law Dictionary 731 (6th ed. 1990).

n166 Merriam-Webster Dictionary (visited April 26, 1998) <http://www.m-w.com>.

n167 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202.*

n168 Black's Law Dictionary 1070 (6th ed. 1990).

n169 Merriam-Webster Dictionary (visited April 26, 1998) <http://www.m-w.com>.

n170 See Neil W. Netanel, Comment, The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement, *37 Va. J. Int'l L. 441, 460 (1997).*

n171 *Id. at 460 n.75* (citing Draft Agreement on the Trade-Related Aspects of Intellectual Property, Communication from the United States, art. 6, GATT Doc. No. MTN.GNG/GN11/W/70 (May 11, 1990)).

n172 1 Records of the Intellectual Property Conference of Stockholm, June 11-July 14, 1967, 112 (Doc.S/1) (WIPO) [hereinafter Stockholm Act Records].

n173 Id.

n174 See id.

n175 See Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, 480 (1987).

n176 Stockholm Act Records, supra 172, at 113.

n177 Id. at 690 (Doc. S/70).

n178 See id. (Doc. S/67).

n179 Id. at 692 (Doc. S/86).

n180 See 2 Stockholm Act Records, supra 172, at 858 (Minutes of Main Committee I).

n181 See Ricketson, supra note 175, at 482.

n182 See id.

n183 See id.

n184 Id.

n185 See id.

n186 See Neil W. Netanel, Asserting Copyright's Democratic Principles in the Global Arena, *51 Vand. L. Rev. 217, 310 (1998).*

n187 See H.R. Res. 390, 105th Cong. (1998), reprinted in 55 Pat. Trademark & Copyright J. (BNA) 479, 494-95 (Mar. 26, 1998).

n188 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202.*

n189 See Paul E. Geller, Policy Consideration, Legal Transplants in International Copyright: Some Problems of Method, *13 UCLA Pac. Basin L.J. 199, 225 (1994).*

n190 See Netanel, supra note 186, at 310.

n191 WIPO Guide to the Berne Convention, supra note 121, at 55.

n192 1 Stockholm Act Records, supra note 172, at 1146.

n193 See Ricketson, supra note 175, at 483.

n194 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202.*

n195 2 Stockholm Act Records, supra note 172, at 883.

n196 Id.

n197 Id. at 1145-46.

n198 See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6, WTO Agreement Annex 1A [hereinafter Anti-Dumping Agreement].

n199 See Ricketson, supra note 175, at 485.

n200 See Anti-Dumping Agreement, supra note 198, art. 5.8.

n201 See H.R. Res. 390, 105th Cong. (1998), reprinted in 55 Pat. Trademark & Copyright J. (BNA) 479, 494-95 (Mar. 26, 1998) (testimony of Rep. Dreier citing statistics provided by the Congressional Research Service).

n202 See The State of Small Business: A Report of the President (1995).

n203 ASCAP and BMI may not be willing to volunteer statistics to the United States. Their interests lie in assisting the EC, because if the EC wins this case, in the long run it means that ASCAP and BMI will likely be able to collect licensing fees from establishments that were previously exempt. Thus these societies have no interest assisting the United States in this matter.

n204 The EC estimates that the annual loss of licensing income to Community right-holders is thirteen to twenty-four percent of the U.S. performing rights organizations' annual distributions to Community collecting societies. The EC states that a similar exemption in the EC would cause a loss of eighty-two million ECU (the currency of the European Community) a year. See *Licensing of Musical Works, supra* note 6, at 25.

n205 Id. at 33.

n206 Ruth L. Gana, Prospects for Developing Countries Under the TRIPs Agreement, *29 Vand. J. Transnat'l L. 735, 761 (1996).*

n207 Id.

n208 See *Licensing of Musical Works, supra* note 6, at 33.

n209 See Copyright Act, R.S., c. C-30 (as updated to Jan. 1, 1994 -- Chapter C-42 An Act respecting copyright) art. 69(2) (Can.), reprinted in Copyright and Neighboring Rights Laws and Treaties, Canada Text 1-01, at 23 (WIPO 1998).

n210 Id.

n211 See *Licensing of Musical Works, supra* note 6, at 33.

n212 Japanese Copyright Act, Law No. 48 of 1970, art. 38(3), (as amended by Laws No. 49 of 1978, No. 45 of 1981, No. 78 of 1983, No. 23 of 1984, No. 46 of 1984, No. 62 of 1985, No. 64 of 1986, No. 65 of 1986, No. 87 of 1988, No. 43 of 1989, No. 112 of 1994, and No. 91 of 1995), reprinted in Copyright and Neighboring Rights Laws and Treaties, Japan Text 1-01 at 9 (Agency for Cultural Affairs, Copyright Division of Japan trans., WIPO 1995).

n213 Id. art. 14.

n214 International Copyright Law and Practice, Japan, § 8[1]aii, at Jap-48-49 (Paul Edward Geller & Melville B. Nimmer eds.) (rel. no. 11, Oct. 1999).

n215 See id.

n216 Section 56d(1), Copyright Amendment Law 1996, Federal Law to Amend the Copyright Law and the Copyright Amending Law of 1980, No. 151 (1996), reprinted in Copyright and Neighboring Rights Laws and Treaties, Austria Text 1-05, at 4 (WIPO trans., WIPO 1997).

n217 See id.

n218 See United States -- Section 110(5) of US Copyright Act, Request for the Establishment of a Panel by the European Communities and Their Member States, WT/DS160/5 (April 16, 1999).

n219 John H. Jackson, Editorial Comment: The WTO Dispute Settlement Understanding -- Misunderstandings on the Nature of Legal Obligation, *91 A.J.I.L. 60, 61 (1997).*

n220 See id.

n221 DSU, supra note 152, art. 23.1, *33 I.L.M. at 1241*.

n222 Id. art. 3.7, *33 I.L.M. at 1227.*

n223 Id. art. 22.1, *33 I.L.M at 1239.*

n224 Id. art. 22.8, *33 I.L.M. at 1241*.

n225 Id. art. 26.1(b), *33 I.L.M. at 1243.*

n226 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202.*

n227 Id.

n228 S. 1628, 104th Cong. (1996).

n229 See id.

n230 See id.

n231 TRIPS, supra note 8, art. 13, *33 I.L.M. at 1202*

n232 S. 1628, 104th Cong. (1996).

n233 See *17 U.S.C. § 107* (1994) (providing "fair use" limitations on exclusive rights).

n234 S. 1628, 104th Cong. (1996).

n235 Id.

n236 Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, § 110(5)(B), 112 Stat. 2830 (to be codified at *17 U.S.C. § 110*(5)(B)).

n237 See European Communities Regime for the Importation, Sale and Distribution of Bananas, WT/ DS27/R/ECU and WT/DS27/AB/R/ECU.

n238 Office of the United States Trade Representative, Press Release 99-17 (March 3, 1999).

n239 Ambassador Rita Hayes' Statement to WTO General Council on Bananas, Doc. No. iwp991534 bananas (March 8, 1999) (quoting President Clinton).

n240 Ambassador Rita Hayes' Statement to WTO General Council on Bananas, Doc. No. iwp991534 bananas (March 8, 1999).