

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

Request for the Establishment of a Panel by the European Communities
and their Member States

The following communication, dated 15 April 1999, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have asked me to submit the following request on behalf of the European Communities and their Members States for consideration at the next meeting of the Dispute Settlement Body.

Section 110(5) of the United States Copyright Act, as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998, exempts, under certain conditions, the communication or 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 (subparagraph A) and, also under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a non dramatic musical work intended to be received by the general public (subparagraph B) from obtaining an authorisation to do so by the respective right holder. 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.

However, Article (9)1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights contained in Annex 1C to the Agreement Establishing the World Trade Organization (hereafter the "TRIPS Agreement") obliges WTO Members to comply with Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (hereafter the "Berne Convention").

Article 11bis(1) of the Berne Convention, as revised by the Paris Act of 1971 grants the authors 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 any other analogous instrument. Article 11(1) of the same Convention grants the authors 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.

As a consequence of the above, Section 110(5) of the United States Copyright Act appears to be inconsistent with the United States' obligations under the TRIPS Agreement, including, but not limited to, Article 9(1) of the TRIPS Agreement.

In a communication dated 26 January 1999 (WT/DS160/1-IP/D/16) the European Communities and their Member States requested consultations with the United States of America pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the WTO Agreement (hereafter "the DSU"). Such consultations, which were held on 2 March 1999 in Geneva, have allowed a better understanding of the respective positions, but have not led to a satisfactory resolution of the dispute.

Accordingly, the European Communities and their Member States request the establishment of a panel pursuant to Article 6 of the DSU and Article 64:1 of the TRIPS Agreement to examine the matter in the light of the relevant provisions of the TRIPS Agreement and to find that the United States of America fails to conform to the obligations contained in the TRIPS Agreement, including, but not limited to, Article 9(1) of the TRIPS Agreement, and thereby nullifies or impairs the benefits accruing directly or indirectly to the European Communities and their Member States under the TRIPS Agreement.

The European Communities and their Member States request that the panel be established with the standard terms of reference as provided for in Article 7 of the DSU.
