

UNITED STATES - SECTION 110(5) OF US COPYRIGHT ACT

Request for Consultations by the European Communities
and their Member States

The following communication, dated 26 January 1999, from the Permanent Delegation of the European Commission to the Permanent Mission of the United States and the Chairman of the Dispute Settlement Body is circulated pursuant to Article 4.4 of the DSU.

On behalf of the European Communities and their Member States, we hereby request consultations with the United States of America pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article 64:1 of the WTO Agreement on Trade-Related Intellectual Property Rights (hereafter "TRIPs Agreement") regarding Section 110(5) of the United States Copyright Act as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998.

Section 110(5) of the US Copyright Act exempts, under certain conditions, the communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public from obtaining an authorisation to do so by the rightholders of the music works. In practice this means that Section 110(5) of the US Copyright Act permits, under certain circumstances, the playing of radio and television music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.

The European Communities and their Member States consider that this statute is not in conformity with the United States of America's obligations under the TRIPs Agreement, and more particularly its Article 9(1), under which WTO Members must comply with Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (hereafter the "Berne Convention").

The European Communities and their Member States base this consideration on the fact that Section 110(5) of the US Copyright Act does not appear to be in conformity with Article 11 bis(1) of the Berne Convention, as revised by the Paris Act of 1971 (which grants the right holders of literary and artistic works, including musical works, the exclusive right of authorising not only the broadcasting and other wireless communication of their works, but also the public communication of a broadcast of their works by loudspeaker or analogous instrument), and with Article 11(1) of the same Convention (which grants the rightholders of musical works the exclusive right of authorising the public performance of their works, including such public performance by any means or process, and any communication to the public of the performance of their works).

The European Communities and their Member States consider that reference to the above legal basis does not rule out recourse to any other pertinent provision of the Agreement establishing the WTO and of the Agreements annexed to it.

The European Communities and their Member States look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.
